



## CLIENT ALERT

### **FFCRA Overview: New DOL Regulations and Guidance**

The federal government has enacted the sweeping Families First Coronavirus Response Act (FFCRA). The obligations on many employers may seem staggering. In response, we have developed a Families [First Coronavirus Compliance Package](#), described [here](#). Emergency leave, paid sick leave, enhanced family and medical leave plus notice and posting requirements are addressed. We will update this Compliance Package via email as required to keep you informed and in line with the law.

Eligible employees can now take FFCRA leave. The DOL has published their regulations on the FFCRA which may help explain when employees are eligible for the leaves.

As we all scramble to understand the changes in the law and identify when employees are eligible for the leave, here is a friendly reminder that the DOL will not bring any enforcement actions against employers until after April 17, provided that the employer has made reasonable, good faith efforts to comply with FFCRA.

The DOL Regulations can be found [here](#). The IRS has also provided their requirements for documentation to obtain the tax credits on questions 44-46 [here](#).

Not all employers have obligations under the FFCRA (see below) but employers of all sizes must keep their workplace safe. Our [COVID-19 Infectious Disease Response Toolkit](#) can assist with this onerous task. The Toolkit, like the FFCRA Compliance Package, is updated and emailed to you as changes unfold.

Speaking of changes, here is the just-updated summary of the FFCRA, including real life examples from clients so far:

#### **Families First Coronavirus Response Act**

This law requires employers with **less than 500 employees** to provide two new forms of paid leave: **Emergency Family Leave and Paid Sick Leave**. These leaves can only be taken for reasons related to the Coronavirus pandemic.

Businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes in order to pay employees for Paid Sick Leave and Emergency Family leave upfront. The payroll taxes that are available for retention include withheld federal income taxes, the employee share

of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. More guidance from the IRS [here](#).

Small business with less than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The DOL has issued guidance on this topic on question 58 [here](#).

The DOL and IRS have both announced a temporary period of non-enforcement for the until April 17, so long as the employer has acted reasonably and in good faith to comply with FFCRA.

Employers will need to provide Paid Sick Leave and Emergency Family Medical Leave for qualifying coronavirus-related reasons throughout 2020, but not beyond. When trying to figure out how to organize leave plans and prepare for the impact of these new laws, we can help. Do not hesitate to reach out with questions and to utilize our [FFCRA Compliance Package](#).

### **Here's an Outline of the Requirements under both of these Leaves:**

The DOL regulations has provided clarity on when employees actually qualify for these leaves:

#### **Emergency Paid Sick Leave**

**Eligibility:** All current employees who work for a covered employer are eligible. Employers of health care employees or emergency responders can elect to exclude such employees from coverage, if the DOL creates regulations allowing this.

**Leave Entitlement:** Employees are eligible for 2 weeks of paid leave (80 hours for full-time employees, pro-rata based on average hours worked for part-time employees).

#### **When Can Employees Take Paid Sick Leave?**

Employees can take paid sick leave when they are unable to work or telework because:

- 1. The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.**

Quarantine/Isolation orders include:

- Shelter in place orders;
- Stay at Home orders;
- Orders requiring Isolation or Quarantine; or
- Other orders that restrict an employee's mobility and cause employees to be unable to work even though there is work for them to do.

The DOL has noted that an employee may only take this leave because of a shelter in place or stay at home order if the order causes the employee to be unable to work even though the employer has work the employee could perform but for the order. Employees cannot take paid sick leave for this reason if the employer does not have work for the employee as a result of a shelter-in-place or stay at home order.

The IRS also provided guidance, noting that employers will be required to report which government entity ordered the quarantine. Employers must obtain this information from employees when they start on the Paid Sick Leave.

**2. The employee has been advised by a health care provider to self-quarantine related to COVID-19.**

An employee can take leave for this if their health care provider has recommended self-quarantine because:

- The employee has COVID-19;
- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19.

The employee must not be able to work or telework while on this quarantine in order to qualify.

The IRS requires employers report the name of the healthcare provider who has recommended self-quarantine in order to obtain the tax credit.

**3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis.**

An employee can only take this leave for the duration the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, like making a doctor's appointment, waiting for one, or attending appointments and tests for COVID-19.

Symptoms of COVID19 include fever, dry cough, shortness of breath, or other CDC defined symptoms.

Once the employee has obtained a medical diagnosis, the employee can only continue Paid Sick Leave if the employee has been ordered to self-quarantine by the healthcare provider or a government entity. An employee cannot take paid sick leave if the employee unilaterally decides to self-quarantine for an illness without medical advice.

The employer will need to obtain the name of the health care provider that the employee sought medical diagnosis from in order to qualify for the tax credit.

**4. The employee is caring for an individual subject to a quarantine order or self-quarantine as ordered by a health care professional.**

Employees can take this leave for the following individuals:

- An immediate family member;
- A household member;
- A roommate; or
- Similar person with whom the Employee has a relationship that creates an expectation that the employee would care for the person.

An employee can only take this leave if they would otherwise be able to work but for the need to care for this individual. An employee must genuinely need to care for that individual.

The IRS requires that an employer report the name of the individual, the individual's relationship to the employee, as well as the name of the healthcare provider or government entity ordering that individuals quarantine in order to obtain the tax credit.

- 5. The employee is caring for his/her child whose school or place of care is closed or childcare provider is unavailable due to COVID-19 related reasons.** The definition of son or daughter has changed. It now includes children under the age of 18 as well as children over the age of 18 if they are incapable of caring for themselves due to a mental or physical disability.

The employee can only take this leave if but for the need to care for the child, the employee would be able to work or telework.

