

CLIENT ALERT: ADDITIONAL DOL GUIDANCE ON FFCRA
March 30, 2020

The U.S. Department of Labor continues to update its guidance on the paid leave benefits under the Families First Coronavirus Response Act (“FFCRA”), which comes into effect on Wednesday, April 1. Brann & Isaacson issued an alert on the initial passage of FFCRA that can be accessed [here](#), as well as another alert when the USDOL issued its initial guidance on FFCRA on March 24, 2020, which can be accessed [here](#). Since March 24, DOL has been adding to its guidance, and below is a summary of new points of clarification impacting employers in the most recently updated guidance. Because guidance and developments have been evolving, please check to verify that you are operating based on the most current information available as implementation of these benefits moves forward.

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➤ **Intermittent use of paid leave and expanded FMLA leave**

- Employees working at usual worksite
 - For employees who are working at their usual worksite (i.e., the employee is not teleworking), statutory paid sick leave benefits cannot be used intermittently for leave due to: 1) federal, state, or local quarantine or isolation orders, 2) self-quarantine mandated by a health care provider, 3) symptoms of COVID-19 and seeking a medical diagnosis, 4) caring for an individual under quarantine, or 5) any substantially similar condition specified by the federal DHHS.
 - Unless the employee is teleworking (see below), once an employee begins taking paid sick leave under the FFCRA for one of the five reasons listed above, they must continue to take paid sick leave each day until they 1) exhaust the paid sick leave, or 2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.
 - Employees working at their usual worksite can be allowed to take paid sick leave or expanded FMLA leave on an intermittent basis to care for their child whose school or day care is closed. Intermittent leave for this purpose is at the discretion of the

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employer, as is the decision whether to allow intermittent leave for this purpose in partial day increments or full day increments. The Department of Labor “encourages employers and employees to collaborate to achieve maximum flexibility.”

- Employees who are teleworking
 - If an employee is teleworking, an employer is not required to allow the employee to take the statutory paid sick leave or expanded FMLA leave on an intermittent basis, but the employer may choose to allow the employee to use intermittent leave.
 - The Department of Labor “encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.”

➤ **Documenting FFCRA leave**

Depending on the reason for leave, it is appropriate for employers to obtain the following types of documentation from employees: 1) copy of federal, state, or local quarantine order, 2) documentation from health care provider advising the employee to quarantine, and 3) documentation from a child’s school or child care provider, which may include a notice online, an email from an employee or official of the school, or an email from the child care provider. In this context, a “health care provider” is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

In order to be eligible for the tax credits available under FFCRA, private employers should retain documentation of an employee’s use of paid leave and/or expanded FMLA leave under the FFCRA. If you intend to claim tax credits for FFCRA benefits, you should retain the above documentation for your records and consult IRS guidelines for any other documentation requirements. In your documentation, include:

- The employee’s name,
- Qualifying reason for requesting leave,
- A statement that the employee is unable to work (including telework), and
- The date(s) for which leave is requested

➤ **FFCRA benefits in the event of workplace closures**

If an employer closes their business either before or after April 1, 2020, employees are not eligible for paid sick leave or expanded FMLA leave benefits. In this circumstance, employees may be eligible for unemployment benefits.

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If a business closes after April 1 and there are employees already on paid sick leave or expanded FMLA, employees are entitled to payment for those leave days taken *before* the workplace closed. Employees are not eligible for paid leave or expanded FMLA benefits *after* their workplace closes.

➤ **FFCRA benefits for employees on furlough**

Employees on furlough on or after April 1 are not eligible for paid sick leave or expanded FMLA leave. Employees on furlough may be eligible for unemployment benefits.

➤ **FFCRA benefits and reduced work hours**

Employees on reduced work hours may not supplement their income with paid sick leave or expanded FMLA leave. Of course, if an employee has a qualifying reason for leave, they may cover their work hours with FFCRA benefits.

➤ **FFCRA benefits and health insurance**

Employers must maintain an employee's group health insurance coverage while that employee is on leave under the FFCRA. Additionally, if an employee takes paid sick leave while waiting to become eligible for their employer's health care coverage, the days the employee is on sick leave count towards any waiting period.

➤ **Interaction between FFCRA benefits and an employer's own paid benefits**

- Employees cannot use paid leave benefits under the FFCRA concurrently with paid leave benefits offered under an employer's policy *unless* an employer allows such use. In other words, employers may allow employees on FFCRA paid leave to use preexisting paid leave benefits to supplement their income to make themselves whole. For example, if an employee takes expanded FMLA leave under the FFCRA, and is receiving 2/3 their normal rate of pay, the employer may allow that individual to use preexisting, employer-provided paid leave to obtain the additional 1/3 of their normal pay. Employers who permit this will not be entitled to tax credits for the supplemental amount paid to their employee (here, the 1/3 amount).
- Employers cannot force employees to use their preexisting, employer-provided leave concurrently with FFCRA leave. Likewise, the employer cannot force the employee to take preexisting leave *instead* of FFCRA paid leave benefits. The employee may request to do so, or to supplement their income with preexisting leave, and the employer may approve or deny this request.

