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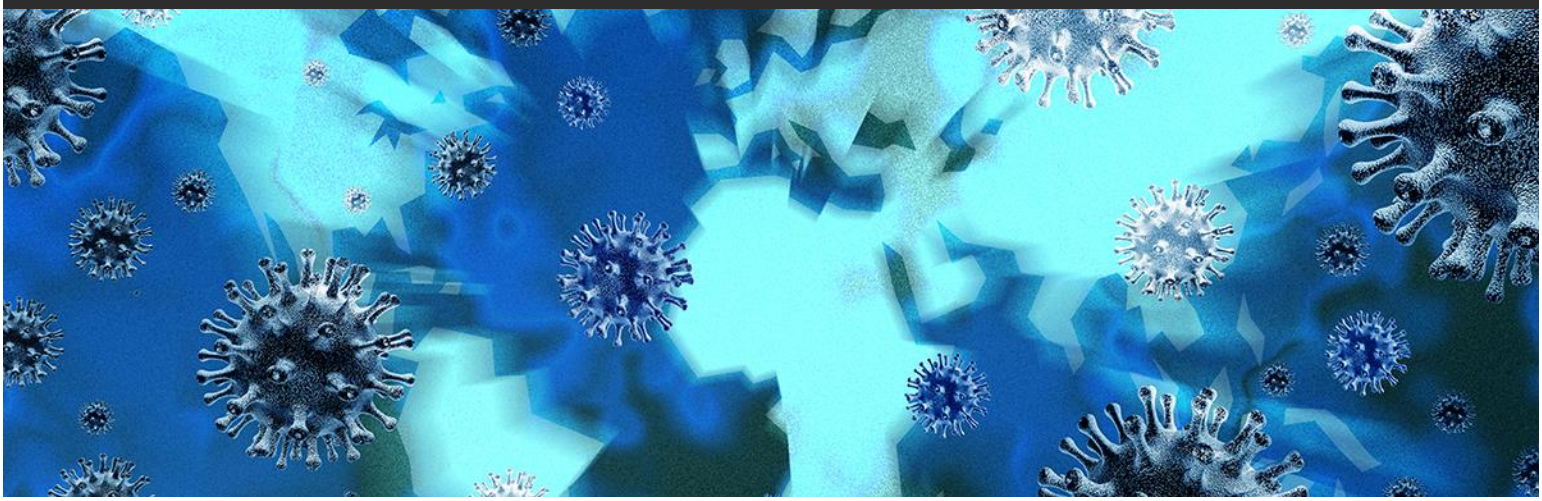
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



April 6, 2020

DOL Clarifications on Emergency Leave Under the Families First Coronavirus Response Act (FFCRA)

Given the speed with which the Families First Coronavirus Response Act (FFCRA) was legislated before its March 18, 2020, enactment, open questions remained at the time of our March 20, 2020 Alert. Employers covered by FFCRA's paid leave provisions asked how the tax credits would work. Some of those tax credit questions have since been answered by the Internal Revenue Service (IRS), as detailed in our March 25, 2020 Alert. As the FFCRA became effective April 1, 2020, the Department of Labor (DOL) provided guidance in the form of questions and answers, a poster to be displayed in employer workplaces and, importantly, temporary regulations to implement the public health emergency leave provisions of the FFCRA.

DOL continues to add to and make revisions to its question and answer guidance, which has thus far been available at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

The following questions now appear to have at least some answers:

Counting Toward the 500 Employee Threshold

Employers were initially left wondering when and whom to count to determine whether the employer has fewer than 500 employees to be covered by the emergency leave provisions of the FFCRA. Related to this issue is whether employers affiliated with other employers under a corporate umbrella may count all

employees together or are deemed to stand separately for purposes of the FFCRA. DOL now states the following:

- When: DOL has now definitively instructed that the time to count to see if the 500-employee threshold is met is "at the time your employee's leave is to be taken." Accordingly, the count must be separately done each time an employee needs leave and, for some employers, the answer could change over time.
- Who: DOL has also stated that the employee count must include (a) all full-time employees (40 or more hours per week); (b) all part-time employees (fewer than 40 hours per week); (c) all employees on leave; and (d) all employees jointly employed by a professional employer organization (PEO), contract vendor, or temporary agency. DOL instructs employers to exclude all independent contractors as defined under the Fair Labor Standards Act (FLSA), as well as those employees who have been laid off or furloughed and not re-employed.
- Aggregating: DOL has now stated that where one 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. DOL also states, however, that "two or more entities are separate employers unless they meet the integrated employer test under the FMLA," and if they are then employees of "all entities making up the integrated enterprise must be counted." These two statements, while supplying no obvious answer for any given employer(s), at least now clarify two possible legal frameworks applicable to a further tailored analysis, which depends on the context.

