

New Regulations Released for Families First Coronavirus Response Act

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The U.S. Department of Labor yesterday issued temporary regulations interpreting and clarifying the Families First Coronavirus Response Act (FFCRA). The temporary regulations went into effect yesterday and will be published in the Federal Register on Monday.

The guidance clears up ongoing confusion about employer coverage, employee eligibility, and implementation of the program in areas such as:

Employee Eligibility for Paid Sick Leave and Documentation Requirements: The act provides six reasons an employee may take leave, and the regulations clarify each. Employers may require that employees follow reasonable notice procedures when requesting leave. In addition, employees must provide a signed statement with their name, the leave date(s) requested, the COVID-19 qualifying reason for leave and a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Additional information or documentation from the employee is also required, depending on the reason for leave, as set forth below.

- **The employee is subject to a quarantine or isolation order by a federal, state or local government related to COVID-19.** This category is limited to governmental orders but includes those that advise some or all citizens to restrict their mobility. However, if a business is forced to shut down because of a government order or does not have work available to an employee because of a government closure order or economic downturn, the employee is not eligible for the leave. In addition to a signed statement, the employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

- **The employee has been advised by a health care provider to self-quarantine because of COVID-19.** This category includes all situations in which a healthcare provider has advised the employee to self-quarantine because they have COVID-19, may have COVID-19, or are particularly vulnerable to COVID-19. The employee must also provide the name of the health care provider who advised them to self-quarantine for COVID-19 related reasons.

- **The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.** The regulations note that symptoms of COVID-19 include fever, dry cough, shortness of breath, or other symptoms identified by the CDC. This category of leave is limited to the time an employee is taking affirmative steps to obtain a diagnosis. No employee is entitled to sick leave under this category without seeking a diagnosis.

- **The employee is caring for an individual who is subject to an order as described above or has been advised to self-quarantine by a health care provider because of COVID-19.** The "individual" must be in a relationship with the employee that creates the expectation that the employee would care for the person if in quarantine. In addition, the individual must actually be subject to quarantine or have been advised by a healthcare provider to self-quarantine. The employee must provide either 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, depending on the precise reason for the request.
- **The employee is caring for a son or daughter whose school or place of child care is closed, or child care provider is unavailable, due to COVID-19 precautions.** An employee may not take leave under this category if another individual is available to provide the care the child needs. In addition, the employee must provide the name of the child being care for the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons and a statement representing that no other suitable person is available to care for the child during the period of requested leave.
- **The employee is experiencing substantially similar conditions as specified by the secretary of the U.S. Department of Health and Human Services, in consultation with the secretaries of the U.S. Department of Labor and the U.S. Department of the Treasury.** This sixth category remains undefined in the regulations, but we recommend that analysis proceed on a case-by-case basis.

Employers should also note that, for leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.

Ability to Telework: The regulations clarify that employees may not take paid sick leave or expanded FMLA unless they are actually prevented from working or teleworking. An employee is not eligible for paid leave, despite a stay-at-home order, a self-quarantine recommendation, caregiving responsibilities, etc., if an employer has work for the employee to perform, the employer permits the employee to perform that work from the location where the employee is isolating and there are no extenuating circumstances that would prevent the employee from performing that work such as a power outage.

Interaction with Other Forms of Paid Leave: An employee may be entitled to two weeks of emergency sick leave for reasons 1-4 or 6 above, then later become eligible for expanded FMLA for child care reasons. In such a case, the employee is entitled to an additional 12 weeks of job-protected FMLA leave, though the first two weeks are unpaid. The employer may require an employee to take accrued paid time off during these initial two weeks. Employers and employees may also agree to supplement mandated paid leave with other forms of PTO to bring employees to their full regular wages, but employers may not take tax credits for this additional amount.

Exemptions for Small Businesses: The regulations confirm the previous guidance clarifying the circumstances under which an employer with fewer than 50 employees may take advantage of the FFCRA small business exemption. [Those are explained in this alert.](#) The regulations further clarify, however, that an employer may deny paid sick leave or expanded family only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business

revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Exemption for Health Care Providers: The exemption applies to any employee who is "employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions."

Clarified Definitions and Timelines: The regulations clarify that "son or daughter," for purposes of school closures, includes children over 18 who are incapable of self-care because of mental or physical disability, despite statutory language suggesting the contrary. Other definitions are largely taken from the Family and Medical Leave Act. The regulations further note that the unpaid period of expanded FMLA is interpreted as two weeks rather than 10 workdays, and the 30-day eligibility requirement refers to calendar days on payroll prior to the leave request, rather than 30 days worked.

Flexibility of Telework Arrangements: The FFCRA allows employees to telework and eliminates the typical "continuous workday" guidance from the Fair Labor Standards Act. Employees may work intermittently throughout the day, with the agreement of the employer, and need only be paid for the hours actually worked.

Intermittent Leave: Intermittent leave is permitted under the FFCRA so long as the employer and employee agree. Intermittent leave is only permitted either while teleworking, unless the reason for the leave is child care responsibility due to school closure.

Calculation of Eligibility for Part-Time Employees with Varied Schedules: Employers are to calculate an employee's entitlement by multiplying 14 by the "number of hours that the employee was scheduled per [calendar] day" over a two-week period, averaged over the prior six months. Different calculations exist for newer employees. Full-time employees, defined as those who work at least 40 hours per week, are entitled to 80 hours of benefits.

Recordkeeping: All documentation regarding leave requests, whether granted or not, must be retained for four years.

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