GBS Compliance

DOL Regulations for Families First Coronavirus Response Act

April 9, 2020

The U.S. Department of Labor (DOL) has issued temporary regulations under the Families First Coronavirus Response Act (FFCRA). The FFCRA created new employer requirements to provide paid sick leave and partially compensated, expanded FMLA leave for reasons related to the COVID-19 pandemic. The regulations include important clarifications to the law and earlier DOL guidance on the FFCRA that will help employers understand their obligations under these new paid leave mandates.

The regulations expand on features of the law such as:

- The small business exemption;
- The implications of teleworking;
- Employee leave rights when caring for someone else; and
- The effect of existing paid leave policies and Family and Medical Leave Act (FMLA) leave on the new leave mandates.
- The regulations also include definitions that were not in the FFCRA statute itself, such as the definition of "subject to a quarantine or isolation order," "telework" and an "individual" who needs care. The regulations also provide detail on when an employee may take intermittent leave and documentation required of employees and employers under the FFCRA.

This summary highlights key elements of the FFCRA temporary regulations.

Highlights

- The DOL has issued regulations under the FFCRA's paid leave provisions.
- The regulations expand on issues such as the small business exemption, teleworking and leave entitlements when caring for another person.
- Documentation required of employers and employees is also explained in the regulations.

Important Dates

April 1, 2020
FFCRA temporary regulations became operational.

April 2, 2020
FFCRA temporary regulations became effective.

Dec. 31, 2020
FFCRA temporary regulations expire.

Action Steps

Employers should become familiar with the FFCRA regulations and guidance from the DOL to ensure compliance with the new law.

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Covered Employers

The expanded FMLA requirements under the FFCRA apply to private employers with fewer than 500 employees, and some government employers. In general, nonfederal public agencies are covered by the expanded FMLA leave requirements, but most federal government agencies are not. The FFCRA paid sick leave requirements apply to all private employers with fewer than 500 employees, and all government employers.

However, the law allows a small business exemption from both leave mandates to certain businesses with fewer than 50 employees, if the leave would jeopardize the viability of the business. Both leave requirements also allow employers to exempt employees who are health care providers or first responders.

Counting Employees

To determine whether they have fewer than 500 employees, according to the regulations, employers should count all full-time and part-time employees in the United States (including any U.S. territory or possession) at the time an employee would take leave, including:

- ✔ Current employees
- ✔ Employees on leave of any kind
- ✔ Employees of temporary placement agencies who are jointly employed under the FLSA
- ✔ Day laborers supplied by a temporary placement agency
- ✔ Common employees of joint or integrated employers

Part-time employees are counted as full-time employees for this purpose. The Fair Labor Standards Act test for joint employers applies, as does the FMLA test for integrated employers. Employers should not count independent contractors, or employees who were laid off or furloughed and not rehired.

Small Business Exemption

Employers with fewer than 50 employees may be eligible for an exemption from the FFCRA's expanded FMLA leave requirements and child care-related paid sick leave requirements, if the leave would jeopardize the viability of the business. Consistent with DOL guidance on the issue, the regulations allow for this exemption when the requirements would jeopardize the viability of the business as a going concern. Specifically, businesses with fewer than 50 employees are entitled to the exemption if an authorized officer of the business has determined that:

- ✔ The leave would result in the business's expenses and financial obligations exceeding available business revenues, and cause the small business to cease operating at a minimal capacity;
- ✔ The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business or responsibilities; or
- ✔ There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and the labor or services are needed for the small business to operate at a minimal capacity.

An employer electing this exemption must document that a determination has been made according to the above criteria and retain the records in its files.

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Health Care Provider and Emergency Responder Exemptions

Under the FFCRA, employers may exempt employees who are health care providers or emergency responders from both of the laws' leave requirements.

For purposes of the exemption, health care providers are defined as anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy or any similar institution, employer or entity. This includes any permanent or temporary institution, facility, location or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. It also includes anyone employed by any entity that provides medical services, produces medical products or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments. It also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's, or the District of Columbia's response to COVID-19.

This definition differs from the definition of "health care provider" in parts of the statute addressing an employee's qualified reasons to take paid sick leave, which is more narrow.

