

Alert: DOL Issues Guidance on Families First Coronavirus Response Act

March 25, 2020

On Tuesday March 24th, the U.S. Department of Labor issued its first guidance on the Families First Coronavirus Response Act (“FFCRA”). The Department has not yet issued regulations, but we expect those to be released in the coming weeks. We are continuing to track the latest developments and will be in touch with updates. In the meantime, Peter Lowe, Dan Stockford and other members of our team at Brann & Isaacson are available to respond to any questions:

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Here are the major takeaways from the Department’s guidance document:

- FFCRA effective date: the FFCRA becomes effective on April 1, and does not apply retroactively. The FFCRA paid leave provisions apply to leave taken between April 1, 2020 and December 31, 2020.
- New leave requirement: If you already gave employees leave for a reason identified in the emergency paid sick leave law before April 1st, there is a new leave requirement as of April 1st. In other words you don’t get to offset your leave obligation with paid leave provided to employees prior to April 1.
- Determining whether the FFCRA is applicable to your business: The FFCRA applies to private employers with fewer than 500 employees (see note at bottom of this update regarding public sector employers). In calculating your number of employees, you must include 1) full-time and part-time employees, 2) employees already on leave, 3) temporary employees jointly employed by you and another employer, and 4) day laborers supplied by a temporary agency. Please note the following regarding independent contractors and joint employers:
 - Independent Contractors: independent contractors are not considered employees for purposes of reaching the 500-employee threshold.
 - Joint Employers: if two entities are joint employers, all of their common employees must be counted towards the 500-employee threshold.
- Small business exemption: Businesses with fewer than 50 employees may be exempt from the child care related provisions of FFCRA if compliance will “jeopardize the viability of the business as a going concern.” The Department advises businesses who plan to use this exemption to document why their business meets this criteria. Details of the criteria and applying for the exemption will be included in the regulations.

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- Calculating leave hours for part-time employees: Under the FFCRA, part-time employees are entitled to leave based on the average number of work hours in a two-week period. This average should be based on the employee's normally scheduled work hours. If the employee's schedule varies, or the normal hours are unknown, employers may use a six-month average.
 - Part-time employees for less than six-months: If a part-time employee's normal hours vary and the employee has not been on staff for at least six months, use the number of hours that you and the employee agreed the employee would work upon hiring. If there was no such agreement, employers may use the average number of hours per day the employee has worked for the duration of their employment.

- Overtime and calculating leave hours for all employees: There is no premium payment due for overtime hours.
 - Emergency Paid Sick Leave Act- requires paid sick leave be paid up to 80 hours over a two-week period. This cap pertains to any and every eligible reason for leave. In other words, an employee cannot use 80 hours to care for themselves, and then use an additional 80 hours to care for a family member. Additionally, if an employee normally works 50 hours per week, the employee is entitled to 50 hours of paid sick leave in the first week, and 30 hours of paid sick leave in the second week. If an employee's schedule varies week to week, use the same framework as outlined for part-time employees.
 - Emergency FMLA Expansion Act: requires employees to be paid based on hours normally scheduled, even if that is more than 40 hours per week. Again, there is no premium required for overtime hours.

- Calculating amount of pay for employees taking leave: rate of pay depends on the employee's normal schedule and the reason for leave
 - Paid sick leave due to self-quarantine, COVID-19 symptoms, or awaiting COVID-19 medical diagnosis: Employees are entitled to either their regular rate of pay, the federal minimum wage, or state/local minimum wage, whichever is *greatest*. Payment per day is capped at \$511, and \$5,110 total, over the entire paid sick leave period.
 - Paid sick leave to care for a family member under quarantine, to care for a child whose school is closed or whose child care provider is unavailable, or any other substantially-similar condition: Employees are entitled to compensation at 2/3 of the greater of the amounts mentioned above. Payment per day is capped at \$200, and \$2,000 over the entire paid sick leave period.

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- Expanded FMLA leave: The first ten days of FMLA leave may be covered by paid sick leave, or the employee may elect to use any accrued vacation, personal, or medical leave under an employer's policy. For the following ten weeks, employees must be paid 2/3 of their regular rate for normally scheduled hours. Payment is capped at \$200 per day, and \$12,000 over the entire twelve week period.
- Calculating "regular rate of pay": this is the average regular rate of pay over a period of up to six-months to the date on which an employee takes leave. If an employee has been with the company for less than six months, consider the rate of pay for each week employed. Commissions and tips should be included in the calculation.
- Interaction of paid sick leave and expanded FMLA: Employees who qualify for both types of leave may use paid sick leave first, and then ten weeks of FMLA leave. The entire leave period is paid: the first ten days are paid in accordance with emergency paid sick leave, and the subsequent ten weeks are paid at 2/3 the employee's normal rate, subject to the applicable caps. Only those employees on FMLA leave to care for a child whose school is closed or whose child care provider is unavailable for COVID-19 reasons are eligible for paid FMLA leave. The FFCRA does not provide payment for other types of FMLA leave.
- Calculating whether an employee has been employed for 30 days: Employees are eligible for the expanded FMLA leave if they have been employed by their current employer for at least 30 days. This should be measured backwards from the date the employee's leave will begin. For example, if an employee wants to take expanded FMLA leave beginning April 1, 2020, they must have been on their employer's payroll as of March 2, 2020.

Please note regarding FFCRA's applicability to public sector employers:

- Federal employees: The Department's guidance indicates that all *federal* employees are eligible for emergency paid sick leave. Eligibility for *federal* employees under the expanded FMLA leave hinges on whether these employees are covered under Title I or Title II of the Family Medical Leave Act.
- State and local government employees: The guidance is silent on application of FFCRA to *state and local government employers* other than to state that the Department will issue additional guidance for public sector employers. We have interpreted the language of the Act as applying to state and local government employers, and we will issue additional updates if this changes.