



## **Department of Labor Issues Guidance Interpreting Families First Coronavirus Response Act; Further Guidance to Follow**

On March 24, the U.S. Department of Labor (“DOL”) issued guidance interpreting the Families First Coronavirus Response Act (“FFCRA”). As discussed in our recent update, the FFCRA was enacted on March 18 and requires businesses with fewer than 500 employees to provide paid leave to eligible employees for reasons related to COVID-19.

The DOL’s March 24 guidance includes fact sheets for employees and employers, a list of frequently asked questions and answers, and workplace posters regarding the FFCRA. The DOL also advised that it will continue to issue guidance on a rolling basis, including further guidance in April. As employers prepare for the FFCRA, these documents provide some insight about how the DOL will enforce the law will be enforced and when enforcement will begin. Below are some highlights.

**FFCRA Effective Dates** – The FFCRA will become effective on April 1, 2020. Prior to the DOL’s guidance, it was believed that the FFCRA would become effective on April 2. The DOL clarified that employers must comply with the law beginning April 1 and through December 31, 2020.

However, the DOL also announced a temporary non-enforcement period. The DOL will not enforce the FFCRA against employers making good faith efforts to comply with it until April 17. Prior to that date, the DOL will focus on assisting employers with compliance.

**The FFCRA is Not Retroactive** – Employee benefits under the FFCRA are not retroactive. Accordingly, even if an employee already has taken paid leave for reasons related to COVID-19, he or she still is eligible for leave under the FFCRA after April 1. Leave taken prior to April 1 will not count under the FFCRA.

**Notice Requirement** – All employers with fewer than 500 employees are required to provide to their employees a copy of the DOL’s Employee Rights notice. This notice should be placed alongside other similar DOL notices. Considering the number of employees now working remotely, an employer also should email or mail the notice to employees or post the notice on a website accessible by employees.

**FFCRA Provides a Total of 12 Weeks Leave** – The FFCRA contains two provisions, the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”). The EPSLA requires employers to provide up to 80 hours of paid leave to eligible employees. The EFMLEA requires employers to provide eligible employees up to 12 weeks of paid leave, the first 10 days of which are unpaid.

DOL guidance confirms that employees “may be eligible for both types of leave, but only for a total of twelve weeks of paid leave.” Accordingly, an employee eligible under both provisions can use the provisions of the EPSLA to cover the unpaid portion of leave under the EFMLEA. Employees may not, however, use the provisions to extend leave beyond the 12 weeks provided by the EFMLEA. Leave is capped at 12 weeks.



---

**Documenting FFCRA Leave** – If an eligible employee takes leave provided for by the FFCRA, an employer may require the employee to provide documentation to the extent permitted under the rules for conventional FMLA leave requests. Examples include COVID-19 notices from newspapers or posted on government and school websites and communications with officials, administrators, and childcare providers. Employers are *not* required to provide leave if materials sufficient to support the applicable tax credit have not been provided by the employee.

Employees must meet the eligibility requirements set forth in the EPSLA and/or EFMLEA in order to qualify for paid leave under the FFCRA. *Employees out of work as a result of economic downturn or “shelter in place” and “stay at home” orders do not qualify for paid leave under the FFCRA.*

Employers that provide paid leave to employees under the FFCRA are eligible for reimbursement through refundable tax credits. In order to claim a tax credit under the FFCRA, employers should retain documentation supporting the credit.

**Small Business Exemption** – Small businesses with fewer than 50 employees may qualify for an exemption from FFCRA requirements to provide paid leave to eligible employees when doing so would jeopardize the viability of the business as a going concern. Small businesses may claim this exemption if an officer determines that:

1. The paid leave would result in the business’s expenses and financial obligations exceeding revenues and cause business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge, or responsibilities; *or*
3. There are not sufficient workers available to perform the labor or services provided by the employee or employees requesting paid leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses that may seek the exemption should document how the business meets one or more of these criteria, but refrain from sending documentation to the DOL at the current time. The DOL will address these criteria in more detail in “forthcoming regulations.” No date was given.

**Further Guidance Forthcoming** – The DOL will issue further guidance and formal regulations regarding the FFCRA on a rolling basis. Further guidance is expected in April 2020, likely after the FFCRA takes effect on April 1 and ideally before the non-enforcement period ends on April 17.

The COVID-19 pandemic and government responses continue to evolve, sometimes on a daily basis. We will continue to provide you with updates on this fluid situation. For questions about the FCRA, DOL guidance, and compliance with the new law, please contact Daley Mohan Groble.