

Overview of the DOL Guidance and Regulations on the FFCRA

Hinckley Allen Labor & Employment

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The Department of Labor Wage and Hour Division (“Department”) **published a Q&A document** on the implementation of the Families First Coronavirus Response Act (FFCRA). Through its guidance documents, the Department is providing compliance assistance to employers and employees about their responsibilities and rights under the FFCRA. Last week Hinckley summarized **the first series of Q&A** issued by the DOL. Below find a summary of all of the Department’s guidance thus far, including updated information from the Department’s temporary regulations that were **published** on Wednesday, April 1, 2020. Hinckley will continue to monitor the Department’s webpage and update this page as new information becomes available.

Importantly the most recent updated Q&A provided guidance on: how the FFCRA applies to employees forced home by shutdowns or furloughs; certification requirements; and telework and intermittent leave.

For purposes of this article “paid sick leave” means paid leave under the Emergency Paid Sick Leave Act and “expanded family and medical leave” means paid leave under the Emergency Family and Medical Leave Expansion Act.

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Overview of Guidance Provided by the Department

Effective Date and Application to Furloughs and Layoffs

- The FFCRA goes into effect April 1, 2020 and applies to paid sick leave and expanded family and medical leave taken between April 1, 2020 and December 31, 2020. It is not retroactive.
- If an employer closed before April 1, 2020, employees will not be eligible for FFCRA leave.
- If an employer closes on or after April 1, 2020, before an employee goes out on leave, an employee is not eligible for FFCRA leave.
- If an employer closes while an employee is on paid sick leave or expanded family and medical leave, the employer must pay the employee for the leave used before the employer closed. The employer does not need to pay the employee for leave as of the date it closes its worksite.
- A furloughed employee is not eligible for leave under the FFCRA.

How to Calculate Whether your Business meets the 500-Employee Threshold

- Both leave provisions apply to employers with fewer than 500 employees.
 - An employer has fewer than 500 full-time and part-time employees if, *at the time an employee takes leave*, an employer has fewer than 500 full-time and part-time employees within the United States. This includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this calculation, employers should include employees on leave, temporary employees who are jointly employed by employer or another employer, and day laborers supplied by a temporary agency. Independent contractors, **under the Fair Labor Standards Act (“FLSA”)**, are not considered employees for the purpose of the 500-employee calculation.
 - Where a corporation has an ownership interest in another corporation, the two are considered separate employers unless they are joint employers under the FLSA. Likewise, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA). This is a fact specific analysis. Employers with questions about how these tests may apply to their specific situation should contact their Hinckley Allen attorney for assistance.
- Businesses should not count employees who have been laid off or furloughed or employees outside of the United States.
- Businesses (including religious or nonprofit organizations) with fewer than 50 employees may qualify for an exemption if complying with the leave requirements of the FFCRA would jeopardize the viability of the business as a going concern.
 - A small business may claim this exemption if an authorized officer of the business has determined that: (1) the provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or (3) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
 - Businesses should document why it meets one of these criteria. The regulations provide that if an employer decides to deny leave, it must document its “authorized officer’s determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.”
 - Businesses should not send any materials to the Department when seeking the exemption at this time.

Calculating Leave Time and Pay for Employees

Reason for Leave	Duration of Leave	Calculation of Pay	Documentation Required
1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19	A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.	Employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)	Signed statement containing the following information: (1) the employee’s name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason; and (5) the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

<p>2. Employee has been advised by a health care provider to self-quarantine related to COVID-19</p>	<p>A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.</p>	<p>Employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)</p>	<p>Signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason; and (5) the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.</p>
<p>3. Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis</p>	<p>A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.</p>	<p>Employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)</p>	<p>Signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.</p>
<p>4. Employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)</p>	<p>A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.</p>	<p>Employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)</p>	<p>Signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason; and (5) either the name of the government entity that issued the quarantine or isolation order to which the individual is subject or the name of the health care provider who advised the individual to self-quarantine.</p>

<p>5. Employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19</p>	<p>A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.</p>	<p>Employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period)</p>	<p>Signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason; (5) the name of the child being cared for; (6) the name of the school, place of care, or child care provider that is closed or unavailable due to COVID-19; and (6) a statement representing that no other suitable person is available to care for the child during the period of requested leave.</p>
<p>6. Employee is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury</p>	<p>A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.</p>	<p>Employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)</p>	

- Reduced Hours
 - If an employer reduces an employee's scheduled work hours because it does not have work for the employee to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours that the employee is no longer schedule to work.
 - The question is whether the employee would be able to work or telework "but for" one of the reasons for paid sick leave. An employee may not take paid sick leave where the employer does not have work for the employee.

