

Labor Department Provides Families First Coronavirus Response Act Guidance

March 25, 2020

Late yesterday, the Department of Labor (DOL) issued guidance on the new Families First Coronavirus Response Act (FFCRA). The new guidance clarifies that the FFCRA has an **effective date of April 1**, which is actually only 14 days after enactment, not 15 as required by the law itself, and applies to **leaves taken between April 1 and Dec. 31, 2020**. The paid sick leave and the expanded family and medical leave requirements are NOT retroactive.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act only provides for **two weeks** (up to 80 hours) of paid leave. It may only be taken once per employee, even if they later incur another qualifying reason.

When calculating how much paid sick leave to provide to employees, you should pay them for the hours they are normally scheduled to work, but not in excess of 80 during any two-week period. For example, an employee regularly scheduled to work 50 hours per week is paid 50 hours of paid sick leave the first week and 30 hours the second of the applicable two-week period because the amount of leave is capped at 80 hours. The rate of pay is the employee's regular rate, without including any premium for overtime hours.

For workers whose pay fluctuates, the regular rate is their average weekly pay over the prior six months, including "all remuneration," including wages, tips and commissions. If the employee has worked less than six months, they must be paid based on their average earnings for the period they have worked according to the DOL.

Part-time employee hours of eligible leave are calculated based on the number of hours the employee is normally scheduled to work. If unknown, or if they have a variable schedule, you use a six-month average to calculate the average daily hours. Part-time employees may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after that.

As a reminder, employees who take paid sick leave because:

- they are subject to federal, state, or local quarantine or isolation order related to COVID-19;

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- have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or
- are experiencing symptoms of COVID-19 and are seeking medical diagnosis;

will receive for each applicable hour, the greater of the employee's regular rate of pay or the highest applicable minimum wage, to a maximum of \$511 per day or \$5,110 total over the entire paid sick leave period.

If the sick leave is taken because the employee is:

- caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- caring for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19; or
- because they are experiencing any other substantially similar condition that may arise as specified by HHS;

the sick pay is paid at 2/3 of the employee's regular rate of pay or the highest applicable minimum wage rate, with a maximum of \$200 per day or \$2,000 over the entire two-week period.

Emergency FMLA Expansion

If an employee takes expanded FMLA, they may use the new paid sick leave for the first 10 days or they may choose to substitute any accrued PTO they have under their employer's policies. For the remaining 10 weeks, they must be paid no less than 2/3 of either their regular rate of pay up to the \$200/day or \$12,000 total under the FFCRA for the entire 12-week period, counting both the new paid sick leave and expanded FMLA, if the leave was to care for children when schools or day cares are closed due to COVID-19 reasons.

Covered Employer Status

When counting employees to determine if you are below 500, and thus subject to this new law, you count active employees, employees on leave, temporary employees and employees who are jointly employed by you and another employer. Do not count independent contractors.

As you might recall, the law provides that businesses with fewer than 50 employees may be able to obtain an exemption when offering the required leave benefits would jeopardize the viability of the business as a going concern. The DOL is going to issue regulations in the coming days to instruct business owners on how to request the referenced small business exemption. In the meantime, the DOL advises such businesses to "document why your business with fewer than 50 employees meets

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the criteria set forth by the department, which will be addressed in more detail in forthcoming regulations.”

Anti-Retaliation Provision

As always, employers may not discharge, discipline or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA or files a complaint. The DOL will implement a 30-day temporary period of non-enforcement as long as the employer has acted reasonably and in good faith to comply with the Act.

To access the DOL's model notice for posting this information, [click here](#).

Please contact your Plunkett Cooney attorney if you have questions concerning the new laws that continue to be enacted.