For purposes of this exemption, an emergency responder is anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients or others needed for the response to COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

The definition also includes any individual whom the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for the response to COVID-19.

Using FFCRA Leave

Employee Notice

Employers may require employees to follow reasonable notice procedures after the first workday (or portion thereof) for which an employee takes paid sick leave for any reason other than for child care. Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case.

An employee taking either expanded FMLA leave or paid sick leave for a child care-related purpose must provide the employer with notice as soon as practicable, if the leave is foreseeable.

Employers may not require advance notice, and may only require the notice after the first workday (or portion thereof) for which an employee takes paid sick leave or expanded FMLA leave. Under the regulations, the following notice requirements will generally be considered reasonable:

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- ✔ After the first workday, notice as soon as practicable under the facts and circumstances of the particular case;
- ✔ Oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA; and
- ✔ Compliance with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Generally, notice may be given by the employee's spokesperson (for example, a spouse, adult family member or other responsible party) if the employee is unable to do so personally.

If an employee fails to give proper notice for FFCRA leave, the employer should provide notice of the failure and give the employee an opportunity to provide the required documentation before denying the request for leave.

Documentation of Need for Leave

The regulations spell out the documentation required of employees for both paid sick leave and expanded family and medical leave. For leave for any reason, the employee must provide documentation to the employer containing:

1. The employee's name;
2. The dates for which leave is requested;
3. The qualifying reason for the leave; and
4. An oral or written statement that the employee is unable to work because of the qualified reason for leave.

Depending on the reason for the requested leave, the regulations require additional documentation from employees as follows:

- ✔ Employees requesting paid sick leave due to a COVID-19 quarantine or isolation order (for themselves or another person) must provide the name of the government entity that issued the order.
- ✔ If paid sick leave is being requested on the basis of medical advice to self-quarantine (for the employee or another person), the name of the health care provider who provided the advice must also be provided.
- ✔ To take paid sick leave or expanded FMLA leave for a child care-related reason, an employee must provide:
    - The name of the son or daughter being cared for;
    - The name of the school, place of care, or child care provider that has become unavailable; and
    - A representation that no other suitable person will be caring for the son or daughter during the leave period.
- ✔ The employer may also request additional material needed to support the employer's request for tax credits under the FFCRA.

Telework

The FFCRA allows for paid sick leave in certain circumstances where an employee is not able to work or "telework." Under the DOL regulations, an employee subject to a quarantine or isolation order, or who is caring for an individual under such an order, may not take paid sick leave if the employee is able to telework. In this case, an employee is able to telework if:

- ✔ The employer has work for the employee to perform;

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- ✔ The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and
- ✔ There are no extenuating circumstances (such as serious COVID-19 symptoms or a power outage) that prevent the employee from performing that work.

Further, the regulations stipulate that telework may be performed during normal hours or at other times agreed to by the employer and employee. Wages must be paid as required by law and not as paid leave under FFCRA, and for all hours worked.

Quarantine or Isolation Orders

The FFRCA requires covered employers to provide paid sick leave to employees who are subject to a federal, state or local COVID-19 quarantine or isolation order themselves, or are caring for an individual subject to such an order. The regulations define the situations that are included in a quarantine or isolation order, but apply limits to when an employee subject to such an order can take leave under the FFCRA.

Specifically, quarantine or isolation orders include quarantine, isolation, containment, shelter-in-place or stay-at-home orders issued by any federal, state or local government authority that cause the employee to be unable to work. However, an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. The question is whether the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order.

An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. The reason for this is the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. That said, he may be eligible for state unemployment insurance and should contact his state workforce agency or state unemployment insurance office for specific questions about his eligibility.

According to the DOL, this analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed because its customers were required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be that the coffee shop was subject to the order, not that the cashier himself was subject to the order.

Also, an employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if:

- ✔ His or her employer has work for the employee to perform;
- ✔ The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and
- ✔ There are no extenuating circumstances that prevent the employee from performing that work.

