

Department of Labor Answers Critical Questions

COVID-19 Response Resource Center: Timely Counsel for your Business

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Yesterday, March 26, the Department of Labor (DOL) issued additional guidance on how the Families First Coronavirus Response Act (FFCRA) will be applied, the latest in a string of expected clarifications leading up to the April 1 effective date. The FFCRA includes the Emergency Family and Medical Leave Expansion Act (EFMLA) and Emergency Paid Sick Leave Act (EPSLA). This guidance provided several important clarifications for employers on the DOL's enforcement policy.

Here are the highlights:

Implications of Furloughs and Closures

- Furloughed employees, or employees whose worksite has been closed even for a short period of time, are not entitled to leave under the FFCRA during the furlough or closure. This is true even if the employer closed pursuant to a federal, state, or local directive to do so.
- If an employer closes a worksite or furloughs an employee prior to the time an employee's qualifying need for leave arises, whether before or after April 1, employees will not be eligible for the leave provided under the FFCRA, though they will be eligible for unemployment insurance benefits.
- If an employer closes while an employee is taking leave pursuant to the FFCRA, the employer must pay for leave used before closing. After the date the worksite closes, the employee is no longer eligible for paid leave or EFMLA, but may be eligible for unemployment insurance benefits.
- A reduction of an employee's hours due to lack of work does not constitute a qualifying reason for leave under the FFCRA.
- The paid sick leave and expanded family and medical leave requirements are not retroactive. Therefore, they do not apply to leave taken prior to the Act's April 1, 2020 effective date.

How to Process Employee FFCRA Leave

- When calculating the paid sick leave for which an employee is eligible under the EPSLA, employers should use the hours for which the employee would normally have been scheduled to work, including overtime. If normal hours are unknown, or if an employee's schedule varies,

the employer may use a six-month average to calculate the average daily hours.

- If an employee takes paid leave under the FFCRA, the employer must collect appropriate documentation supporting the reason for leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work (including telework) for that reason, and the date(s) for which leave is requested. The employee must also provide documentation of the reason for leave, including the source of any quarantine or isolation order, the name of the health care provider who advised the employee to self-quarantine, or evidence of a school closure. Employers who intend to claim a tax credit under the FFCRA for payment of sick leave wages should retain this documentation, as well as consulting applicable IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Alternative Work Schedules (Including Telework) and FFCRA Leave

- Employers may authorize intermittent leave under the FFCRA, though an intermittent leave schedule will differ depending on whether the employee can telework and the reason for the leave.
- Telework:
 - An employee who is otherwise able to telework is not eligible for FFCRA leave unless a qualifying COVID-19 related reason prevents the employee from being able to do so. For purposes of this analysis, the DOL will consider an employee able to telework if the employer permits the employee to work from a location other than their normal workplace (the employee's home, or at another location).
 - If an employee is unable to telework because the employee must care for a child, even if telework is an available option otherwise, the employee is entitled to leave. The amount of leave to which the employee is entitled depends on the extent to which an employee is unable to telework. For example, the employee may be able to perform some work at times other than the normal work day, or may be able to work a few days out of the week. The employee is only entitled to leave for the amount of time the employee is unable to work.
 - Employers may also permit teleworking employees to take intermittent leave in any increment; for example, an employer may permit a teleworking employee to take 90 minutes of leave every day from 2:30 PM to 4:00 PM, but otherwise maintain their regular working load.
- Working on the Job Site

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- For employees who cannot telework, intermittent leave is not available unless the reason for the leave is to care for a child due to a school closure.
- Unless the employee is teleworking, once the employee begins taking paid sick leave, the employee must continue to take paid sick leave each day until all of the leave is used or the reason for the leave ceases. The reason for this rule is that the intent of the FFCRA is to prevent employees from spreading the virus to others.
- If the reason for the leave is school closure, the employee is entitled to take leave on a non-continuous basis (for example, Mondays and Wednesdays). The employer may also agree to allow the employee to take leave to care for a child due to school closure intermittently.

Availability of Other Benefits During FFCRA Leave

- Employees taking paid leave under the FFCRA generally are not eligible for unemployment insurance, though the DOL directs employees to contact their state's agency with specific questions about eligibility.
- An employee taking EFMLA leave due to a school closure or the unavailability of childcare is entitled to group health coverage on the same terms as if they continued to work. Employees who do not return to work after their EFMLA coverage expires should check with their employer to determine whether they are eligible to continue coverage on the same terms.
- Employers may not require employees to use employer-provided leave in conjunction with, or in lieu of, FFCRA leave. Similarly, employees may not simultaneously use FFCRA paid leave and paid leave provided under an employer's pre-existing policies.
- However, employers may permit, but not require, employees to use PTO to supplement the difference between FFCRA paid sick leave and the employee's normal earnings. For example, an employer may permit an employee receiving 2/3 of their normal earnings from FFCRA paid leave to get the additional 1/3 of normal earnings from the employer's PTO policy.
- An employer may also pay employees in excess of FFCRA requirements. The employer may not claim or receive a tax credit for any supplemental PTO or pay provided above the FFCRA requirements.

The DOL also reiterated the position taken by other federal agencies that the program is designed to ensure that covered employers have access to the resources needed to pay the required sick leave and family leave wages. It states that private employers who are eligible for tax credits, but who have insufficient cash flow, should pay employees for the paid leave (1) as soon as possible; (2) within seven calendar days after the employer has withdrawn the amount equivalent to the required paid leave from its federal payroll tax deposits; or (3) if tax deposits are not sufficient, seven calendar days from the day on which the employer receives a refund from the IRS to cover

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the required wages. In other words, if cash flow is a barrier to providing the paid leave required by the Act, the impacted employer may make the required payment to employees after receiving the necessary funds through tax credits and/or refunds.

Importantly, the DOL will forego enforcement actions against employers for violations that occur through April 17, 2020, provided that the employer who violated the Act made a reasonable, good faith effort to comply and has remedied any violations. Thus, while employers should take prompt and thorough action to comply with the FFCRA's requirements, employers acting in good faith to comply do not need to fear enforcement actions for the first few weeks the Act is effective.

For your convenience, the DOL's Questions and Answers regarding the FFCRA are linked [here](#).

Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our [COVID-19 Response Resources](#) page.

Tags: Emergency Family and Medical Leave Expansion Act, Emergency Paid Sick Leave Act, Families First Coronavirus Response Act, U.S. Department of Labor