

US COVID-19: DOL ISSUES FMLA, FFCRA GUIDANCE

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The United States Department of Labor (DOL) wrapped up 2020 by issuing COVID-related guidance under both the Family and Medical Leave Act (FMLA) and the Families First Coronavirus Response Act (FFCRA).

FMLA Guidance

The DOL issued new FMLA guidance in the form of two “Field Assistance Bulletins” (FAB)^[1], noting in a [press release](#) that the guidance is part of the DOL’s “ongoing efforts to support the American workforce through the pandemic recovery.”

In [FAB 2020-7](#), the DOL addressed the employer notice provisions of various federal labor laws.^[2] With respect to the required posting of the general FMLA notice, the DOL explained that it will consider electronic posting by employers to satisfy the posting requirement when: (a) all hiring and work is done remotely; and (b) the employer posts the FMLA notice on an internal or external website that is accessible to all employees and applicants at all times. To the extent an employer has a hybrid workforce (i.e. employees who work remotely and employees who work on-site), the DOL encourages employers to use electronic postings to supplement, not replace, their posting requirement of the general FMLA notice.

In [FAB 2020-8](#), the DOL indicated that it will continue to apply [a policy previously adopted in response to the pandemic](#) on the subject of telemedicine and the “in-person” visit aspect of the definition of serious health condition under the FMLA. The DOL will consider a telemedicine visit to constitute an “in-person” visit so long as the visit: (a) includes an examination, evaluation, or treatment by a health care provider, (b) is permitted and accepted by state licensing authorities, and (c) generally, is performed by video conference. Importantly, the DOL emphasized that communication methods that do not meet these criteria – “e.g., a simple telephone call, letter, email, or text message” – will be insufficient by themselves to satisfy the “in-person” visit requirement.

FFCRA Q&A

In light of the [December 31, 2020 expiration](#) of employee entitlements to certain paid leave under the FFCRA, along with the late December passage of [amendments to the FFCRA](#) providing tax

credits to employers who voluntarily provide certain FFCRA leave to employees through March 31, 2021, the DOL published two new Q&As (#s 104, 105) in the “Frequently Asked Questions” section of its [website](#).

In #104, the DOL explained that eligible employees who did not use FFCRA leave in 2020 may use FFCRA leave (paid sick or expanded family and medical leave) between January 1 – March 31, 2021, but *only if* their employer voluntarily decides to provide such leave. If the employer decides not to extend FFCRA benefits beyond December 31, 2020, then the employee is not entitled to use any FFCRA leave in the new year. The DOL also directed employers to the [IRS website](#) for questions about claiming the refundable tax credits for qualified leave wages between January 1 and March 31, 2021.

In #105, the DOL explained that, although the FFCRA entitlements expired on December 31, the DOL retains jurisdiction to enforce the FFCRA with respect to complaints about employer violations (e.g., failure to provide paid FFCRA leave) during the period April 1 – December 31, 2020. The DOL noted that the statute of limitations for FFCRA violations is two years from the date of alleged violation, or three years in cases of alleged willful violations.

[1] The DOL drafts FAB for their own staff to use in the field when auditing and/or assessing organizations’ compliance with relevant federal laws. As such, they provide much helpful insight to employers.

[2] In addition to the FMLA, the FAB addresses notice requirements under the Fair Labor Standards Act, the Employee Polygraph Protection Act, and the Service Contract Act.

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MEET THE TEAM



Christy E. Phanthavong

Chicago

christy.phanthavong@bclplaw.com
[+1 312 602 5185](tel:+13126025185)



Lily J. Kurland

Washington

lily.kurland@bclplaw.com
[+1 202 508 6106](tel:+12025086106)

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