



## FFCRA REGULATIONS ISSUED BY U.S. DEPARTMENT OF LABOR

April 2, 2020 | Alert

On April 1, 2020, the U.S. Department of Labor (DOL) issued new regulations addressing the application (and limitations) of the Families First Coronavirus Response Act (FFCRA). The new regulations are temporary, as they take effect on April 2, 2020, without any notice-and-comment period. However, the 120+ pages of new regulations contain helpful guidance for employers, as they resolve several important questions that had been outstanding with regard to the interpretation of the statute. These regulations are in addition to the guidance issued by DOL since the FFCRA became law on March 18, 2020.

We have previously provided guidance on the FFCRA here: ***Update: Congress Passes Emergency Paid Sick Leave & FMLA Changes Applicable to Many Employers*** (March 23), ***U.S. Department of Labor Publishes Guidance for Paid Sick Leave and Paid FMLA Compliance*** (March 26), ***Additional Guidance for FFCRA Paid Sick Leave and Paid FMLA Compliance*** (March 28) and ***U.S. Department of Labor Issues More Guidance in Advance of FFCRA's April 1, 2020 Effective Date*** (March 30).

The best and most informative guidance from the new regulations is summarized below. Employers should be mindful of these points upon receiving requests for paid leave under the FFCRA:

- Under the new regulations, a federal, state, or local isolation or quarantine order **INCLUDES** the "stay at home" or "shelter in place" orders that have been issued by Illinois and numerous other states. To receive paid sick leave under the FFCRA, an employee must show that a "stay at home" or "shelter in place" order prevents him or her from working or teleworking. However, where a business has no work for the employee, or where the business has been forced to close as the result of a "stay at home" order, paid sick leave is not available. For example, where a bar or restaurant has been ordered to close, employees affected by the closure may not receive paid sick leave. This is true whether the lack of work affects the

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employee individually (*g.*, a restaurant host who cannot work from home), or whether the lack of work is applicable to the business generally (*e.g.*, a restaurant has no work because its customers cannot leave their homes). In either scenario, paid sick leave is not available under the FFCRA.

- An employee who self-quarantines under fear of COVID-19 exposure or diagnosis is not entitled to paid sick leave where: (1) the employer has work for the employee; (2) the employee is able to telework; and (3) the employee is not experiencing COVID-19 symptoms or other extenuating circumstances that would prevent the employee from working.
- An employee who requests paid sick leave for the purposes of obtaining a diagnosis of possible COVID-19 symptoms is only entitled to paid sick leave for the time actually spent seeking a medical diagnosis. For example, time spent making or attending a medical appointment may be eligible for paid sick leave; however, time spent waiting for test results would not be eligible for paid sick leave where: (1) the employer has work for the employee; (2) the employee is able to telework; and (3) the employee is not experiencing COVID-19 symptoms or other extenuating circumstances that would prevent the employee from working.
- Paid sick leave is not available under the FFCRA for an employee to care for an individual with whom he or she has no personal relationship. Where an employee requests paid sick leave under the FFCRA to care for someone experiencing COVID-19 symptoms, the cared-for individual must be an immediate family member, roommate, or similar person with whom the employee has a relationship that creates an expectation of care.
- Under the FFCRA, a "full-time employee" means any employee that is scheduled to work at least forty (40) hours per week, which is determined by calculating the average hours worked by an employee over the six-month period preceding a request for paid leave (or the average hours worked over the entire period of employment, if less than six (6) months). A "part-time employee" means any employee that works under this average.
- Under the FFCRA, the amount of paid sick leave available to a part-time employee that works a variable schedule is equal to fourteen times (14x) the average number of hours that the employee was scheduled to work per [calendar] day over the six-month period preceding a request for paid leave. An employer may also use twice the number of hours that a part-time employee was scheduled to work per workweek, averaged over a six-month period. Where a part-time employee has been employed for fewer than six-months, the part-time employee is entitled to fourteen times (14x) the expected number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. This is equal to twice the average number of hours that the employee would be expected to work each workweek.
- The same rules regarding the averaging of hours worked for full-time and part-time employees apply to the calculation of both paid sick leave and paid family medical leave under the FFCRA.
- Any available leave under the FFCRA cannot be taken intermittently unless the employer and the employee agree to mutually acceptable terms upon which intermittent leave will be taken. Such agreement requires the employee and the employer to agree upon an increment of time by which leave will be measured. Only the amount of leave actually taken counts towards the employee's leave entitlement.
- Although the FFCRA generally requires an employer to restore an employee to the same or an equivalent position upon return from paid sick leave or paid family medical leave, this requirement does not apply to an employer with fewer than twenty-five (25) employees where the following



conditions are met: (a) the employee took leave to care for his or her child whose school or place of care was closed or whose child care provider was unavailable; (b) the employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (e., due to COVID-19 related reasons) during the period of the employee's leave; (c) the employer made reasonable efforts to restore the employee to the same or an equivalent position; and (d) where reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of one (1) year to contact the employee if an equivalent position becomes available.

- Employers must preserve documentation of any request for leave (whether granted or denied) for a period of four (4) years. Similarly, employers must retain any paperwork submitted to the IRS for the purposes of claiming tax credits under the FFCRA for a period of four (4) years.
- Employers with fewer than fifty (50) employees can seek exemptions from the requirements of paid leave under the FFCRA where such leave would jeopardize the viability of the business as an ongoing concern. Exemptions are only available from paid leave requested in connection with school closures or the lack of available childcare providers for children under the age of eighteen (18), and further require specific economic determinations to be made by an authorized officer of the employer. Such determinations must be documented in the employer's records. In addition, the employer must post the Department of Labor's notice of employee rights under the FFCRA in a conspicuous location in the workplace even where an exemption is invoked.

The new regulations regarding the FFCRA are detailed, and may require the assistance of an attorney to interpret. If you have any questions regarding the application of the FFCRA, we encourage you to contact the Labor & Employment Group at Burke, Warren, MacKay, and Serritella without delay.