

# U.S. Department of Labor Releases Guidance on the Federal Family First Coronavirus Response Act

**Law and the Workplace Blog** on **March 25, 2020**

On March 24, 2020, the U.S. Department of Labor's Wage and Hour Division ("WHD") published much anticipated initial guidance on the federal Family First Coronavirus Response Act ("FFCRA").

The WHD released a [Questions and Answers on the FFCRA](#), as well as a [Fact Sheet for Employers](#) and a [Fact Sheet for Employees](#) on the Emergency Family and Medical Leave Expansion Act. It is possible additional informal guidance will be issued in the coming days, and formal regulations are expected as well.

We first wrote in detail about the recently enacted FFCRA, which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, [here](#). Under these laws, covered employers must provide employees with paid sick leave for certain Coronavirus-related reasons, including being subject to a quarantine order or caring for a family member under such an order, seeking a diagnosis of COVID-19, or caring for a child whose school or place of care is closed due to Coronavirus-related reasons. Covered employers also must provide eligible employees with partially paid FMLA leave when needed to care for a child due to a school or child care closure related to the outbreak.

The following are some highlights from the WHD's guidance.

## **Effective Date**

Under the terms of the FFCRA, the effective date of the law was to be some time on or before April 2, 2020. The WHD's guidance provides that the effective date of the FFCRA will be April 1, 2020. The law will apply to leave taken between April 1, 2020 and December 31, 2020 and is not retroactive. Any paid leave granted by an employer prior to the effective date of the law, even if for a covered reason under the law, does not reduce the amount of paid sick leave otherwise available to an employee under the FFCRA. Nor is an employer required to provide FFCRA benefits for leaves of absence taken prior to April 1, 2020.

### **500-Employee Threshold for Private Employer Coverage**

With regard to private employers, the FFCRA's leave provisions only apply to employers with fewer than 500 employees (certain public employers are also covered, regardless of size). Following the enactment of the law, one of the key questions for many private employers is how to calculate the 500-employee threshold for coverage.

The guidance states that employees on leave, temporary employees jointly employed by the employer and another employer, and day laborers supplied by a temporary agency should all be counted to determine the total employee count for purposes of coverage. Independent contractors, as defined under the Fair Labor Standards Act ("FLSA"), should not be counted toward the total.

The guidance further states that, "[t]ypically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold." However, the guidance goes on to note that employers with related business entities should apply the joint employer test under the FLSA and the integrated employer test under the Family and Medical Leave Act ("FMLA") to determine how to count employees for purposes of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, respectively. To that end, the guidance provides:

- When a corporation has an ownership interest in another corporation, the two corporations are deemed separate employers unless they meet the joint employer test under the FLSA. If two entities are found to be joint employers, all of their common employees must be counted for purposes of the 500-employee threshold for both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

- Two or more separate entities are generally deemed separate employers unless they meet the integrated employer test under the FMLA. If two entities are found to be an integrated employer, then the employees of all the entities that make up the integrated employer must be counted for purposes of the 500-employee threshold for the Emergency Family and Medical Leave Expansion Act.

Pursuant to the guidance, the FFCRA applies if a private employer has fewer than 500 employees at the time an employee seeks to take applicable leave. In other words, employees whose employers have 500 or more employees on April 1, 2020, but subsequently reduce their workforce so they have fewer than 500 employees, will be eligible for FFCRA leave if, at the time the employee takes eligible leave, the employer's workforce is less than 500 employees.

### **Small Business Exemption for School/Child Care Closure-Related Leave**

Under the FFCRA, small businesses with fewer than 50 employees may qualify for an exemption from providing paid sick leave and/or expanded family and medical leave due to the closure of a child's school or place of care due to a public health emergency if doing so would jeopardize the viability of the business. The Department of Labor will further specify the criteria to meet the small business exemption in forthcoming regulations. However, the guidance states that small employers wishing to elect this exemption should document why their business meets the criteria to be set forth by the Department.

