

DOL PUBLISHES INFORMAL GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On March 24, 2020, the Department of Labor (“DOL”) released an initial set of Questions and Answers (“Q&A”) regarding the Families First Coronavirus Response Act (“FFCRA”). As we’ve summarized in earlier posts, the FFCRA was signed into law on March 18, 2020 and generally requires U.S. employers with fewer than 500 employees to provide paid sick leave and emergency family and medical leave (“FMLA”) benefits to employees in connection with COVID-19.

The Q&A is the latest in a series of publications from the DOL and the Internal Revenue Service to shed light on the FFCRA. Below are some highlights from this guidance for employers to consider as they prepare to comply with the FFCRA:

- **Effective Date:** The FFCRA will become effective on April 1, 2020 and will expire on December 31, 2020.
- **Retroactivity:** Benefits under the FFCRA are not retroactive. Any leave provided to employees prior to April 1, 2020 will not count toward the employer’s leave obligations under the FFCRA, and cannot form the basis for payroll tax credits.
- **Employee Threshold Requirements Generally:**
 - The 500-employee threshold is calculated based on the number of US employees an employer has as of the date the employee’s leave is requested.
 - The following types of employees should be included in an employer’s calculation: full-time employees, part-time employees, employees on leave, temporary employees who are jointly employed, and day laborers supplied by a temporary agency.
 - Independent contractors (as defined under the Fair Labor Standards Act [“FLSA”]) are not considered employees for purposes of the threshold.
- **Paid Sick Leave Hours Generally:** Employees are not entitled to 80 hours of paid sick leave per qualifying reason for leave. Rather, employees are only entitled to 80 hours of paid sick leave in the aggregate.

- **Unable to Work:** The DOL has emphasized that employees are entitled to leave only when they are *unable to work (or unable to telework)* due to one of the qualifying reasons for leave.
- **Calculating Paid Leave Hours for Part-Time Employees:** Part-time employees are entitled to leave for their average number of work hours in a two-week period. If the normal hours scheduled are unknown, or if a part-time employee's schedule varies, employers may use a six-month average to calculate the average daily hours.
- **Calculating Employees' Regular Rates:** For purposes of the FFCRA, an employee's regular rate of pay is the average of the employee's regular rate over a period of up to six months prior to the date on which he or she takes leave. Employers may also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.
- **Overtime Premiums:** Employers must pay employees for all hours that they were otherwise scheduled to work, including overtime hours. However, a premium for overtime hours does not need to be included in paid leave under the FFCRA. Paid leave is based on the employee's regular rate of pay, not a premium rate such as an overtime rate.
- **Refundable Tax Credits:** Employers may immediately (as of April 1, 2020) begin taking advantage of the FFCRA's two new refundable payroll tax credits.
- **Temporary Non-Enforcement Period:** The DOL will not bring enforcement actions against any public or private employer for violations of the FFCRA occurring through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the FFCRA.

Notably absent from these materials is **clear** guidance as to such subjects as:

- Which related entities can be combined for purposes of determining whether the "fewer than 500 employees" portion of the "covered employer" definition is met. Based on the cross-references to the FMLA and the FLSA in both the FFCRA and the DOL's informal guidance, the familiar joint-employer and integrated employer concepts will apply to a determination of whether related entities can be combined for counting purposes. However, these concepts are gray and fact-specific. Given that the DOL and courts are likely to construe the statute in a way that favors coverage, we are currently recommending a conservative approach on this issue, i.e., counting each employing entity separately. However, if the IRS construes the statute differently, employers could find that they have provided paid leave but are not eligible for the offsetting tax credit.
- Whether the FFCRA's paid sick leave requirements apply to all government quarantine orders (including broad lockdown/shelter in place orders) or only those orders that relate to an employee having symptoms or a diagnosis of COVID-19.

- What criteria will be used to determine whether an employer with fewer than 50 employees will qualify for the “small business” exemption for compliance with the paid sick leave and emergency FMLA leave requirements of the FFCRA relating to school closures / child care unavailability.

Although we can hope to receive guidance on these and other important subjects relating to the FFCRA from the DOL soon, at this time we know only that formal guidance is expected to be issued in “April 2020.”

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