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For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would, therefore, be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

Under Medical Advice to Quarantine

An employee may take FFCRA paid sick leave based on a health care provider's advice to self-quarantine only if following the advice prevents the employee from working or teleworking. The term "health care provider" for this purpose has the meaning given in the FMLA regulations:

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under state law;
- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law;
- Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable state or local law or collective bargaining agreement.
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

Symptoms of COVID-19

Employees who are unable to work or telework because they are experiencing symptoms of COVID-19 and are seeking a medical diagnosis are eligible for paid sick leave under FFCRA. The regulations explain that "symptoms of COVID-19" for this purpose means:

- Fever
- Dry cough
- Shortness of breath
- Other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention

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Paid sick leave for this reason is limited to the time an employee is unable to work while taking steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a COVID-19 test. Employees who are told they do not meet the criteria for testing and are advised to self-quarantine, are eligible for paid sick leave for the different FFCRA qualifying reason that they have been advised by a health care provider to self-quarantine due to concerns related to COVID-19, if they satisfy the requirements under that reason.

Leave to Care for a Son or Daughter

Eligible employees of covered employers may take paid sick leave and up to 12 weeks of expanded FMLA leave if they are unable to work (or telework) because they must care for a son or daughter if the son or daughter's school or place of care has closed, or the child's care provider is unavailable, because of COVID-19 precautions, and the employee is unable to work or telework for that reason.

Consistent with DOL guidance, the regulations adopt the FMLA's definition of "son or daughter" as a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.

However, the regulations specify that an employee may take FFCRA leave to care or his or her child only if no other suitable person is available. This means that the leave is permitted only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take paid sick leave or FMLA leave if a co-parent, co-guardian, or the usual child care provider is available to provide the care the child needs.

The regulations expand the definition of child care provider in the FFCRA statute to include an uncompensated, unlicensed family or friend who regularly cares for the employee's child. The regulations define "child care provider" to mean a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group-home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated or registered under state law as described in section 9858c(c)(2)(E) of Title 42; and satisfies the state and local requirements, including those referred to in section 9858c(c)(2)(F) of Title 42. Under the FFCRA, the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

Leave to Care for an Individual

Under the FFCRA, paid sick leave may be taken when the employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to COVID-19 concerns. The regulations clarify that "individual" means an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, "individual" does not include persons with whom the employee has no personal relationship.

The regulations further provide that the individual being cared for must:

1. Be subject to a federal, state or local quarantine or isolation order; or
2. Have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

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Full-time and Part-time Employees - Paid Sick Leave

Under the FFCRA, full-time employees must be provided 80 hours of paid sick time for specified COVID-19-related reasons. Part-time employees (normally scheduled to work fewer than 40 hours per week) are entitled to an amount of paid sick time equal to the average number of hours they work over a two-week period.

The regulations adjust and expand on the FFCRA statutory language in this area to define full-time employees as those who are normally scheduled to work at least 40 hours each workweek. Employees without a normal weekly schedule are full-time if they were scheduled to work an average of at least 40 hours over the lesser of:

- ☑ The six-month period ending on the date on which the employee takes paid sick leave; or
- ☑ The entire period of the employee's employment.

Part-time employees with normal weekly schedules are entitled to paid sick leave equal to the number of hours that the employee is normally scheduled to work over two workweeks.

Part-time employees who lack a normal weekly schedule and have been employed for at least six months must be provided paid sick leave equal to:

- ☑ Fourteen times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes the leave, including any hours for which the employee took leave of any type.

Part-time employees who lack a normal weekly schedule and have been employed for at least six months must be provided paid sick leave equal to:

- ☑ Fourteen times the number of hours the employee and the employer agreed at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

Intermittent Leave

In some cases, both FFCRA paid sick leave and expanded FMLA leave may be taken intermittently, if the employer and employee agree. However, there are certain limits for employees who are working at the work site. Specifically, employees reporting to the workplace may take paid sick leave intermittently only to care for a child whose school or place of child care has closed, or whose care provider has become unavailable, due to COVID-19. An employee taking FFCRA paid sick leave for any other reason must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take the leave.

The agreement between the employer and employee for intermittent leave does not have to be in writing.

