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Resources for Employers: Leave Pursuant to the Families First Coronavirus Response Act

The Department of Labor has Issued New Resources Relating to Paid Sick Leave and Expanded Family and Medical Leave Provided by the Families First Coronavirus Act.

April 13, 2020

The Department of Labor recently released extensive Questions and Answers on the Families First Coronavirus Response Act (the “FFCRA”) to help employers comply with their responsibilities under the law. The Q&A discusses critical topics that are not clearly addressed in the legislation, including calculating part-time employees’ hours, intermittent leave, interactions with preexisting benefits, eligibility for leave in the context of business closure or furlough, and small business exemptions. These topics are highlighted here.

Calculating Part-Time Employees Hours of Leave

Part-time employees are entitled to leave in an amount equal to their “average number of work hours” in a two (2) week period. The “average number of work hours” is the hours the employee is normally scheduled to work. If the normal hours are unknown, or the employee’s schedule varies, the average number of work hours will be the average amount of hours worked each day over six (6) months. If the employee does not have normal hours, and has not been employed for six (6) months, the average number of work hours is the amount of hours that the employer and employee agreed upon when the employee was hired. If there is no such agreement, the average number of work hours is an appropriate number of hours based on the average hours per day the

employee was scheduled to work during the entire term of their employment.

Intermittent Leave

Employers and employees may agree to intermittent sick leave or expanded family and medical leave under the FFCRA. If the employee is teleworking while taking intermittent leave under the FFCRA, the leave can be in any increment agreed upon by the employer and employee. If an employee is not teleworking, and is taking intermittent paid sick leave under the FFCRA while working at the employee’s usual work site, this leave must be taken in full-day increments.

Employees who are not teleworking cannot take intermittent sick leave under the FFCRA if the sick leave is being taken because the employee: (1) is subject to a quarantine or isolation order; (2) has been advised by a health care provider to self-quarantine; (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) is caring for an individual who is subject to an order or quarantine or isolation or has been advised to self-quarantine; or (5) the employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.

Once an employee who is not teleworking begins taking paid sick leave for one (1) or more of the above qualifying

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reasons, the employee **must** continue to take paid sick leave each day until the employee has either used the full amount of paid sick leave, or no longer has a qualifying reason for leave.

Employers can agree to allow employees who are not teleworking to take intermittent expanded family and medical leave because the employee's child's school or place of care is closed, or childcare provider is unavailable, due to COVID-10 related reasons.

Preexisting Sick Leave Benefits

Use of paid sick leave under the Emergency Paid Sick Leave Act *is in addition to* other leave that may be provided to the employees. This means that taking paid sick leave under the Emergency Paid Sick Leave Act does not take away from other leave provided under Federal, State, or local law, a collective bargaining agreement, or an employer's existing company policy. Employers cannot require employees to use preexisting paid leave the employee may have accrued under the employer's policy before the employee may use benefits of the FFCRA.

During the first two (2) weeks of unpaid expanded FMLA leave, employers can allow employees to simultaneously take paid sick leave under the EPSLA and preexisting paid leave. An employer who allows employees to do this must supplement the amount received from paid sick leave with preexisting leave up to the employee's normal earnings. The employee must agree to this supplement.

After the first two (2) weeks of expanded FMLA, however, employees may elect, or employers may require, that

remaining expanded FMLA leave be taken at the same time as any existing paid leave that would be available to the employee in that circumstance. Employers that require employees to take existing leave concurrently with remaining expanded FMLA leave must pay the employee the full amount to which the employee is entitled under the employer's existing paid leave policy for the period of leave taken. An employee may exhaust preexisting paid leave and still be entitled to additional expanded FMLA leave, paid at the statutory rate.

Employers who provide the opportunity to employees to supplement their statutory FFCRA earnings through use of leave cannot take a tax credit for the income paid through use of employer provided leave benefits i.e. the income paid in excess of the limits of the FFCRA.

