

U.S. DOL PUBLISHES ADDITIONAL GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On March 26, 2020, the U.S. Department of Labor (“DOL”) released an updated set of Questions and Answers (“Q&A”) regarding the Families First Coronavirus Response Act (“FFCRA”). As we’ve summarized in earlier posts, the FFCRA was signed into law on March 18, 2020 and generally requires U.S. employers with fewer than 500 employees to provide paid sick leave (“Paid Sick Leave”) and emergency family and medical leave (“Emergency FMLA Leave”) benefits to employees in connection with COVID-19.

The updated Q&A builds on guidance and model notices that the DOL published earlier this week. Below are some highlights from the updated Q&A for employers to consider as they prepare to comply with the FFCRA:

- **Documentation:** Employers must require employees to provide appropriate documentation to support their need for Paid Sick Leave and Emergency FMLA Leave. This documentation must be retained if an employer intends to seek a tax credit for the leave.
- For Paid Sick Leave - This documentation should include the employee’s name, qualifying reason for requesting leave, statement that the employee is unable to work (including telework) for that reason, and the date(s) for which leave is requested. Employers should also require documentation demonstrating the reason why the leave is necessary, including: (i) the sources of any quarantine or isolation order (including a copy of any federal, state, or local quarantine or isolation order); and/or (ii) the name of the health care provider advising the employee to self-quarantine, along with a note from the provider explaining the same.
- For Emergency FMLA Leave - This documentation should support the need for Emergency FMLA Leave, and can include: (i) a notice that has been posted on a government, school, or day care website demonstrating school/child care provider closures; (ii) a notice published in a newspaper demonstrating school/child care provider closures; and/or (iii) an email from an employee or official of the school, place of care, or child care provider regarding the closure.

- For (Traditional) FMLA Leave - To the extent an eligible employee needs leave for a qualifying reason under the FMLA, existing certification requirements remain in effect. Thus, for example, if an employee or an employee's family member has a COVID-19 related medical condition that rises to the level of a serious health condition, employers should require submission of an appropriate FMLA medical certification.

- Modified Work/Telework Schedules: Employees are not eligible for Paid Sick Leave and/or Emergency FMLA Leave if they work the same number of hours that they normally work, even if such work is performed through teleworking (such as working at home instead of the normal worksite) and even if the employee and the employer have agreed on a modified or flexible work schedule.

- Intermittent Leave: As a general rule, employees are not *entitled* to use Paid Sick Leave or Emergency FMLA Leave on an intermittent basis. However, employers *may permit* the use of intermittent leave under certain circumstances. Specifically:
 - If an employee teleworks - Employees may use intermittent leave, subject to the employer's approval of both: (i) the use of intermittent Paid Sick Leave and/or Emergency FMLA Leave; and (ii) the increment(s) / schedule in which leave will be used.

 - If an employee works at their normal worksite –
 - Paid Sick Leave Generally: Employees must use leave for all qualifying reasons other than child care (due to school/child care closings) in full-day increments (i.e., it cannot be used intermittently), and once an employee begins taking Paid Sick Leave for one or more of the foregoing qualifying reasons, the employee must continue to take Paid Sick Leave each day until either: (i) the employee uses the full amount of Paid Sick Leave; or (ii) the employee no longer has a qualifying reason for taking Paid Sick Leave.

 - Emergency FMLA Leave and Paid Sick Leave Applicable due to School/Child Care Closing: Employees may use intermittent leave subject to the employer's approval of both: (i) the use of intermittent leave; and (ii) the increment(s) / schedule in which leave will be used.

- FFCRA Leave Available During Work Site Closures/Furloughs: Employees are not entitled to Paid Sick Leave or Emergency FMLA Leave if:
 - They are furloughed because an employer does not have enough work or business (notably, if an employee's hours are partially reduced as a result of the furlough, the employee is only entitled to an amount of Paid Sick Leave and/or Emergency FMLA Leave based on the employee's new furloughed hours); or

- Their worksite is closed either because of a lack of work or because of a state/local order, regardless of whether the closure occurs before or after April 1, 2020 (the date the FFCRA becomes effective). If an employee is on Paid Sick Leave or Emergency FMLA Leave when the closure occurs, the employee must be paid for the time already taken, but is only entitled to take additional/remaining Paid Sick Leave and Emergency FMLA Leave when the worksite reopens.

Employees should confirm with local authorities as to whether they are eligible for unemployment benefits during these times.

- Health Benefits: Employees are generally entitled to their same health benefits while on Paid Sick Leave and Emergency FMLA Leave.
- Supplementing Pay For Leave: If both the employer and employee agree, employees may supplement their Paid Sick Leave and Emergency FMLA Leave with other forms of paid leave or gratuitous payments, to make up for the difference between normal earnings and the pay available under (most forms of leave) under the FFCRA. However, employers will only receive a tax credit for the paid leave that is covered under the FFCRA.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers deal with coronavirus related issues. If you or your organization would like more information on such issues or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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