

# FFCRA Regulations

Article

April 8, 2020

On April 1, 2020, the Department of Labor (DOL) issued its interim regulations in connection with the Families First Coronavirus Response Act (FFCRA), as title 29 of the Code of Federal Regulations part 826. The regulations are preceded by 82 pages of guidance. The following highlights the guidance provided on the regulations.

## **29 CFR § 826.20 Paid Leave Entitlements.**

This section describes the circumstances under which an eligible employee is entitled to paid leave, as follows:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider;
4. The employee is caring for an individual who is subject to an order as described in (I) or directed as described in (ii) of this subsection;
5. The employee is caring for his or her son or daughter whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual school or place of care, or the child care provider of such son or daughter is unavailable, for reasons related to COVID-19; or
6. The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the effective period, April 1, 2020, to December 31, 2020.

The regulations provide additional guidance on the following terms or concepts contained in the Paid Sick Leave law:

- Subject to a Quarantine or Isolation Order**

An employee may take the paid sick leave if the employee would be able to perform work at the normal workplace or telework but for an isolation order. However, an employee is not eligible for the paid sick leave if the employer does not have work for the employee as a result of the order.

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- The DOL provided the following example: if the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.
- The employee may only take the sick leave if the order prevents him/her from working or teleworking. The employee is able to telework and may not take the paid sick leave if the employer:
  - Has work for the employee to perform;
  - The employer permits the employee to perform that work from the location where the employee is quarantined; and
  - No extenuating circumstances apply preventing that employee from working.
- Significantly, some employers and employees have wondered if a "Shelter-in-Place" or "Safer-at-Home" order (such as that issued by Governor Evers in Wisconsin) constitutes a governmental "quarantine" or "isolation" order. The regulations do define "quarantine or "isolation" order to include "when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them."

However, what does it mean to be "unable to work or telework" due to a Safer-at-Home order? Does this mean that an employee in Wisconsin can request paid sick leave under the FFCRA, claiming that they are "unable to work or telework" due to Governor Evers' Safer-at-Home order? The answer to that question likely depends upon the nature of the employer and employee. If, for example, an employer operates an "essential business" within the meaning of the Wisconsin order, arguably none of its employees are "unable to work or telework" solely due to the order. Similarly, a non-essential business may, according to the Wisconsin order, utilize some of its employees to maintain its "minimum business operations." Those employees are not prevented from working solely due to the order. (Individual employees, of course, may be unable to work or telework because they are subject to an individual quarantine or isolation order, because they have been advised by a health care provider to self-quarantine, or for one of the other qualifying reasons under the FFCRA.)

- **Advised by a health care provider to self-quarantine.**
  - The regulations explain that this applies if the health care provider believes:
    - The employee has COVID-19;

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- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19.
- The employee can only take the paid sick leave if the self-quarantine prevents that employee from being able to work, or telework.
- **Seeking medical diagnosis of COVID-19.**
  - The regulations recognize that currently there are not enough testing kits available and an individual can qualify for the paid sick leave if the employee has the following symptoms:
    - Fever;
    - Dry cough;
    - Shortness of breath;
    - Or any other COVID-19 symptoms identified by the Center for Disease Control.
  - This provision relies on the employee to take affirmative actions to obtain a medical diagnosis.
- **Caring for an individual.**
  - The regulations provide a much needed definition of the term "individual".
    - *"Employee's immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, "individual" does not include persons with whom the Employee has no personal relationship."*
  - Essentially, this care for the individual includes someone who is at the employee's house during this quarantine and would not include an individual the employee must leave the house and care for. It also requires the employee to be unable to work or telework due to caring for the individual.
- **Caring for a son or daughter.**
  - Unable to work due to a need to care for his/her son or daughter whose school or place of care has been closed, or whose child care provider is unavailable for reasons related to COVID-19 only if no other suitable person is able to care for the son or daughter during the period of such leave.
    - The employee cannot perform work for the employer at that time.
    - The employee also qualifies for expanded FMLA.

