

US DOL Releases FAQs re: the Families First COVID-19 Act (FFCRA) – April 1st Effective Date

Labor & Employment Law Update

By Julie Proscia on March 25, 2020

On March 24, 2020, the Department of Labor (DOL) released the much anticipated FAQs regarding the Family First Coronavirus Response Act (FFCRA). The DOL's FAQs offer clarification on some of the more pressing questions that have been on employers' minds. Of particular note is information relating to the counting of employees, commencement of the leave and compilation of the leave. Of major significance is that the FFCRA will become effective on **April 1, 2020** (not April 2nd) and it is not retroactive (and, any benefits provided by employers now through March 31, 2020 cannot be counted towards the FFCRA in any way).

Highlights of the FAQs include:

Effective Date

The effective date of the FFCRA, which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act is **April 1, 2020**, and applies to leave taken between April 1, 2020 and December 31, 2020.

Counting Employees – How and when do you get to 500 – for purposes of paid sick leave and new FMLA mandates?

As a private sector employer you meet the 500 employee count threshold if at the time that the employee's leave is to be taken, you employ under 500 full-time and part-time employees within the United States, which includes any state of the United States, the District of Columbia, or any territory or possession of the United States. When counting employees, employers should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee

threshold. Further, where a corporation has an ownership interest in another corporation, the two are separate employers (with separate employee counts) unless they are joint-employers as analyzed under the FLSA. The FLSA's joint-employer analysis will dictate coverage under the new emergency paid sick leave mandate. Also, two or more entities are separate employers unless they meet the "integrated employer test" under the FMLA. If two or more entities are deemed "integrated" under the FMLA, then the employees of the integrated entities should be counted as one employer (combining the employee counts) for purposes of the new FMLA mandate.

Overtime Hours are included when calculating pay

When calculating the average pay under the FFCRA, the Emergency Family and Medical Leave Expansion Act requires employers to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week, as such this would include regularly scheduled overtime.

Please note, the Emergency Paid Sick Leave Act only requires that paid sick leave be paid up to 80 hours over a two-week period. The example given is as follows: an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80. This determination will change if the employee's schedule varies from week to week. These amounts are subject to the daily and weekly caps as set forth in the FFCRA.

Leave is Not Duplicative

When answering the question of whether or not an employee may take 80 hours of paid sick leave for their personal self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act, the DOL clarified that this was not permissible. Rather eligible employees may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for *any combination of* qualifying reasons. However, the total number of hours for which an employee will receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

Interplay of Expanded FMLA

The DOL further clarified the interplay that can occur when employees are home with their child(ren) because their school or child care provider is closed or unavailable and whether or not they get paid sick leave, expanded family and medical leave, or both. Individuals in this scenario may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. Eligible employees may take both paid sick leave and expanded family and medical leave to care for

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their child(ren) whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two (2) weeks of paid leave. This period covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer's policy. After the first ten workdays have elapsed the employee will receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act (up to \$200 per day and \$10,000 total).

Small Employer Exemption

Employers with less than 50 employees can attempt to justify why compliance with the mandates would jeopardize the viability of the business by documenting the reasons. The DOL will be issuing more guidance specific to this process in the coming days/weeks. At this time, such employers should be in contact with competent legal counsel to discuss this option.

While the FAQs answer some of the pressing questions, more clarification will emerge with the release of the regulations. The interplay between the FFCRA and existing state and local leave laws is a complex issue that must be analyzed prior to the determination of any leave. Because of the complexity and evolving nature of the issues it is always advisable to consult with counsel when implementing or denying leaves under the FFCRA.

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