- Leave for a part-time employee should be calculated based on the number of hours the employee is normally scheduled to work.
 - If the normal hours scheduled are unknown, or if the schedule varies, employers may use a six-month average to calculate the average daily hours.
 - If a six-month average is not available because the employee has not worked for six months, use the number of hours you agreed upon when the employee was hired. If there is no such agreement, calculate the amount based on average hours per day the employee was schedule to work over the entire term of his or her employment.

- *How is regular rate of pay determined for purposes of the FFCRA?*
 - The formulation to compute an employee's regular rate of pay is the employees regular rate over a period of up to six months (See [DOL website for more information](#)):
 - Commission, tips, or piece rates will be incorporated to the same extent they are included in the calculation of the regular rate under the FLSA. (See [DOL website for more information](#))

- *Must overtime be included?*
 - Overtime *hours* must be included for the expanded family and medical leave as an employer must pay an employee for hours the employee would have been normally schedule to work even if more than 40 hours a week.

- Pay does not need to include a premium for overtime hours under expanded family and medical leave or paid sick leave.
- *Can an employee take paid sick leave for their own self-quarantine and then another paid sick leave for another reason provided under the FFCRA?*
 - The FFCRA caps leave at a total of 80 hours for full-time employees and the number of hours equal to the average number of hours worked in a typical two-week period for part-time employees. Employees do not get additional sick leave after the 80 hours are exhausted.
- *Can an employee staying home with a child because the child's school closed get paid sick leave and expanded family and medical leave, or both?*
 - An employee may be eligible for both types of leave, but only for a total of twelve weeks of paid leave.
- *If an employer gave an employee paid sick leave prior to April 1, 2020, the date the FFCRA goes into effect, for a reason identified in the act, can the employer deny the employee paid sick leave?*
 - No, the FFCRA imposes new leave requirements on employers starting April 1, 2020.
- *If an employee no longer has a qualifying reason to take paid sick leave before the time is exhausted, can the employee take the remaining leave at a later date?*
 - Yes, the employee may take any remaining paid sick leave if another qualifying reason occurs, until December 31, 2020. The new regulations provide that an employee is limited to a maximum of two weeks of paid leave. That is the absolute upper limit. Thus if an employee changes jobs, the employee is not entitled to a new 80 hours. "His or her employer (if covered by FFCRA) must provide paid sick leave until the employee has taken 80 hours paid sick leave total regardless of the employer providing it."
- *Can employees take preexisting leave entitlements from an employer concurrently with FFCRA leave?*
 - No, an employee may not simultaneously take both *unless* an employer agrees to supplement the amount an employee received from paid sick leave or expanded family and medical leave under the FFCRA, up to an employee's normal earnings, with preexisting leave. (e.g. if an employee receives 2/3 of his or her normal earnings for paid sick leave or expanded family and medical leave under the FFCRA, an employer may permit an employee to use preexisting employer-provided paid leave to get the additional 1/3 of the employees normal earnings.)
 - Employers are not entitled to a tax credit for any paid sick leave or expanded family and medical leave that is not required to be paid or exceeds the limits set forth under the FFCRA.
 - The new regulations clarify when other leave can be used concurrently. For paid sick leave, an employer may not require an employee to use other paid leave provided by the employer before the employee uses the FFCRA paid sick leave. However, if an employer permits such use the employer can allow employees to decide whether to use existing paid vacation, personal, medical, or sick leave to supplement the amount the employee receives from FFCRA sick leave.
 - For expanded family and medical leave, "an eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off."
- *Can an employee who already used some or all of his or her FMLA leave for non COVID-19 related reasons qualify for expanded family and medical leave?*
 - An eligible employee is entitled to paid sick leave regardless of how much leave the employee has taken under the FMLA. How much expanded family and medical leave an employee can get will depend on how much leave the

employee took during the 12-month period. An employee may take a total of 12 weeks for FMLA or expanded family and medical leave reasons during a 12-month period. Therefore, if an employee has taken some, but not all, 12 workweeks of leave under FMLA during the current 12 month period, the employee may take the remaining portion of leave available. This analysis does not apply if an employer becomes a covered employer under the FMLA on April 1, 2020.

- *Can an employee take paid sick leave if the employee is experiencing symptoms, but is told he or she does not meet the criteria for testing and is then advised to self-quarantine?*
 - Yes, an employee can take leave under the second reason – employee has been advised by a health care provider to self-quarantine for COVID-19 related reasons.

Telework and Intermittent Leave

In its guidance, the Department emphasized repeatedly that it encourages employers and employees to collaborate to achieve flexibility. It is supportive of voluntary arrangements that combine telework and/or intermittent leave to meet mutual needs.