## 29 CFR § 826.21 Amount of Sick Leave:

The employee is entitled to up to 80 hours of paid sick leave so long as he/she is normally scheduled to work 40 hours each week. An employer may look back up to 6 months prior to determine whether the employee is full time. Part time

employees are still eligible for paid sick leave, but at a ratio equal to the number of hours the employee typically is scheduled.

#### **29 CFR § 826.23 Amount of Expanded Family and Medical Leave.**

An eligible employee is entitled to take up to 12 weeks of Expanded FMLA through the end of the calendar year. Any use of EMFLA leave counts toward an employee's 12 weeks of regular FMLA the employee is entitled to.

Substitution of leave under the FMLA shall be applied, provided however that the eligible employee may elect, and the employer may require, the eligible employee to use only leave that would be available to the eligible employee for the purpose of providing care to a son and daughter under the employer's existing policies, such as personal leave or paid time off. Any leave that an eligible employee elects to use or that an employer requires the eligible employee to use would run concurrently with Expanded Family and Medical Leave taken under this section.

#### **29 CFR § 826.30 Employee Eligibility:**

- Sick Leave: All employees are eligible unless they are health care providers and emergency responders.
- EFMLA: All employees are eligible if they were employed for at least 30 calendar days, unless they are health care providers and emergency responders.
  - The employee must be on the payroll for 30 calendar days immediately prior to when the leave begins; or
  - The employee was laid off or terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020. The employee must have been on the Employer's payroll for 30 or more of the 60 days prior to the date the employee was laid off.
  - The EFMLA does not use the typical FMLA eligibility requirements, such as the 1,250 hours of service and 12 months of employment.
- Health Care providers and Emergency Responders that may be excluded:
  - *A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary 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 any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.*
  - *Emergency responder is anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients, or others needed for the*

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*response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.*

The Director of Office Management and Budget has the authority to exclude certain government employees within the executive branch.

### **29 CFR § 826.40 Employer Coverage.**

The DOL provides some much needed clarification regarding public and private eligibility.

- Private Employer: employ fewer than 500 employees. Use the integrated employer test under FMLA and the joint enterprise test under the FLSA to determine eligibility.
- Public Sector:
  - Any public employer must provide Paid Sick leave, except those designated health care workers and emergency responders.
  - Any public employers must provide EFMLA to all employees except:
    - Those designated as health care workers and emergency responders;
    - Federal employees covered under Title II of the FMLA.

### **29 CFR § 826.50 Intermittent Leave.**

Intermittent leave is possible as noted in the DOL Q&A guidance. Intermittent leave can only be used if agreed upon between the employee and employer, and the employee is taking the leave to care for his/her child.

### **29 CFR § 826.50 Leave to care for a child due to school or place of care closure or child care unavailability.**

As previously noted in our articles, employees can be eligible for both paid sick leave and EFMLA. The benefits can run concurrently, to ensure that the individual does not have a gap in pay. An employee is able to supplement EFMLA with other accrued employer provided leave.

### **29 CFR § 826.70 Leave to Care for a Child Due to School or Place of Care Closure or Child Care.**

## Unavailability – Intersection of the EFMLEA and the FMLA.

If an employee has already taken some FMLA leave for qualifying reasons, the employee may take up to the remaining portion of the twelve workweek leave for EFMLA. If the employee already used all 12 weeks of FMLA, then the employee is not eligible for any EFMLA.

## **29 CFR § 826.100 Documentation for Leave:**

- General requirements:
  - Employee's name;
  - Date(s) for which leave is requested;
  - Qualifying reason for the leave; and
  - Oral or written statement that the employee is unable to work because of the qualified reason for leave.
- Paid Sick Leave for qualifying COVID-19 reason:
  - Provide the employer with the name of the government entity that issued the Quarantine or Isolation Order.
  - Provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19.
  - To care for an individual, the employee must:
    - Provide the name of the government entity that issued the Quarantine or Isolation Order to which the individual being care for is subject; or
    - Provide the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.
- Paid Sick leave or EFMLA to care for a child:
  - The name of the son or daughter being cared for;
  - The name of the school, place of care, or child care provider that has closed or become unavailable; and
  - A representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

Employers must continue providing health care coverage to all employees on FFCRA leave. Generally, the employer must return the employee to the same or equivalent position.