CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Family First Coronavirus Relief Act (FFCRA) — Frequently Asked Questions

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On March 24, the Department of Labor issued guidance regarding the FFCRA. With that, we wanted to provide an update with some frequently asked questions (and answers).

When does the FFCRA take effect? April 1, 2020.

What does the FFCRA provide?

For **all employees:** Two weeks (up to 80 hours) of **paid sick leave** for an employee unable to work (or telework):

(i) At **full pay** -- up to $511/day or $5,110 in the aggregate -- if employee cannot work (or telework):

- because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or

- because the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis and/or;

(ii) At **2/3 pay** -- up to $200/day or $2000 in the aggregate -- if employee cannot work (or telework):

- because he/she needs to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider);

- because he/she needs to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or

- because the employee is "experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor."

For **employees who have worked for an employer for at least 30 days**: Up to an additional 10 weeks of **paid family leave** at 2/3 pay "where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19."

https://www.dol.gov/newsroom/releases/whd/whd20200324

Which employers are covered by the FFCRA? Certain public employers and private employers with fewer than 500 employees.

If I am a private employer, how do I determine my employee count? A private employer needs to count all full-time and part-time employees within the United States on its payroll (including employees on leave). A private employer also needs to consider whether it is a "joint employer" with another entity, any shared employees also need to be counted. And, a private employer needs to consider any related entities under the FMLA's "integrated employer" test.

What about employers with less than 50 employees? There is no automatic exemption. Small businesses *may be exempt* from providing leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. Here are the specific instructions: "To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations. **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**." https://www.dol.gov/newsroom/releases/whd/whd20200324

What about new employees? Any employee, even a newly-hired, employee is eligible for paid sick pay. Employees only qualify for paid family leave if they have worked for an employer for 30 days.

How do I determine an employee's regular rate of pay? Pay shall be at employee's **regular rate** or minimum wage, whichever is higher. An employee's regular rate is determined by the test under the FLSA, and includes any guaranteed payments, e.g., wages, attendance bonuses, shift differentials.

What about employees who do not work full-time or a regular schedule? That employee's paid leave is calculated as the average number of hours he/she works in a two-week period. If the schedule varies, an employer should look at the employee's average schedule over six months or the term of employment (whichever is shorter).

Does an employee have to take paid sick leave in the amount of 80 hours per week? No, but the total leave is capped at 80 hours over two weeks.

Does an employee have to take all 80 hours of the paid sick leave for one reason? No, the employee may qualify for the paid sick leave under more than one factor. However, the total time available is 80 hours.

What if an employer already provides paid leave? Leave under the FFCRA must be *in addition* to any other paid leave already offered. Employees may, however, elect to substitute accrued vacation leave, personal leave, or medical or sick leave under a pre-existing policy for the 2/3 pay paid family leave provided for under the Act when an employee is unable to work or telework due to the unavailability of child care.

What notice is required? Covered employers must provide notice to employees of leave available under the FFCRA. The DOL will issue a poster on *March 25, 2020.*

Does the FFCRA change the FMLA? No, the paid family leave portion is a temporary expansion of the FMLA, and on December 31, 2020.

What about tax credits? Per the DOL: "Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage."

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