### **30 Day Eligibility Requirement for Emergency FMLA**

In order to be considered a covered employee for purposes of the Emergency Family and Medical Leave Expansion Act's school/place of care closure leave provisions, an employee must be employed at least 30 calendar days by the employer. The guidance clarifies that an employee who is on an employer's payroll for the 30 calendar days immediately prior to the day they seek to begin leave would be covered for purposes of the law. In addition, a temporary employee who is subsequently hired on a full-time basis may count their days previously worked as a temporary employee towards this 30 calendar day requirement.

### **Calculating An Employee's Paid Sick Leave**

*Calculating the Regular Rate of Pay*

Under both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, paid leave is to be calculated based upon the employee's regular rate of pay. Note that "regular rate of pay," as a general matter, includes all remuneration paid to the employee. The guidance affirms that commissions, tips, and piece rates should be incorporated into the regular rate calculation.

The guidance clarifies that, for purposes of calculating paid sick leave, an employee's regular rate of pay will be the average of their regular rate over a period of up to six months prior to the date that the employee takes leave. If the employee has not worked for the employer for six months, the regular rate of pay will be the average of the employee's regular rate of pay for each week worked for the employer. Alternatively, an employer may calculate an employee's regular rate of pay by adding all compensation that is part of the regular rate over the prior six months (or lesser period of time worked) and dividing that sum by all hours worked in the same period.

#### *Part-Time Employees and Employees with Varying Schedules*

For part-time employees, paid sick leave and expanded family and medical leave amounts are calculated based on the average number of hours the employee would be regularly scheduled to work in a two-week period.

The guidance clarifies that if a full-time or part-time employee's schedule varies, the employer may use a six-month average to calculate the average daily hours. If the employee has not been employed for six months, then the employer may use the number of hours agreed-upon when the employee was hired. If there was no such agreement, the employer may calculate the number of hours based on the average hours per day the employee was scheduled to work over the entire term of their employment.

#### *Counting Overtime Hours for Purposes of Leave*

The guidance states that overtime hours should be included for purposes of calculating the amount of leave available to an employee under both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. However, there is no requirement that an employer pay a premium for such overtime hours under either Act.

With regard to the Emergency Paid Sick Leave Act, a covered employer is required to pay sick leave up to a cap of 80 hours over a two-week period. Thus, for example, an employee who is regularly scheduled to work 50 hours would be eligible for 50 hours of paid sick leave in the first week and 30 hours in the second week. All such time need only be paid, however, at the employee's regular rate of pay or 2/3 of that regular rate (depending on the reason for leave), up to the daily and aggregate caps set forth under the law.

The Emergency Family and Medical Leave Expansion Act requires employers to pay an employee for hours that the employee would have been normally scheduled to work, even if that is more than 40 hours in a week, at the rate of 2/3 of the employee's regular rate of pay, up to the daily and aggregate caps as provided under the law.

**Leave for an Employee Caring for a Child Because Their School or Place of Care is Closed, or Child Care Provider is Unavailable**

The guidance makes clear that an employee who requires leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19-related reasons, may be eligible for both paid sick leave under the Emergency Paid Sick Leave Act and paid FMLA leave under the Emergency and Family Medical Leave Expansion Act.

Practically, this means the employee could utilize paid sick leave under the Emergency Paid Sick Leave Act during their first two weeks of FMLA leave under the Emergency and Family Medical Leave Expansion Act (which is otherwise unpaid leave), unless the employee elects to use existing vacation, personal, or medical or sick leave under their employer's policy. Thereafter, the employee would be eligible to receive 2/3 of their regular rate of pay (up to the daily and aggregate caps) for the hours they would have been scheduled to work for up to the next ten weeks per the Emergency and Family Medical Leave Expansion Act.

The guidance does not provide any clarification around what, if any, certification or documentation an employer may request to confirm a bona fide need for child care leave under these provisions. This may, however, be something that is addressed by the Department of Labor's forthcoming regulations.

The Department of Labor has stated that additional guidance and regulations on the FFCRA are forthcoming. We will continue to monitor and provide updates as further guidance and regulations are released.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. [Visit our Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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