Preexisting FMLA Benefits

Employees who have already used some or all of their leave under the Family and Medical Leave FFCRA are eligible for paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave they have taken under the FMLA.

If an employer was covered by the FMLA prior to April 1, 2020, an employee's ability to utilize the expanded FMLA benefit depends on how much FMLA leave the employee has taken in the prior twelve (12) month period as the twelve (12) week cap on FMLA benefits persists. Accordingly, an employee's ability to use the expanded FMLA benefit will be diminished by the amount of FMLA leave they have taken in the prior twelve (12) months.

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Employers are not required to pay employees for FMLA leave taken under the previously existing reasons for FMLA leave. The FFCRA only requires paid FMLA leave for leave required due to the need to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-10 related reasons. For purposes of the FFCRA, a child is the biological, adopted, or foster child, stepchild or a child for whom the employee stands in loco parentis, who is under the age of 18; or is 18 years of age or older, has a mental or physical disability, and is incapable of self-care because of that disability. Further, such leave is only paid for the need for such leave in excess of ten (10) days.

Leave in the Event of Business Closure, Furlough, or Reduced Hours

Whether an employer closes a worksite for lack of business, or because it is required to close pursuant to a Federal, State, or local directive, employees may not be eligible for paid sick leave or expanded FMLA leave.

If an employer closes at any time, whether permanently or temporarily, and stops paying employees because it does not have work for employees, its employees will not be eligible for paid sick leave or expanded FMLA leave under the FFCRA. This applies whether the employer closed before or after April 1, 2020.

If an employer closes after April 1, 2020, and an employee is on FFCRA paid sick leave or expanded FMLA leave, the employee is entitled to payment for any paid sick leave or expanded FMLA leave that was used before the employer closed. As of the date of the employer's closure, the employee is no longer entitled to

additional paid sick leave, expanded FMLA leave, or traditional FMLA leave.

If an employer is open on or after April 1, 2020, but an employee is furloughed because the employer does not have enough work or business for the employee, the employee is not entitled to take paid sick leave, expanded FMLA leave or traditional FMLA leave as of the date the furlough commences.

If an employer reduces employee's hours because the employer does not have enough work or business for the employee, the employee is not entitled to use paid sick leave, expanded FMLA leave or traditional FMLA leave for the hours that the employee is no longer scheduled to work.

Leave to Care for Another

Employees can take paid sick leave to care for an immediate family member or someone who regularly resides in the employee's home who, as a result of being subject to a quarantine or isolation, is unable to care for him or herself and depend on the employee for care, and the provision of that care prevents the employee from working and from teleworking.

Employees may take paid sick leave to care for a self-quarantining individual if a health care provider advises that individual to stay home because he or she may have COVID-19, or is particularly vulnerable to COVID-19, and provision of that care prevents the employee from working and from teleworking.

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Employees may not take expanded FMLA leave to care for a child other than the employee's own child.

Small Business Exemptions

Employers with fewer than fifty (50) employees are exempt from providing paid sick leave, or expanded FMLA leave, due to school or place of care closures or child care provider unavailability for COVID-19 related reasons, when doing so would jeopardize the viability of the small business as a going concern. The exemption can be claimed if an authorized officer of the small business has determined that:

- Providing leave under the FFRCA would result in expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
- The absences of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, or qualified, and who will be available at the time and place needed to perform the labor or services provided by the employees, and these services are

needed for the business to operate at a minimal capacity.

The Q&A further provides that the Department of Labor will set forth additional criteria for small business exemptions in forthcoming regulations.

Additional Topics

Additional topics covered by the Q&A include:

- Determining whether an employer is under the 500-employee threshold;
- Defining full-time and part-time employees, health care providers, emergency responders, and "son or daughter";
- Records employees must keep related to leave taken under the law; and
- Calculating seasonal employees' hours of leave.

The entire Q&A can be accessed here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

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