



Nathan Read
nread@mwlaw.com
(479) 464.5663

UPDATE: Wage and Hour Division of Department of Labor Provides Guidance On Employers' Responsibilities Under the Families First Coronavirus Response Act

03/26/2020

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "FFCRA"). The FFCRA contains several important provisions that require employers to offer paid leave for employees unable to work due to issues related to coronavirus (or COVID-19), whether through illness or quarantine of the employee, illness or quarantine of an employee's family member, or school/place of care closures. The FFCRA provided for the issuance of implementing regulations by the U.S. Department of Labor ("DOL"). While those regulations are still forthcoming, the Wage and Hour Division published on March 24, 2020, fact sheets for [employers](#) and [employees](#) and a [list of questions and answers](#) to provide compliance assistance as people prepare for the law to go into effect.

Effective Date

The DOL guidance clarifies that the effective date of the FFCRA's leave provisions is Wednesday, April 1, 2020. The FFCRA itself states that it shall go into effect not later than fifteen days after the enactment on March 18, 2020, which is April 2, 2020. It appears that the DOL has opted to make the FFCRA go into effect one day earlier than it could have. Therefore, the FFCRA will apply to leave taken between April 1, 2020, and December 31, 2020.

Covered Employers – Employee Threshold

The FFCRA only applies to employers with fewer than 500 employees. If a private sector employer has more than 500 employees, then the employer is not covered under the FFCRA. The DOL made several clarifications with respect to calculating the number of employees:

- Full-time and part-time employees count toward the threshold.
- Employers cannot count employees outside the United States to meet the threshold.
- United States includes any State of the United States, the District of Columbia, or any Territory or possession of the United States.
- Employers must count employees on leave, temporary employees shared with another employer (even if the employee is only maintained on one payroll), and day laborers supplied by a temporary agency (even if you are the temporary agency).
- Independent contractors under the Fair Labor Standards Act ("FLSA") do not count.

- The FLSA's joint employer test applies, so if two entities are joint employers, then all common employees can be counted both for application of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act parts of the FFCRA.
- The FMLA's integrated employer test applies for determining application of the Emergency Family and Medical Leave Expansion Act, so if two entities meet the integrated employer test, then all employees of entities comprising the integrated employer can be counted towards the threshold.

Small Business Exemption

For employers with 25 to 50 employees, the Secretary of Labor has authority to grant exceptions to the paid sick leave requirement if complying with the requirement would "jeopardize the viability of the business." The DOL has not explained how employers can qualify for an exemption, but indicated that the DOL would be issuing a regulation setting forth criteria for the exemption. Employers wishing to get an exemption will need to document why their businesses meet the criteria, but the DOL emphasized: "You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave." Mitchell Williams will continue to monitor for additional guidance on this point.

Counting Hours: Part-time Employees and Varying Schedules

Part-time employees are entitled to leave for the number of hours worked, on average, over a two-week period. The DOL instructed employers to calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the employer does not know the number of hours the employee is normally scheduled to work or if the part-time employee has a varying work schedule, the employer can use a six-month average to calculate the average daily hours. A part-time employee could take paid sick leave for the average daily hours each day to a two-week period, then take expanded family and medical leave for the average daily hours each day for up to ten weeks after the initial two-week period.

If the employee has been employed for less than six months, the employer can:

- Use the number of hours agreed upon at hiring; or
- If there was no agreement upon hiring, use the average hours per day the employee was scheduled to work during his or her employment.

The calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

Overtime Hours

The DOL clarified that pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act. However, when calculating pay due to employees under the Emergency Family and Medical Leave Expansion Act, employers must pay employees for the hours they normally would have been scheduled to work, even if the number of hours is more than forty hours in a week. With respect to the Emergency Paid Sick Leave Act, an employer is required to pay sick leave only up to eighty hours over a two-week period.

Interaction of Paid Sick Leave and Expanded Family and Medical Leave

If an employee needs leave to take care of a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, the employee is eligible for both types of leave. However, only a total of twelve weeks of paid leave is available. For the initial two weeks the employee may use paid sick leave under the Emergency Paid Sick Leave Act, receiving up to eighty hours of paid sick leave. Then, after the initial ten workdays, the employee may use paid expanded and family medical leave under the Emergency Family and Medical Leave Expansion Act. The employee will receive 2/3 of his or her regular rate of pay for the hours he or she would normally have been scheduled to work. This scenario

only arises with employees who need leave to take care of a child whose school or place of care is closed or child care provider is unavailable, due to COVID-19 related reasons.

Eligibility for Expanded Family and Medical Leave

The Emergency Family and Medical Leave Expansion Act applies to employees who have been employed for at least thirty calendar days. An employee needs to have been on his or her employer's payroll for the thirty calendar days immediately prior to the day his or her leave would begin.

Employee Notice

The DOL also issued a model [Employee Rights notice](#), which outlines the key provisions of the FFCRA and lists the qualifying reasons for leave. This notice must be posted in a conspicuous place. The DOL clarified that, given the number of employees teleworking, the notice requirement may be satisfied by "emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website."

Conclusion

Many questions remain unanswered as employers struggle to keep their businesses operating during these uncertain times. The DOL has indicated that it will provide additional guidance on a rolling basis. Mitchell Williams is closely monitoring the situation. For additional guidance on how the FFCRA applies to your business, please contact us.