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- Employers may pay their employees in excess of the FFCRA paid leave benefits, but will not receive tax credits for any additional payments. Employers will only receive tax credits for the benefits required under the FFCRA.

➤ **Contributions under a CBA to a multiemployer fund, plan, or program**

- To satisfy the FFCRA requirements, employers who make contributions to a multiemployer fund, plan, or program under a collective bargaining agreement (CBA) should continue to do so. Contributions must be based on the amount of paid sick leave and expanded FMLA leave that an employee is entitled to under the FFCRA. The Department of Labor states that employers with a CBA may also satisfy their FFCRA obligations by other means, but there are no specific examples in the guidance.

➤ **Defining “son or daughter” for the purposes of FFCRA leave**

The FFCRA provides that employees are eligible for leave to care for their “son or daughter” impacted by COVID-19. The Dept. of Labor defines “son or daughter” as:

- An employee’s own child, including biological, adopted, or foster children, stepchildren, a legal ward, or a child for whom the employee legally cares for and financially supports on a daily basis.
- An employee’s adult child who 1) has a mental or physical disability, and 2) is incapable of self-care because of that disability.

➤ **Interaction between FMLA and expanded FMLA benefits under the FFCRA**

Expanded FMLA leave under the FFCRA is an additional type of FMLA leave, and eligible employees cannot take more than 12 weeks of FMLA leave, for any reason, in a calendar year. For example:

- If an employee is eligible for expanded FMLA leave but has already exhausted their FMLA days in this calendar year, they cannot take any “expanded” FMLA days.
- If an employee has already used four weeks of FMLA leave in this calendar year, and is eligible for expanded FMLA leave, they may take six weeks of leave at 2/3 their normal rate of pay
- If an employee has not used any FMLA leave during this calendar year, and is eligible for expanded FMLA leave, they may be entitled to use all 12 weeks.

Likewise, if an employee takes three weeks of expanded FMLA leave, they are able to take nine weeks of FMLA leave for the remainder of the calendar year.

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Expanded FMLA leave is available only until December 31, 2020. After that, only FMLA leave is available.

➤ **Interaction between FMLA, expanded FMLA, and emergency paid sick leave**

Emergency paid sick leave under the FFCRA is available to employees regardless of how much FMLA leave that employee has used in this calendar year. For example, if an individual has already exhausted their FMLA benefits for this calendar year, they remain eligible for two weeks of emergency paid sick leave. Paid sick leave does not count towards the FMLA maximum of 12 workweeks per calendar year *unless* an employee uses emergency paid sick leave for the first two weeks of their expanded FMLA.

➤ **FFCRA benefits and the public sector**

Public sector employees are eligible for emergency paid sick leave. However, health care providers and emergency responders may not be eligible (see below).

Public sector employees who work for state government, cities, municipalities, townships, counties, or similar entities likely are eligible for expanded FMLA leave. Federal employees may not be entitled to expanded FMLA, and the Dept. of Labor encourages those employees to seek guidance from their employers as to eligibility. Additionally, health care providers and emergency responders may not be eligible for expanded FMLA.

➤ **Defining “health care provider” for purposes of FFCRA benefits**

Employees may be eligible for emergency paid sick leave if their health care provider advises the employee to self-quarantine. In this context, a “health care provider” is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Health care providers may be excluded by their employer from using FFCRA benefits. In this context, a “health care provider” is 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 individuals employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the

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facility. This also includes those individuals providing medical services, producing medical products, or otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

➤ **Defining “emergency responder” for the purposes of FFCRA benefits**

Emergency responders may be excluded by their employer from using FFCRA benefits. In this context, “emergency responder” is an employee necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes the military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, EMTs, paramedics, emergency management personnel, 911 operators, public works personnel, and individuals otherwise necessary to provide their skills to aid in a declared emergency.

➤ **Small Business Exemptions under the FFCRA**

Under the FFCRA, employers (including religious and non-profit organizations) with less than 50 employees may be exempt from providing paid sick leave and expanded FMLA when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption when:

- The provision of paid sick leave or expanded FMLA would result in the small 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 paid benefits under the FFCRA would entail a substantial risk to the financial health or operational capabilities of the small 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 paid sick leave or expanded FMLA, and these labor or services are needed for the small business to operate at a minimal capacity

In past guidance documents, the Dept. of Labor has suggested small businesses will need to apply for this exemption. Details on whether there will be an application process and if so what it will require have yet to be released.

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➤ **Notifying Employees of their rights under the FFCRA**

Recognizing that many employees are working from home, the Department stated that it is appropriate to email the FFCRA posters to employees, post the notice on an internal or external webpage, or mail the posting to employees' homes. Posters should also be placed in a conspicuous area of the physical workplace. Posters can be accessed here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

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