- The regulations define telework to mean “work the Employer permits or allows an Employee to perform while the Employee is home or at a location other than the Employee’s normal workplace. An Employee is able to Telework if: (a) his or her Employer has work for the Employee; (b) the Employer permits the Employee to work from the Employee’s location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the Employee from performing that work. Telework may be performed during normal work hours or at the other times agreed by the Employer and Employee. Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the [paid sick leave] or the [expanded family medical leave]. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the Employer knew or should have known were worked by the Employee.”
 - An employee can take paid sick leave or expanded family and medical leave if he or she is unable to telework due to one of the qualifying reasons for leave.
- The Department’s regulations specifically state that paid sick leave or expanded family and medical leave can be taken intermittently if certain conditions are met.
- An employee and employer may agree that an employee take intermittent paid sick leave or expanded family medical leave while teleworking. The Department provided the following example: an employee can take 90-minute increments of leave if he or she teleworks from 1:00 to 2:30 PM, take leave from 2:30 to 4 PM, and then returns to teleworking.
- Intermittent leave can also be used when an employee is working at his or her usual worksite under the following conditions.
 - Leave must be taken in full-day increments unless an employee and employer collaborate and come to a voluntary agreement for an employee taking paid leave to care of a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons. An employee may mix leave with normal work on a worksite (e.g. taking leave Monday, Wednesday, and Friday and working Tuesday and Thursday).
 - Intermittent leave cannot be taken at a worksite if the leave is taken for any of the following reasons: (1) the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19; (2) employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) employee is experience any other substantially similar condition specified by the Secretary of Health and Human Services.
 - Once an employee begins taking paid sick leave for one or more of the reasons listed above, the employee must continue taking paid sick leave until the employee either (1) uses the full amount of paid sick leave or (2) no longer

has a qualifying reason for taking paid sick leave.

Guidance for Employers that are part of Multiemployer Collective Bargaining Agreements

- An employer that is part of a multiemployer collective bargaining agreement (CBA), may satisfy its obligation under the FFCRA for paid leave and expanded family and medical leave by making contributions to a multiemployer fund, plan, or other program in accordance with existing collective bargaining obligations. Contributions must be based on the amount of leave to which each employee is entitled to under the Act based on each employee's work under the CBA. The fund, plan, or other program must allow the employee to secure or obtain their pay for the related leave they take.
- However, an employer may choose to satisfy its obligations under the FFCRA by other means, provided they are consistent with the employers bargaining obligations and CBA.

Employer Provided Group Health Coverage

- An employer must continue an employee's health coverage if he or she takes paid sick leave.
- If an employer provides group health coverage that an employee has elected, the employee is entitled to continued group health coverage during expanded family and medical leave on the same terms as if the employee continued working. An employee generally must continue making normal contributions for the costs of health coverage. ([See DOL website for more information](#))
- If an employee does not return to work at the end of his or her leave, the employee must check with his or her employer to see if he or she is still eligible to keep health coverage on the same terms. If not, the employee may be eligible for COBRA or mini-COBRA.
- If an employee is in a waiting period for an employer's health coverage, taking paid sick leave during the waiting period will not impact when the coverage takes effect.

Reimbursement for the Costs Associated with Leave and Certifications

- Under the FFCRA, private sector employers that provide paid sick leave and expanded family and medical leave are eligible for reimbursement of the costs of leave provided through refundable tax credits. The Department says employers must collect documentation in support of leave.
- The Department instructs employers to consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. ([See IRS website more more information](#))
- The Department stated employers can require employees who take expanded family and medical leave to provide additional documentation in support of such leave. This can include a notice that has been posted on a government, school, or day care website. The new regulations set out specific documentation employers can require for each type of leave. See the table above for what is required.
- The regulations require employers to retain all documentation for four years, regardless of whether a leave was granted or denied.

Right of Employees to Return to Work

- Generally an employer must provide the same (or a nearly equivalent) job to an employee who returns to work following a leave.
- An employer is prohibited from firing, disciplining, or otherwise discriminating against an employee who takes leave or an employee who files any type of complaint or proceedings relating to the FFCRA, or who intends to testify in any such proceeding.
- The Department makes clear that employees are not protected from layoffs that would have affected them regardless of whether they took leave. For example, an employer can lay off an employee for legitimate business reasons, such as worksite closures. Employers must be able to demonstrate the employee would have been laid off even if they had not taken leave.

- Employers may refuse to return employees to work who are highly compensated “key” employees as defined under the FMLA. (See [DOL website](#) for more information)
- Employers may also refuse to return employees to work if the employer has fewer than 25 employees, and the employee took leave to care for his or her own son or daughter due to a school closing, or because a child care provider was unavailable, and all of the four following hardship conditions exist: (1) the employee's position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave; (2) the employer made reasonable efforts to restore you to the same or an equivalent position; (3) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and (4) the employer continues to make reasonable efforts to contact employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

Disclaimer:

This summary does not include or address every provision of Families First Coronavirus Response Act (“FFCRA”), which should be read in its entirety.

This summary was originally published on April 2nd, 2020 and updated April 6th, 2020.

We are here to help answer specific questions and offer advice on your options. Feel free to contact any member of our Labor & Employment Group.

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Associated People

Lisa A. Zaccardelli

Thomas J. Pagliarini

Julianna Malogolowkin

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