

April 7, 2020

DOL Issues Rule and Additional Q&As on Families First Act Leave

Human Resources & Employment

The U.S. Department of Labor (DOL) published a temporary rule Monday, April 6, 2020, that provides additional guidance on the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) portions of the Families First Coronavirus Response Act (FFCRA). [As we discussed in a previous blog post](#), the DOL has been providing additional guidance in the form of Q&As. This update summarizes the rule's key clarifications of the FFCRA and the DOL's updated guidance.

Entitlement to Paid Leave

Eligible Employees

Employers must provide Emergency Paid Sick Leave (EPSL) or leave under the EFMLEA if they have less than 500 employees. All employees are entitled to EPSL. To be eligible for expanded FMLA leave, employees must have been employed by the employer for at least 30 calendar days at the time they start leave. This includes, pursuant to an amendment from the CARES Act, employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least 30 of the 60 calendar days prior to their last day, and were subsequently rehired or otherwise reemployed by the same employer on or before Dec. 31, 2020.

The rule also makes clear that employees receive paid leave under FFCRA *in addition to* existing leave. Therefore, any existing leave provided by employers prior to April 1, 2020 is not replaced by leave under FFCRA. Employees have access to both.

Eligible Employers

The rule clarifies that the threshold of 499 employees is a fluctuating number, dependent on the number of employees at the time an employee would take leave. For example, if an employer has fewer than 500 employees in April, but subsequently hires new employees such that the employer has more than 500 employees in September, it is no longer required to provide paid leave.

Employers must include full- and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors and employees who have been laid off or furloughed, and not subsequently rehired, do not count toward the 500 employee threshold.

Paid Leave Due to Stay-at-Home or Isolation Order

The FFCRA provides that employees may take paid sick leave if the employee is unable to work or telework because of any one of six qualifying reasons related to COVID-19. The first reason for paid sick leave applies when an employee is unable to work because they are subject to a federal, state or local COVID-19 quarantine or isolation order. There has been confusion over whether an employee subject to a stay-at-home or quarantine order qualifies for leave under this reason. The rule clarifies that the existence of the order is not enough to qualify. Rather, the employee taking leave *must be missing work* during the leave. The rule provides a "but for" standard: but for the qualifying event, the employee could perform work or telework the employer has for the employee.

For example, the rule notes that if a coffee shop closes temporarily or indefinitely due to a downturn in business related to the COVID-19 pandemic, it would not have work for its employees and those employees are not entitled to paid sick leave. This is true

even if the closure of the coffee shop was forced to close by a stay-at-home order or substantially caused by a stay-at-home order (i.e., its customers were required to stay at home). However, where an employee is allowed to telework during a stay-at-home order and the power goes out at their home, leaving them unable to telework, this is an extenuating circumstance allowing the employee to take leave.

Paid Leave Due to Self-Quarantine

An employee may take paid sick leave when they are unable to work because they have been advised by a health care provider to self-quarantine for a COVID-19 reason. The DOL clarified that an employee who is self-quarantining and is able to telework may not take paid sick leave for this reason. Extenuating circumstances, such as serious COVID-19 symptoms that prevent the employee from teleworking, may enable an employee to take leave for this reason.

Paid Leave to Seek a Medical Diagnosis

Employees experiencing symptoms of COVID-19 *cannot* take paid sick leave to self-quarantine without seeking a medical diagnosis. Where an employee seeks to take paid sick leave to obtain a medical diagnosis for COVID-19 symptoms, the employee is only entitled to paid leave when they are unable to work because they are “taking affirmative steps to seek a medical diagnosis.” This includes time spent making, waiting for or attending an appointment for a test for COVID-19. An employee waiting for test results may not take paid sick leave if they are able to telework. They may be able to take paid sick leave after testing positive, provided that the health care provider advises the employee to self-quarantine.

Paid Leave to Care for an Individual

The DOL provides another “but for” test when an employee seeks leave to care for another individual. Once again, the employer must have work for the employee. Therefore, paid leave is available only if “but for” a need to care for *an individual*, the employee would be able to perform work for their employer. The rule also defines an “individual” being cared for as an “immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if [they] self-quarantined or [were] quarantined.”

Paid Leave to Care for a Child

The same “but for” test also applies when taking paid sick leave to care for a child. The rule states that an employee generally would not need to take such leave if another “suitable individual,” such as a co-parent, co-guardian, or the usual childcare provider, is available. Note that the DOL’s Q&A clarifies that a school is still closed for purposes of FFCRA even if it offers distance learning.

The rule defines “child care provider” as a provider who receives compensation for providing child care services on a regular basis. The eligible child care provider, however, need not be compensated or licensed if they are a family member or friend, such as a neighbor, who regularly cares for the employee’s child. Note that recent IRS guidance also requires that, when an employee cannot work or telework “because of a need to provide care for a child older than 14 during daylight hours[.]” the employee must provide “a statement that special circumstances exist requiring the employee to provide care.”