Establishing the Applicable Hourly Rate of Pay

The two paid leave sections of the FFCRA also use different language in describing how an employee's rate of pay is determined for purposes of calculating paid sick leave. DOL has now instructed that for employees who have worked for their current employer for at least six months, the applicable rate is the average of the employee's regular rate of pay over that six-month period prior to the date leave is taken. For those employees who have worked fewer than six months at the time of taking leave, the applicable rate is calculated as the average of the regular rate over the employee's period of employment. DOL has also clarified that commissions, tips, or piece rates must be incorporated into the regular rate calculation for the applicable time frame, in accordance with the FLSA. Finally, DOL allows employers the option of simply "adding all compensation that is part of the regular rate" or the applicable period "and divid[ing] that sum by all hours actually worked in the same period."

FFCRA Leave Used as Intermittent Leave

Whether an employee must be allowed to use any of the new FFCRA leave as intermittent leave or may be required to use it as block leave was also an unanswered question as of FFCRA's enactment.

DOL has now affirmatively prohibited leave from being taken intermittently by any employee reporting to the worksite based on any of the qualifying reasons other than childcare, i.e., where the employee may have, or has a need to care for someone with, COVID-19, COVID-19 symptoms, or possible exposure to COVID-19. DOL explains its rationale for not allowing intermittent leave under these circumstances as stemming from the "intent of the FFCRA," to provide sick leave to employees who are sick or possibly sick with COVID-19 so that they aren't "spreading the virus to others." Accordingly, only full day paid leave may be allowed in this context.

DOL otherwise establishes a "General Rule" that intermittent leave under the FFCRA is allowed, but "only if the employer and employee agree." Absent such agreement, however, FFCRA leave may not be taken on

an intermittent basis. There are two circumstances under which employers and employees may agree to the intermittent use of FFCRA leave. The first is where employees reporting to the worksite are allowed to take either type of FFCRA leave intermittently because of COVID-19 related childcare responsibilities. The second is where teleworking employees experience any of the qualifying reasons for FFCRA leave, including their own COVID-19 illness or to care for another individual, and there is agreement that they can work only a portion of their regular worktime and are allowed to take intermittent FFCRA for the remainder.

While the DOL's temporary regulations speak more to the prerequisite of an agreement before FFCRA leave may be taken intermittently, its questions and answers repeatedly indicate DOL's support for employers and employees who work together, stating that it "encourages employers and employees to collaborate to achieve flexibility" and "is supportive of such voluntary arrangements" that allow for the use of intermittent leave while also keeping employees from spreading COVID-19.

Recordkeeping

Another issue left open by the text of the FFCRA is what, if any, records an employer must keep, or require of the employee, when an employee has a need for either type of FFCRA leave. DOL has now made it clear that employers may require employees to provide the following:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19-related qualified reason the employee is requesting leave and written support for such reason; and
4. A written or oral statement that the employee is unable to work, including by means of telework, for such reason.

Additional information may be required, depending on the COVID-19-related reason for Emergency Leave:

- For a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
- For a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 years old during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

As of the date of this Alert, neither DOL nor IRS has provided specific guidance on what documentation it will accept to support the need for leave. DOL, however, suggests as an example of documentation supporting the need for leave for childcare that employees may be required to supply notices, publications and/or other communications relating to school or day care closures or the unavailability of childcare

providers due to COVID-19. As of the date of this Alert, DOL has not otherwise provided further guidance regarding recordkeeping pertaining to the new leaves available under FFCRA, other than the need to maintain such documentation.

