



March 29, 2020

**Client Alert – Employment Law**  
**Additional DOL Clarifications Regarding**  
**FFCRA Paid Sick Leave and Paid E-FMLA**  
**COVID-19 (Coronavirus)**

The FFCRA changed the employment landscape. The DOL has now released additional guidance as to how the new laws are to be interpreted. Much of the guidance is as expected but there are a few twists. This Client Alert discuss some of the more significant issues for employers.

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**1. How does an employer with fewer than 50 employees claim the FFCRA exemption?**

An employer with fewer than 50 employees can claim this exemption if childcare-related paid sick leave and E-FMLA would jeopardize the viability of the business as a going concern. To claim this exemption, a business should document why it meets the criteria (why it would jeopardize the business). At this point, there is no procedure to gain DOL approval of the exemption. I expect the DOL will come up with a process but, for now, employers should gather the documentation needed to prove it when the time arises.

**2. If an employee starts working from home but later becomes unable to telework, can they draw paid sick leave or E-FMLA?**

If an employee is tele-working and then the employee becomes unable to perform either the work or the required number of hours due to a qualifying reason, then the employee can take paid sick leave. If the leave is for the employee to care for the employee's out-of-school child, then paid leave is only available to the extent that the employee cannot work.

**3. If a business closes – do employees still get FFCRA paid sick leave or E-FMLA?**

- a. No. This is true regardless of whether the business closes before or after April 1, 2020.
- b. This is true regardless of whether the employer closed due to a lack of work or pursuant to a Federal, State, or local directive.
- c. If the employee is already taking paid sick leave or E-FMLA when the business closes, then the employer must pay the employee for leave taken before the business closed.
- d. The employees would be eligible for unemployment.

**4. If an employer reduces an employee's hours, can the employee use paid sick leave or E-FMLA to replace the reduced hours?**

No. The employee is not being prevented from working those hours due to a COVID-19 qualifying reason. That is true even if the reduction in hours was somehow related to COVID-19. If an employee has a qualifying reason that prevents them from working their full schedule, then the employee can take paid leave and/or E-FMLA based on their work schedule before it was reduced.

## 5. If an employee is furloughed do they receive paid sick leave or E-FMLA?

No. A furlough is not a qualifying reason to draw paid sick leave or E-FMLA. If the employee resumes work, they could then be eligible for paid sick leave or E-FMLA as warranted.

## 6. Can an employee take FFCRA paid sick leave or E-FMLA intermittently?

This depends on the employee's status.

- a. If the employee is physically at work (not teleworking):
  - i. Then the leave must be taken in full-day increments.
  - ii. Once the employee begins taking paid sick leave, they must continue to take paid sick leave each day until they either:
    1. Use the full amount of paid sick leave; or
    2. No longer have a qualifying reason for taking paid sick leave.
  - iii. The purpose of FFCRA paid leave is not to give employees paid leave to use at their discretion. It is intended to keep employees from spreading the virus to others. Therefore, it cannot be taken intermittently if the leave is being taken because:
    1. They are subject to a quarantine or isolation order related to COVID-19;
    2. They've been advised to self-quarantine due to COVID-19;
    3. They are experiencing symptoms of COVID-19 and seeking a diagnosis;
    4. They are caring for someone who has been quarantined or advised to self-quarantine due to COVID-19; or
    5. They are experiencing any other substantially similar condition.
  - iv. If an employee's reason for taking paid sick leave ends before they exhaust their paid sick leave, then they can save the unused leave and use it later during the year (until 12/31/20) if another qualifying reason occurs.
  - v. If the reason that the employee is taking paid leave is to care for the employee's child whose school or childcare is closed, or whose childcare provider is unavailable, due to a COVID-19 related reason, then the employer can (but does not have to) agree to allow the employee to take the paid leave on an intermittent basis.
- b. If the employee is working remotely:
  - i. Then yes, if the employer agrees.
  - ii. The employer can also set the terms.
  - iii. For example, the employer could require that the employee work from noon until 2:30 pm and then take leave from 2:30 until 4:00 pm before returning to work.

## 7. Can an employee concurrently draw both paid sick leave or E-FMLA and also PTO?

No. However, if an employee is receiving 2/3 of their normal wage, the employer could consent to allowing the employee to use accrued PTO to replace the 1/3 that is unpaid. **However, the employer will not be entitled to a tax credit for any payments that are not required to be paid or that exceed the limits required.**

## **8. Does group health insurance continue while an employee is on paid sick leave or E-FMLA?**

An employer must continue group health coverage for an employee on paid sick leave. An employee on E-FMLA is entitled to continue their group health coverage on the same terms (the employee must continue to pay their portion). An employee who does not return to work at the end of E-FMLA leave will likely be eligible to continue their coverage under COBRA. For smaller employers (fewer than 20 employees) this will depend on state law.

## **9. Who is a son or daughter?**

The FFCRA limits leave to care for “your own child” which opens the question as to who would be deemed to be the employee’s son or daughter. The DOL has clarified that the term is to be interpreted as broadly as possible. The employee’s child includes:

- A biological, adopted, or foster child;
- A stepchild, a legal ward, or a child for whom you are standing *in loco parentis*; and
- Someone with day-to-day responsibilities to care for or financially support a child.

Additionally, notwithstanding the language in the FFCRA that states that the child must be under age 18, the DOL has directed that the FFCRA’s use of the term child includes an adult son or daughter (i.e., one who is 18 years of age or older), who:

- Has a mental or physical disability; and
- Is incapable of self-care because of that disability.

## **10. What about an employee who has already exhausted their FMLA? Can that employee take additional E-FMLA or paid sick leave?**

An employee can take paid sick regardless of how much FMLA leave they have taken.

With regard to FMLA leave, the FFCRA expands the events for which leave may be taken. It does not expand the amount of leave. An employee may take a total 12 weeks for both FMLA and/or E-FMLA. If an employee has already taken some, but not all, of their FMLA, then they can take the remaining weeks. But, if the employee has already exhausted their FMLA leave, then they do not get additional E-FMLA. The opposite situation is consistent. If an employee takes E-FMLA, that leave counts against their total FMLA available over the 12-month period.

## **11. What kind of documentation can an employer require for paid sick leave or E-FMLA?**

An employer should require appropriate documentation identifying the reason for requesting leave, a statement that the employee is unable to work (including telework) for that reason, and the date(s) for which leave is requested. An employer will use this documentation to support a payroll tax credit. The documentation could include a quarantine/isolation order applicable to the employee, the name of the health care provider who directed the employee to self-quarantine, a notice or even an email advising that their child’s school or childcare is closed.

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