Paid Leave for a Substantially Similar Condition

The FFCRA’s final qualifying reason for leave is a source of confusion. In fact, in its Q&A, the DOL confirms that it is not actually a qualifying reason at this time. If the U.S. Department of Health and Human Services (HHS) identifies any “substantially similar condition” that would allow an employee to take paid sick leave, the DOL states that it will issue further guidance.

FMLA Leave Limited to 12 Weeks Over 12 Months

FFCRA amended FMLA by adding expanded FMLA leave for a limited purpose and for a limited time. The DOL clarifies that an employee may not exceed a total of 12 weeks of leave during a 12-month period, including expanded and traditional FMLA leave. The rule does not change depending on whether the employer uses a calendar year, fiscal year or rolling method. For example, if an employer’s 12-month period begins on July 1 and an employee took seven weeks of expanded FMLA leave from May–June 2020,

the employee may only take up to five additional weeks of expanded FMLA leave between July 1 and Dec. 31, 2020, even though the first seven weeks of expanded FMLA leave fell in the prior 12-month period. The DOL clarifies that employees do not have any right to use paid sick leave or expanded FMLA leave for any unpaid or partially paid leave taken before April 1, 2020.

More Flexibility for Teleworking

Generally, all time between performance of an employee's first and last principal activities is compensable work time. Therefore, employees must always record – and be compensated for – all hours actually worked in accordance with the FLSA. However, the rule clarifies that the DOL *will not* be enforcing the “continuous workday” rule for teleworking employees. To encourage flexibility between employer and employee during the pandemic, employers must pay employees only for “all hours actually worked.” (If an employee fails to report hours worked, an employer is not liable to compensate the employee unless the employer had actual or constructive knowledge about the telework.) The DOL’s guidance regarding the continuous workday will continue to apply to all employees who are not teleworking for reasons related to COVID-19.

Intermittent Leave

If an employee is teleworking, they may take intermittent EPSL or expanded FMLA leave intermittently only if the employer and employee agree. If the employee is reporting to the worksite, then they may only take intermittent leave related to caring for a child whose school or place of care is closed, or whose child care provider is unavailable, for reasons related to COVID-19, and then only if the employer and the employee agree.

Classifying Employees

Full-Time Employees

A full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each work week. The rule clarifies that employees who do not have a normal weekly schedule will be counted as full time if the average number of hours they are scheduled in a workweek is at least 40 hours over the entire period of employment or the six-month period that ends when the employee takes paid sick leave, whichever is shorter.

Part-Time Employees

A part-time employee is scheduled to work less than 40 hours each workweek or – if the employee lacks a normal weekly schedule – one who is scheduled to work, on average, less than 40 hours each workweek. Part-time employees are entitled to paid sick leave equal to the number of hours they are normally scheduled to work over a two-workweek period. If a part-time employee's schedule varies, they are entitled to paid sick leave equal to 14 times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave. If an employee has worked for fewer than six months, the rule clarifies that employers should use the expected daily average number of hours to estimate the two-week average. This expected number is usually evidenced by an agreement between the employer and employee at the time of hiring.

Seasonal Employees

The DOL’s supplemental Q&A clarifies how to calculate leave for a seasonal worker. Employers are to take the average number of hours worked per day over the last period of employment (not to exceed six months) and multiply it by the average hourly rate to find the base daily paid leave amount.

More Detail on Required Documentation

Per the DOL, employees must provide documentation to their employer in support of the need for paid leave. The documentation must include (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. The DOL also provides more detailed statements employees must provide, depending on the reason for leave:

- For an employee subject to a federal, state or local quarantine or isolation order related to COVID-19 the employee must provide the name of the governmental entity that issued the order.
- Where a health care provider advises an employee to self-quarantine due to concerns related to COVID-19, the employee must provide the name of the health care provider who advised the employee to self-quarantine.
- Where an employee is caring for an individual who is subject to a quarantine or isolation order or an individual who has been advised by a health care provider to self-quarantine, the employee must provide either the name of the governmental entity that issued the order to which the individual being cared for is subject, or the name of the health care provider who advised the individual to self-quarantine.
- Where an employee is caring for a child whose school is closed or childcare is unavailable due to COVID-19 precautions, the employee must provide the name of the child being cared for, the name of the school, place of care or child care provider that has closed or become unavailable, and a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Employers are required to retain documentation for four years.

Updated Poster Available

The DOL has updated its poster notice to employees that recites the FFCRA requirements. As a reminder, each covered employer must post this notice in a conspicuous place on its premises. An employer can also satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. This poster can be downloaded [here](#).