



UPDATE: U.S. DOL Publishes New Guidance Clarifying Paid Sick Leave and Expanded FMLA Under the Families First Coronavirus Response Act

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03.30.2020

UPDATE

This alert updates our March 25, 2020 client alert with new information posted by the Department of Labor on March 30, 2020. As previously reported, on Tuesday, March 24, 2020, the Department of Labor published guidance in three separate documents related to the Families First Coronavirus Response Act (FFCRA), which goes into effect on April 1, 2020 through December 31, 2020. The guidance is provided in a **Fact Sheet for Employees**, a **Fact Sheet for Employers**, and a **Questions and Answers Document**. **On March 30, 2020, the DOL updated its Questions and Answers Document to provide additional guidance.**

The FFCRA requires certain employers to provide employees with Family Leave Emergency Pay (amendments to FMLA) and Emergency Sick Pay (in addition to FMLA). On March 19, 2020, Williams Mullen published a **Legal Alert** that contained a chart outlining employer obligations under the FFCRA. Prior to the guidance issued on March 24, it was unclear whether qualifying employees could receive only 10 weeks or up to 12 weeks of paid leave to care for a son or daughter under 18 years of age if the child's school or place of care has been closed due to reasons related to COVID-19. The guidance clarifies that eligible employees may receive pay for the full 12 weeks because this reason triggers employer requirements under both Family Leave Emergency Pay and Emergency Sick Pay.

March 30, 2020 Updated Guidance: After first publishing its **Questions and Answers Document**, the DOL updated the document to provide important additional guidance:

1. Questions 15 & 16 ? Employees must provide, and Employers must keep, appropriate documentation supporting the need for FFCRA leave. Employers who intend to seek reimbursement of the costs of FFCRA leave through available tax credits are directed to

consult IRS forms and instructions.

2. Question 18 ? If an employee is able to telework, and the employer and employee agree that the employee may telework outside of the employee's normally scheduled hours (early in the morning or late in the evening) for the regular number of hours, the employee is able to work and leave is not necessary unless the employee is prevented from working the altered schedule due to FFCRA-qualifying reasons.
3. Questions 20 & 21 ? Employers may, but are not required to, permit employees to use Emergency Sick Pay intermittently in some circumstances. The DOL encourages employers to be flexible in allowing intermittent leave if possible.
4. Questions 23 & 24 ? If an employer closes its worksite, sends the employee home, and stops paying the employee either before or after April 1, 2020, then the employee is not eligible for FFCRA leave after the date the worksite closes.
5. Question 26 ? Employees who are furloughed because there is insufficient work are not entitled to FFCRA paid leave.
6. Question 28 ? Employees who have their hours reduced because there is insufficient work are not entitled to FFCRA paid leave for that reason alone. They must have a separate FFCRA-qualifying reason that prevents them from working.
7. Questions 31 & 32 ? Employers may (but are not required to) permit, and employees may elect (but cannot be required) to use, pre-existing paid leave concurrently to supplement amounts received by the employee for FFCRA leave. No tax credit is available for supplemented amounts paid that are not required to be paid pursuant to the FFCRA.
8. Question 56 & 57 ? The DOL's updated guidance provides definitions for a health care provider or emergency responder that may be excluded from the FFCRA's provisions.
9. Question 58 & 59: Small Business Exception ? A small business (fewer than 50 employees) may claim the exemption for paid leave due to school or place of care closures or child care provider unavailability for COVID-19 reasons when an authorized officer of the business has determined one of the following:
 1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The **Questions and Answers Document** also addresses the following issues with which many employers have struggled, as previously reported:

1. Question 2 ? Because the FFCRA covers only employers with up to 500 employees, it is imperative for employers to know what employees to count. The DOL responded that the following individuals are included to determine whether an employer exceeds the 500-employee threshold for the FFCRA's provisions to apply: (i) employees on leave, (ii) temporary employees who are jointly employed, and (iii) day laborers supplied by a temporary agency.
 1. If two entities meet the Family and Medical Leave Act of 1993's integrated employer test, then all of both entities' employees combined count toward the 500-employee threshold.
 2. If two entities are joint employers of certain employees under the Fair Labor Standards Act, *all* common or joint employees are counted towards the 500-employee threshold.
2. Question 4 ? The DOL has indicated that it will be addressing the small business exemption -- those employers with fewer than 50 employees -- in further regulation. No additional specific guidance was provided regarding this exemption other than for businesses to document why the business meets the exemption criteria. This documentation should not be provided to the DOL at this time.
3. Question 10 ? Employees who must care for a child because the child's school or place of care is closed may be eligible to have Emergency Sick Pay cover the first ten (10) days of expanded family leave, which is otherwise unpaid under the FMLA provisions of the FFCRA. In other words, the employee can use paid emergency sick leave for the first 10 days/2 work weeks, and then paid (reduced pay) leave under the FMLA provisions of the FFCRA for up to the remaining 10 work weeks of needed leave.
4. Question 14 ? Employers should determine whether an employee has been employed for at least 30 calendar days based on payroll. If the employee was on the employer's payroll for the 30 calendar days immediately prior to the day the employee's leave would begin, then they are eligible to receive Family Leave Emergency Pay.

The **Fact Sheet for Employers** provides the following critical guidance:

1. Employers will be required to post an FFCRA notice in a conspicuous location at each work site, and a model notice will be provided by the DOL no later than March 25, 2020.
2. Employers who violate the FFCRA will be subject to penalties and enforcement (for Emergency Sick Pay ? penalties under the Fair Labor Standards Act; for Family Leave Emergency Pay ? under the Family and Medical Leave Act). However, the DOL will observe a 30-day temporary period of non-enforcement from April 1, 2020 if an employer has acted reasonably and in good faith.

The **Fact Sheet for Employees** clarifies that most federal government employees are not governed by the amendments to the FMLA and are, therefore, not covered by Family Leave Emergency Pay. In addition, it clarifies that employees may elect, but are not required, to substitute any pre-existing paid leave for Emergency Sick Pay.

Williams Mullen is closely monitoring coronavirus developments. All of our COVID-19 related articles are

available **here**. Please contact any member of the Williams Mullen Employee Benefits Group or Labor, Employment & Immigration Group if you have any questions.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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