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THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (H.R. 6201) AND DEPARTMENT OF LABOR FREQUENTLY ASKED QUESTIONS

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA). While the federal Department of Labor (DOL) is currently working on implementing regulations, it issued a frequently asked questions page (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>) to provide further guidance to employers on the application of the FFCRA.

If you want to read more about FFCRA, please read our previous blog [here](#).

Below is a summary of the FFCRA and the DOL's current guidance:

1. What benefits does the FFCRA provide?

The FFCRA created several temporary measures to assist employees and employers during the pending COVID-19 pandemic. The most relevant are:

- a. The Emergency Family and Medical Leave Expansion Act (EFMLEA) which provides partially paid leave for eligible employees who cannot work (or telework) due to a need to care for the employee's son or daughter (under 18 years of age) in the event of school or childcare closure due to a COVID-19 emergency.
- b. The Emergency Paid Sick Leave Act (EPSLA) which provides paid sick time if an employee is unable to work (or telework) due to a need for leave because:
 - i. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - ii. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - iii. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - iv. The employee is caring for an individual who is subject to a quarantine order or has been advised to self-quarantine.
 - v. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 - vi. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.



- c. The FFCRA provides for tax credits for paid sick and paid family and medical leave payments (subject to applicable caps).

2. When does the FFCRA go into effect?

Per DOL guidelines, April 1, 2020 is the effective date.

In a [field assistance bulletin](#) dated March 24, 2020, the DOL stated it will not enforce the FFCRA until April 17, 2020 if the employer has made reasonable, good faith efforts to comply with the Act. An employer acts “reasonably” and in “good faith” when all of the following facts are present:

- i. The employer remedies any violations, including by making all affected employees whole as soon as practicable.
- ii. The violations of the Act were not “willful”.
- iii. The DOL receives a written commitment from the employer to comply with the Act in the future.

3. Who is an eligible employee under the FFCRA?

EFMLEA

For school-closure leave purposes, an “eligible employee” is any employee who was on the employer’s payroll for 30 calendar days immediately prior to the employee’s leave.

The DOL provides the following example: “if you want to take leave on April 1, 2020, you would need to have been on your employer’s payroll as of March 2, 2020.”

EPSLA

For paid sick leave purposes, an “eligible employee” is any employee employed by a covered employer.

4. Who is a covered employer under the FFCRA?

Employers with 500 or fewer employees.

Per the DOL, the “500 or fewer” threshold is based on all part- and full-time employees, employees on leave, jointly-employed employees, and temporary employees (including day laborers) employed anywhere in the United States, the District of Columbia, or any territory or possession of the United States, as of the time the employee’s leave is taken.

Workers who are properly classified as independent contractors under the Fair Labor Standards Act (FLSA), are not considered employees for purposes of the 500-employee threshold.



Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees, in which case, all of their common employees must be counted in determining coverage under the Act.

5. Is there a small-business exemption under the FFCRA?

Currently, the FFCRA states the DOL has authority to issue regulations to exempt companies with fewer than 50 employees when the imposition of leave would jeopardize the viability of the business.

The DOL states that if an employer with fewer than 50 employees believes that providing child-care related paid sick leave and expanded family and medical leave would jeopardize the viability of its business as a growing concern, the employer should document why its business meets the criteria “which will be addressed in more detail in forthcoming regulations.” No materials should be sent to the DOL in requesting an exemption.

We understand this to mean that as of the writing of this Update, there is no practical exemption in place, and unless stated otherwise by the DOL, all covered employers must comply with the requirement of the Act. If you have less than 50 employees and complying with the Act will jeopardize the viability of your business as a growing concern, we suggest documenting the reasons so you can seek to establish an exemption (with supporting documentation) if/once the DOL provides a mechanism for doing so.

6. How much time off (paid and unpaid) do employers need to provide under the FFCRA and how it should be calculated?

EPSLA

Paid sick time is 80 hours for full-time employees, or the average number of hours that the employee works over a typical two-week period for part-time employees. If the part-time employee’s schedule varies, employers may use a six-month average.

Calculation of paid leave varies based on the qualifying reason:

- If leave is taken pursuant to paragraphs 1(b)(i)-(iii) above (i.e., due to isolation/quarantine order/advice or COVID-19 symptoms), it should be calculated based on the employee’s regular rate of pay (no less than the applicable minimum wage), up to \$511 per day, or \$5,110 in the aggregate.
- If leave is taken pursuant to paragraphs 1(b)(iv)-(vi) above (i.e., to care for an individual who was ordered/advised to self-quarantine, to care for a child whose school was closed, or for other substantially similar condition), it should be calculated based on 2/3 of the employee’s regular rate of pay, up to \$200 per day, or \$2,000 in the aggregate.



EFMLEA

Employees who need school closure-related leave are entitled to up to 12-weeks of leave:

- The first 10 days (two weeks) of leave may be unpaid, but an employee may elect to use any accrued vacation or sick leave, including sick leave under the EPSLA.
- The following ten weeks must be paid at not less than 2/3 of the employee's regular rate of pay for the hours the employee would normally be scheduled to work (unless the schedule varies, in which case you may use the 6-month average – see above), up to \$200 per day, or \$10,000 in the aggregate.

7. How can I determine the employee's regular rate of pay for FFCRA paid leaves?

Per the DOL, the regular rate of pay used to calculate paid leave under the FFCRA is the average of the employee's [regular rate](#) over a period of up to six months prior to the date of leave.

For new hires (who have not yet completed six months of employment), the regular rate of pay is the average of the employee's regular rate for each week employee has worked for the employer.

If an employee is paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

8. Can I deduct paid sick leave already provided under California law/Company policy from the amounts required under the EPSLA?

No. Any paid sick leave required under the EPSLA is in addition to an already existing paid sick leave policy or benefit.

9. Can I instruct employees to use paid sick leave under Company policy prior to using leave under the EPSLA?

No. The Act specifically says that an employee may first use paid sick time under the EPSLA for any qualifying reason, and that an employer may not require the employee to use other paid leave before the employee uses the federal allotment.

10. What are the notice requirements under the FFCRA?

For employers: The DOL has created a [model notice](#) that all covered employers must post in a conspicuous place where employees can see it. If employees are not working (e.g., due to State order), then you must provide notice in another way to ensure receipt (e.g., mail, email, internet, intranet, etc.) The DOL is translating the poster into other languages.



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For employees:

- For sick leave purposes, employers may require employees to follow reasonable notice procedures following the first workday (or portion thereof) an employee receives paid sick time under the EPSLA.
- For school-closure leave purposes (under the EFMLEA) employees must provide notice of leave as soon as practicable.