Continuation of Health Care Coverage

Employees on expanded FMLA or paid sick leave are entitled to continued coverage under the employer's group health plan on the same terms as if they did not take leave. The employees remain responsible for the same portion of the premium they paid before taking leave. If premiums are adjusted, the employee is required to pay the new employee premium contribution on the same terms as the other employees. Notice of any opportunity to change plans or benefits must also be given to employees on FFCRA leave, and if the employee requests the changed coverage, the employer must provide it.

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Interaction With Other Leaves

Expanded FMLA With Paid Sick Leave

Employees eligible for both paid sick leave and expanded FMLA leave to care for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, will have those leaves run concurrently. The paid sick leave may provide compensation during the first two uncompensated weeks (up to 80 hours) of expanded FMLA leave.

FMLA

An employee's entitlement to 12 weeks of expanded FMLA leave under the FFCRA is reduced by any amount of traditional FMLA leave the employee took in their employer's current 12-month FMLA leave year. Employees who have already exhausted the full 12 weeks of traditional FMLA leave during the 12-month period may not take expanded FMLA leave.

Another limitation on expanded FMLA use made clear in the regulations is that employees may take only a maximum of 12 weeks of the leave during the period in which the leave may be taken (April 2, 2020 to Dec. 31, 2020), even if that period spans two of their employer's 12-month FMLA periods.

Employees may take any unused portion of the 12-week expanded FMLA entitlement for traditional qualifying FMLA reasons.

Employer Leave

Employers may not require, coerce or unduly influence employees to use another source of paid or unpaid leave before taking expanded FMLA leave. However, employers may require employees (or employees may choose) to use any accrued leave available for child care purposes concurrently with expanded FMLA leave. This could include, for example, personal time or paid time off.

Paid sick leave is in addition to, and not a substitute for, other sources of leave that the employee had already accrued or used before the FFCRA became operational on April 1, 2020, and effective on April 2, 2020. Therefore, paid sick leave may not count against an employee's balance or accrual of any other type of leave.

If an employee elects, or an employer requires, concurrent leave, the employer must pay the employee the full amount the employee is entitled to under the preexisting paid leave policy for the period of leave taken.

One Time Use

Any person is limited to a total of 80 hours of paid sick leave. This means an employee who has taken the full 80 hours and then changed employers is not entitled to additional paid sick leave from a new employer. Conversely, an employee who has taken fewer than 80 hours of the leave and then changes employers is entitled to the remaining portion of leave from any new employer covered by the FFCRA.

Employer Notice

The FFCRA statutory language requires employers to post a notice provided by the DOL in conspicuous places where employee notices are customarily posted. The regulations allow employers to use another format for the notice, as long as the information provided includes, at a minimum, all of the information contained in the DOL notice. In addition, the regulations state that the notice may be provided by email, direct mail or by posting the notice on an internal or external employee information website.

The regulations also provide that the notice described above satisfies any FMLA general notice obligation for employers subject to the FFCRA expanded FMLA provisions, but not to other provisions of the FMLA.

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Record Keeping

Employers must retain all documentation provided by an employee to support a request for FFCRA leave for four years, regardless of whether leave was granted. Employers are also required to document and maintain for four years oral statements provided by employees to support their requests for leave.

An employer that denies a request for leave based on the **small business exemption** (for employers with fewer than 50 employees) must document the determination by its authorized officer that it is eligible for the exemption, and retain the documentation for four years.

To claim **tax credits** for employee leave compensation, employers are advised to maintain the following records for four years:

- ☑ Documentation to show how the employer determined the amount of paid sick leave and expanded FMLA leave to employees, including records of work, telework and leave;
- ☑ Documentation to show how the employer determined the amount of qualified health plan expenses allocated to wages;
- ☑ Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- ☑ Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer about the employer's entitlement to the credit claimed on Form 941; and
- ☑ Other documents needed to support requests for tax credits pursuant to IRS applicable forms, instruction and information for the procedures that must be followed to claim a tax credit.

For more information on claiming tax credits, see the COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs provided by the IRS.

The information is provided as educational material only and is not intended as legal, financial or tax advice. Consult your legal counsel for complete details on your compliance requirements for your plan(s).

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