Prior Use of FMLA

As noted in our March 20, 2020, GT Alert, the FFCRA was also silent on whether the Emergency Family and Medical Leave Expansion Act (Division C of the FFCRA) gave employees an additional 12 weeks of FMLA leave entitlement for the reasons specified or if an employee's prior uses of FMLA would reduce the employee's available amount of new Emergency FMLA. DOL has now provided a definitive answer to this question. DOL's answer is essentially that Emergency FMLA is limited to 12 weeks for each employee between April 1, 2020, and Dec. 31, 2020 (regardless of the FMLA year used by the employer), and to the extent an employee has previously taken FMLA leave for another FMLA-qualifying reason during the FMLA year defined by the employer, this reduces the amount of Emergency FMLA available to the employee.

Employer-Provided Leave

Another issue on which the FFCRA itself was silent is whether and how paid leave already provided by employers might be used to allow employees to receive full pay for leave time in light of the caps on paid leave under both types of FFCRA leave. The DOL has now clarified that employees may use, and employers may require employees to use, employer-provided leave such as vacation or PTO to run concurrently with Emergency FMLA (but not Emergency Paid Sick Leave) so that an employee can be paid at 100% of the employee's regular rate of pay. For purposes of any tax credit, however, employers can only claim the amount allowable under the FFCRA.

Employer Business Decisions/Ineligibility for Leave

Questions have also arisen since the FFCRA was enacted about retroactivity of leave, whether and how FFCRA emergency leaves apply to employees who are laid off or furloughed during the COVID-19 public health emergency, and whether FFCRA leave applies when employees have no work.

First, DOL has made clear that the FFCRA leave entitlements are not retroactive.

In addition, DOL has clarified that FFCRA leave entitlements do not extend to any of the following:

- Employees sent home without pay for lack of work before April 1, 2020;
- Employees whose worksites are closed, either for lack of business or pursuant to a federal, state, or local directive, and who do not work after April 1, 2020;
- Employees furloughed for lack of work after April 1, 2020;
- Employees whose worksites are closed and who do no work but are told that the worksite will reopen at some time in the future.

DOL suggests that employees in all of the above circumstances can and should contact their state workforce agencies and/or seek unemployment compensation.

Finally, DOL has provided guidance that: (1) employees whose scheduled hours are reduced for lack of work cannot use FFCRA leave to get paid full time; and (2) employees who request and receive FFCRA

leave prior to a worksite closure are not entitled to FFCRA leave past the period they would otherwise have stopped working.

None of above DOL guidance prevents an employer from being found to have violated the retaliation provisions of the FFCRA leave laws if it selectively furloughs or terminates employees who take or express interest in taking FFCRA leave. However, it appears the consistent principles DOL is applying in the above guidance are: (1) that the FFCRA does not preclude broad-based employer business decisions; and (2) that FFCRA leave is only applicable if the employee would otherwise be working.

Meaning of Quarantine or Isolation Order

There has also been uncertainty since FFCRA's enactment about what circumstances lead to availability of emergency paid sick leave under Section 5102(a)(1), which relates to employees who are "unable to work (or telework) due to a need for leave" because "the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." This issue has become an area of increasing focus as various versions of "stay at home" or "shelter in place" orders have been issued and enacted by states and municipalities across the country.

In its temporary regulations, DOL now defines the phrase "Subject to a Quarantine or Isolation Order" in two different ways. First, DOL clarifies that this phrase includes the sweep of "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State or local government." Second, DOL states that this phrase also includes "when a Federal, State, or local government authority has advised categories of citizens to shelter in place, stay at home, isolate, or quarantine."

Consistent with DOL's regulatory and question-and-answer guidance described in the "Employer Business Decisions/Ineligibility for Leave" section above, DOL also clearly indicates that any employee affected by either of the two types of order identified by DOL may only receive paid leave where their employers have work for them. Where the order has closed the employer's business, and the employer has no work that the employee could otherwise be doing, the employee is not entitled to paid leave under the FFCRA.

Small Business Exception

The FFCRA vests the DOL with authority to "issue regulations for good cause" to "exempt small businesses with fewer than 50 employees from the requirements of" the FFCRA with regard to providing leave for childcare "when the imposition of such requirements would jeopardize the viability of the business as a going concern." In its temporary regulations issued April 1, DOL states that a small business "is entitled to this exemption if an authorized officer of the business has determined" that any of the following conditions exist:

1. Paying leave under the FFCRA "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 leave under the FFCRA "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" FFCRA leave, "and these labor or services are needed for the small business to operate at a minimal capacity."

