

U.S. COVID-19: DOL (YET AGAIN) PUBLISHES REVISED GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Apr 06, 2020

This weekend, the Department of Labor (“DOL”) released yet another set of [updated and revised Questions and Answers \(“Q&A”\)](#) regarding the Families First Coronavirus Response Act (“FFCRA”). This updated informal guidance comes just days after the DOL published its [formal Temporary Rules \(“Rules”\)](#) interpreting the 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 \(“Paid Sick Leave”\)](#) and [emergency family and medical leave \(“Emergency FMLA Leave”\)](#) benefits to employees in connection with COVID-19.

The FFCRA’s Paid Sick Leave and Emergency FMLA Leave provisions became effective on April 1, 2020; however, as the DOL [previously announced](#), to enable covered employers to come into compliance with the new law, the DOL will observe a temporary period of non-enforcement through April 17, 2020. This temporary period of non-enforcement only applies if an employer makes a reasonable, good faith attempt to comply with the FFCRA. As such, if they have not already, employers should take steps to comply with the FFCRA immediately, and should continue to monitor and incorporate guidance from the DOL into their policies and practices.

Below is a summary of new or revised guidance outlined in the updated Q&A (that was not previously summarized in our earlier posts) that employers should consider as they comply with the FFCRA. Links to our posts summarizing the earlier guidance are available [here](#).

Revised Q&A Guidance

- [Health Care Providers and Emergency Responders](#): Updates were made to the Q&A to align with the Rules’ [slightly revised definitions of “health care providers” and “emergency responders,”](#) as those phrases are used to determine which employees may be excluded from Paid Sick Leave and Emergency FMLA Leave benefits.
- *Health Care Providers*: While the Rules did not alter the definition of medical institutions that qualify as “health care providers,” they did modify the circumstances under which an entity contracting with such institutions may exclude employees. Specifically, while all employees

of covered medical institutions qualify as “health care providers,” only those employees of such contracting entities whose services actually support the operation of the medical institution qualify as “health care providers.”

- *Emergency Responders*: The new guidance clarifies that “child welfare workers and service providers” are included within the definition of “emergency responders.”
- Substitutions/Supplementation of Other Paid Leave: As we have previously highlighted, the Rules contain conflicting guidance as to if and when employers may require employees to substitute and/or supplement Paid Sick Leave and/or Emergency FMLA Leave with other forms of available paid leave. Unfortunately, the updated guidance does not explicitly clarify the circumstances under which such a requirement is permissible. As such, employers should consult with legal counsel before incorporating such a requirement into their FFCRA policy or practice.

New Q&A Guidance

- Calculating the 500-Employee Threshold for Staffing Companies: The updated Q&A confirms that staffing companies may qualify as a “joint employer” for workers who are staffed offsite. If they do, such companies must count all employees on their payroll toward the 500-employee threshold, even if the company provides or refers such employees to other employers.
- Limitations on Paid Sick Leave for Ill Employees: The new guidance makes clear that generally being ill, alone, does not qualify an employee for Paid Sick Leave. In order to be entitled to such benefits, an ill employee must have COVID-19 symptoms and either: (i) be seeking a medical diagnosis, (ii) test positive for COVID-19, or (iii) otherwise be advised by a health care provider to self-quarantine. Additional rules apply to employees who are asymptomatic and/or have other underlying health issues that may make them vulnerable to COVID-19.
- Additional Guidance for Child Care-Related Leave: Both Paid Sick Leave and/or Emergency FMLA Leave may be available to an employee for certain child care-related needs,^[1] including when the employee’s son or daughter’s “place of care” or “child care provider” is “closed” or unavailable. The updated Q&A includes several helpful definitions for these phrases.
 - *Place of Care*: The updated guidance defines a “place of care” as a physical location in which care is provided for the employee’s son or daughter. Notable examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
 - *Child Care Provider*: The updated guidance broadly defines a “child care provider” to include individuals who are paid to care for the employee’s son or daughter, as well as individuals

who are not paid and/or are not licensed to, but regularly do, care for the employee's son or daughter, such as family members or neighbors.

- *“Closed” Facilities*: The updated guidance confirms that a place of care (like a school) is considered “closed” if the physical location is closed, even if instruction or other services are provided to the child online.
- Pay for Seasonal Employees with Varying Work Schedules: The updated Q&A provides a four-step process for calculating Paid Sick Leave and Emergency FMLA Leave wages for such employees. The process is highly fact-specific, so employers are encouraged to consult the Rules directly, or legal counsel, for specific guidance.
- Eligibility for FFCRA Leave When an Employee is Receiving Workers’ Compensation and/or Temporary Disability Benefits: The guidance clarifies that such employees generally are not entitled to Paid Sick Leave or Emergency FMLA Leave, unless the employee: (i) returned to light duty work prior to requesting Paid Sick Leave and/or Emergency FMLA Leave; and (ii) is otherwise entitled to Paid Sick Leave and/or Emergency FMLA Leave.
- Eligibility for FFCRA Leave When an Employee is on an Employer-Approved Leave of Absence: The guidance clarifies that such individuals may be entitled to Paid Sick Leave and/or Emergency FMLA Leave if their leave of absence is voluntary (in which case the employee could end the voluntary leave of absence and begin taking FFCRA leave if applicable). In contrast, employees on a mandatory employer-approved leave of absence are not eligible for Paid Sick Leave and/or Emergency FMLA Leave (but may be eligible for unemployment benefits).

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bcplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bcplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

[1] Employers should remember that child care-related Paid Sick Leave may also be available if the employee is caring for a child (including someone else's son or daughter) who is: (i) subject to a Federal, state, or local quarantine or isolation order; or (ii) advised by a healthcare professional to self-isolate. Emergency FMLA is not available to an employee who is caring for someone else's son or daughter.

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