



National Compliance Update

USI EMPLOYEE BENEFITS

March 26, 2020

DOL Issues Guidance for Families First Coronavirus Response Act

On March 24 and 25, 2020, the Department of Labor (“DOL”) issued Fact Sheets, Questions and Answers, Posters, and a Field Assistance Bulletin addressing the Families First Coronavirus Response Act (the “FFCRA”). The notable items are summarized below.

BACKGROUND

[As reported previously](#), the FFCRA provides new types of leave to employees of private employers with less than 500 employees, briefly described as follows:

- Two weeks (up to 80 hours) of paid sick leave at the employee’s regular rate of pay where the employee is unable to work¹ because the employee is quarantined (pursuant to federal, state, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at 2/3 the employee’s regular rate of pay because the employee is unable to work because of a bona fide need to (1) care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider), or (2) to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or (3) the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
- Up to an additional 10 weeks of paid expanded Family and Medical Leave Act (“FMLA”) leave at 2/3 the employee’s regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

TIMING

The effective date is April 1, 2020, rather than April 2, 2020 as widely understood. The new requirements are not retroactive.

¹ For this purpose, “work” also includes telework.

Paid leave provided for any qualifying reasons taken before April 1, 2020 does not count against the employee's leave entitlement under the FFCRA.

TRADITIONAL FMLA LEAVE REMAINS UNPAID

Traditional FMLA leave (e.g., FMLA leave available for the serious health condition of the employee or employee's family member rather than related to childcare issues associated with COVID-19) remains unpaid.

COVERED EMPLOYERS

The 500-employee threshold is determined under regular FMLA rules which include:

- Not using controlled group rules. Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the:
 - “joint employment” test (where two or more businesses exercise some control over the work or working conditions of the employee); or
 - “integrated employer” test (factors include: (i) common management; (ii) interrelation between operations; (iii) centralized control of labor relations; and (iv) degree of common ownership/financial control).
- Only counting employees within the United States.
- Including employees on leave and employees placed with the employer by a temporary agency.

ELIGIBLE EMPLOYEES

For FMLA leave purposes, the employee must have been on payroll for the 30 calendar days immediately prior to the day leave begins. Any time as a temporary employee is counted.

For emergency paid sick leave, any employee of the employer is eligible.

EMPLOYEE NOTICE

Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

COUNTING HOURS

An employee is entitled to leave based on his or her average number of work hours in a 2-week period.

If the normal hours scheduled are unknown, or if the employee's schedule varies, the employer may use a 6-month average to calculate the average daily hours.

If the employee has not been employed for at least 6 months, the employer should use the number of hours that the employer and employee agreed that the employee would work upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Overtime hours must be counted, subject to 80-hour cap for sick leave.

PAYMENT AMOUNT

Employees are paid as follows:

1. For paid sick leave based upon an employee's need for leave due to (1) federal, state, or local quarantine or isolation order related to COVID-19; (2) having been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) experiencing symptoms of COVID-19 and seeking medical diagnosis, the employee will receive for each applicable hour the greater of:
 - the regular rate of pay;
 - the federal minimum wage in effect under the FLSA; or
 - the applicable state or local minimum wage.

The maximum is \$511 per day, or \$5,110 total over the entire paid sick leave period.

2. For paid sick leave due to: (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by HHS, the employee is entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, the employee is subject to a maximum of \$200 per day, or \$2,000 over the entire 2-week period.

3. For FMLA leave, the employee can take paid sick leave for the first 10 days of that leave period, or the employee may substitute any accrued vacation leave, personal leave, or medical or sick leave under the employer's policy. For the following 10 weeks, the employee will be paid at an amount no less than 2/3 of the regular rate of pay for the hours he or she would be normally scheduled to work capped at \$200/day or \$10,000 in the aggregate. The regular rate of pay used to calculate this amount is at or above the federal minimum wage, or the applicable state or local minimum wage.

MULTIPLE QUALIFYING REASONS

The 80 hours of paid sick leave is for one or more qualifying reason; it is not 80 hours of paid sick leave per qualifying reason.

If an employee qualifies for both FMLA and sick leave, he or she is only eligible for a total of 12 weeks of paid leave. Paid sick leave covers the first 10 workdays of expanded FMLA leave, which is otherwise unpaid. After the first 10 workdays, the employee will receive 2/3 of his or her regular rate of pay.

However, the employee will not receive more than \$200 per day or \$12,000 for the 12 weeks that include both paid sick leave and FMLA leave when on leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

POSTER

A notice must be provided.

- The notice must be posted in a conspicuous place where employees can see it. For teleworking employees, this includes emailing, direct mailing, or posting to a website.
- There is no requirement to provide it in other languages, but the DOL is working on translations.

- The notice does not need to be provided to former employees, laid off employees, or job applicants, but must be conveyed to new hires.
- All covered employers (including those not normally covered by FMLA) are required to post the notice even if the state requires greater protections.

The notice can be found at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

SMALL EMPLOYER EXCEPTION

Employers with fewer than 50 employees where compliance with the FFCRA's leave requirements associated with childcare related closures due to COVID-19 would jeopardize the viability of the business should document why they meet the criteria set forth by the DOL which will be addressed in more detail in forthcoming regulations. Employers relying on this relief will not be required to send any materials to the DOL.

TEMPORARY NON-ENFORCEMENT PERIOD

Field Assistance Bulletin 2020-1 offers a non-enforcement period to employers making a reasonable and good faith effort to comply with the FFCRA from March 18 to April 17, 2020.

As detailed in FAB 2020-1, the DOL will not bring enforcement action against any public or private employer for violations of the FFCRA during this 30-day window as long as the employer has acted reasonably and in good faith. For purposes of this relief, an employer will be found to be acting reasonably and in good faith when all three of the following are met:

- The employer fixes any violations (including making employees whole) as soon as possible;²
- Violations of the FFCRA were not willful, meaning the employer did not know its acts were in violation or did not act with reckless disregard as to its prohibited conduct; and
- The employer commits in writing to comply with the FFCRA prospectively.

RESOURCES

The new guidance, including the DOL's FFCRA Fact Sheets, Questions and Answers, Posters, and a Field Assistance Bulletin, can be found at <https://www.dol.gov/agencies/whd/pandemic>.

A dedicated USI website on public health emergencies can be found at <https://www.usi.com/public-health-emergencies/>.

USI [usi.com/locations](https://www.usi.com/locations)

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² It is noted that employers who are eligible for tax credits but who have insufficient cash flow should make payment of sick leave wages as soon as possible, but not later than 7 calendar days after the employer has withdrawn an equal amount from the employer's federal payroll tax deposits (or received an applicable refund from the IRS).

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