Authorized officers of small businesses who make such determinations are required to document their determinations, and to retain such documentation. At present, they are not, however, directed to submit the documentation to DOL. Making such a determination also does not relieve the small business of the requirement to post and/or distribute to employees the DOL's notice of FFCRA rights; the small business exception cannot apply to exempt small businesses from the requirement of providing up to 80 hours of paid sick leave under the Emergency Paid Sick Leave Act where employees cannot perform available work for any of the covered reasons other than childcare, including where the employee or an individual he or she must care for has COVID-19, has been exposed to or is suffering from the symptoms of COVID-19 or is subject to an order or quarantine recommendation relating to COVID-19.

Health Care Employer Exception/Discretion to Deny Employee Requests

The FFCRA vests DOL with authority to "issue regulations for good cause" to "exclude certain health care providers and emergency responders from the definition of employee." Under the Emergency Paid Sick Leave Act, this DOL regulatory authority may include "allowing the employer of such health care providers and emergency responders to opt out." Under the Emergency Family and Medical Leave Expansion Act, there is a separate "Special Rule for Health Care Providers and Emergency Responders" allowing employers of such employees to "elect to exclude" these employees from taking leave.

In its April 1 temporary regulations, DOL does not fully authorize health care employers to "opt out" of the FFCRA, but it provides broad definitions of "health care provider" and "emergency responder," whom health care employers "may exclude" from eligibility for paid leave under the FFCRA. Both definitions encompass a broad swath of workers who are and/or will be necessary to deal with the health care needs of those affected by the COVID-19 public health emergency. The definition of "health care provider" also clarifies that it applies not just to those workers specifically engaged in rendering health care but also to those workers employed at or necessary to provide services or to maintain the operation of the many facilities where health care services are being, or may be, provided.

In its March 30 question-and-answer guidance, which also includes the same broad definitions of "health care provider" and "emergency responder," DOL follows each definition with the identical statement directed to health care employers: "To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA."

Enforcement

Finally, DOL's statements indicate that while it is serious about enforcement, it recognizes the new and sudden imposition of the FFCRA leave requirements under the current unprecedented circumstances. DOL has supplied a toll-free number, repeated in multiple places in the guidance and prominently displayed on the "Employee Rights" Notice, which all employers must post and/or distribute to all employees as of April 1. Employees who believe their employers are improperly refusing to provide them paid sick leave under the Emergency Paid Sick Leave Act-portion of FFCRA are first encouraged to "to raise and try to resolve" concerns with their employers, but are then instructed that they may call the toll-free number "(f)or additional information or to file a complaint." At the same time, the DOL has indicated that it will observe a temporary period of non-enforcement for the first 30 days following enactment of the Act, as long as the employer has acted reasonably and in good faith to comply with the Act. DOL's definition of "good faith" is if (1) the violation is not willful, (2) the violation is remedied and the employee

made whole as soon as practicable, and (3) the DOL receives a written commitment from the employer of future compliance. Based on the FFCRA's March 18, 2020, date of enactment, this DOL grace period would apply through April 17, 2020. DOL has made clear, however, that while it will not begin enforcement until after April 17, it will thereafter retroactively enforce violations back to April 1 to the extent such violations have not been remedied.

Conclusion

This GT Alert is not intended to cover every regulatory section or question and answer thus far supplied by DOL, nor to provide any legal advice. The objective of this Alert is to highlight some of the what DOL has provided as of the April 1 effective date of the FFCRA relating to certain issues that have been of concern to many following the initial enactment of the FFCRA. DOL may continue to refine and update its temporary regulations or guidance after this Alert. *See* the current DOL temporary regulations and the current DOL guidance.

For more information and updates on the developing situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

Authors

This GT Alert was prepared by:

- Jon Zimring | +1 312.456.1056 | zimringj@gtlaw.com
- Jill A. Dougherty | +1 312.476.5011 | doughertyj@gtlaw.com