The IRS requires employers report the following information in order to obtain the tax credit:

- The name and ages of the children;
- The name of the school/place of care that is closed or of the child care provider who is unavailable;
- A statement explaining special circumstances that exist if the child is over 14 years old; and
- An affirmation that the employee will be the only caregiver for the child for the duration of the leave.

- 6. The employee is experiencing any other substantially-similar condition specified by the Department of Health and Human Services.**

This section is likely a catch-all section for other types of leave. At this point in time, no other condition has been designated, so the employees would not be eligible for this leave.

**Wage Payments:** An employer must pay employees for Paid Sick Leave at the following rates:

- If an employee takes sick leave for their own sickness or mandated quarantine/isolation, the employee must be paid at their regular rate. You do NOT have to pay the employee more than \$511 per day or \$5,110 in total for this leave.
- If an employee takes sick leave for any other qualifying reason, the employee must be paid at 2/3 their regular rate. You do NOT have to pay the employee more than \$200 per day or \$2,000 in total.

**If you Already have a PTO or Sick Leave Policy:** This leave does not diminish any rights to leave in any other Federal, State, or local law, collective bargaining agreement, or existing employer policy. An employee may choose to use the paid sick leave under this law prior to use of other leaves.

An employer cannot ask an employee to find a replacement worker when using Paid Sick Leave.

**Retaliation:** Retaliation and discrimination for taking leave under this law is prohibited.

**Obtaining Medical Note or Other Verification:** An employer cannot require a notice for the first day of paid sick leave taken under this law. An employer can require an employee follow

reasonable notice procedures in order to continue receiving paid sick time after the first day of leave.

**Notice:** Employers will be required to post notice of this law and its benefits in a conspicuous place in the workplace.

### **Emergency Family Medical Leave**

**Eligibility:** Any employee who has worked at least 30 days for a covered employer is eligible for Emergency Family Leave (“EFL”).

**Leave Entitlement:** Employees are eligible for up to 12 weeks of leave.

#### **When can Employees Take EFL?**

Employees will be able to take up to 12 weeks of Emergency Family Medical Leave if they are unable to work or telework for the following reasons:

- To care for a child (under 18 years of age) of an employee if the child’s school or place of care has been closed, or the childcare provider is unavailable due to coronavirus.

If both parents work for the same employer, only one of the parents would be eligible to take this leave to care for the child, as the child would then have a caretaker.

**Wage Payments:** Emergency Family Medical Leave is partially paid by the employer, depending on the length of leave:

- The First 10 days are unpaid. An employee can use any accrued PTO or the Emergency Paid Sick Leave during this time, but cannot be required to do so. The DOL has issued guidance noting that the first 10 days of Emergency Family Leave should be paid through the Emergency Paid Sick Leave portion of FFCRA.
- After those first 10 days, an employer must pay employees at **2/3** their regular hourly rate. You are **NOT** required to pay more than \$200 per day or \$10,000 in total for one employee’s leave.
- An employer has the option of mandating an employee use accrued PTO concurrently with this leave, if the employer requires that for other forms of FMLA leave.

**Notice:** An employer can only request notice for the need for leave “as soon as practicable.”

**Job Protection and Reinstatement:** The default FMLA rules apply, meaning that an employer must return the employee to the same or equivalent position upon their return from leave.

- **Exception:** If you have less than 25 employees, and there is an economic downturn that causes changes to your business, and you are no longer able to reinstate the employee, you do not need to. You will still need to use reasonable efforts to place the employee back in a similar position for a 1-year period.

#### **Hot Topic – Limitations on Employee Eligibility:**

Employees are not eligible for FFCRA leave when the physical or remote worksite is closed. This means that if the Company has a shut down or is forced to close because of a non-essential business order, the employees are not eligible for FFCRA leave for the duration of that closure.

Employees cannot take FFCRA leave while the employee is receiving workers' compensation or temporary disability benefits through an employer or state-provided plan, unless the employee was able to return to light duty before taking FFCRA leave.

If an employee is on a voluntary leave of absence – such as one related to self-quarantining because they are at high-risk of COVID-19 – the employee can end that leave of absence and take FFCRA leave instead for a qualifying reason. An employee is not eligible for FFCRA leave if the employee is on a mandated leave of absence, such as a company shutdown.

**Hot Topic – Extenuating Circumstances Qualifies Employee for FFCRA:**

As we noted earlier, an employee cannot take FFCRA leave if they are able to work or telework. The DOL has noted that if extenuating circumstances prevent the employee from teleworking, where they would otherwise be able to do so, the employee could take FFCRA leave.

- For example, if the employee has been teleworking during a Stay at Home order and the employee loses power, the employee would be able to take the Paid Sick Leave for the purpose of a Quarantine order, while their power is out.
- Another example is if the employee has been ordered to self-quarantine by a healthcare provider and is able to telework during that period, but their symptoms of COVID-19 become severe so they are unable to complete work, the employee can take FFCRA leave for the duration of those symptoms while on self-quarantine.

**Hot Topic – Intermittent Leave:**

There are now limits on employees being able to use intermittent leave. Employers never have to offer intermittent leave for FFCRA, but if they do allow employees to use it, here are some restrictions:

- Employees can only take intermittent leave for childcare needs if the employee would otherwise need to report in to a worksite. This is because out of all of the FFCRA leaves, this particular leave is the least likely to spread COVID-19.
- If the employee is teleworking and would not report in physically to work, employers have the discretion to allow employees to take any of the leaves intermittently.

**Working remotely, with scrubbed hands, we are at full capacity and at the ready. Please do not hesitate to reach out.**

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