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U.S. Department of Labor Issues Initial Q&A on the Families First Coronavirus Response Act



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The U.S. Department of Labor (DOL) issued a series of Questions and Answers (Q&A) on March 25, 2020, detailing the leave requirements found in the recently passed [Families First Coronavirus Response Act \(Response Act\)](#). We anticipate the DOL will be issuing implementing regulations on the Response Act next week.

Additional clarification on when and for whom the act applies

Under the Q&A, the Response Act **now takes effect on April 1, 2020**, and applies to leave taken between April 1 and December 31, 2020. Employers who previously gave paid sick leave due to the COVID-19 pandemic will *not* be eligible for reimbursement for any leave before April 1, and employees who are receiving paid leave before the Response Act takes effect cannot be denied the benefit of the Response Act leave.

Employers with fewer than 500 employees are covered, with eligibility determined by the number of employees at the time leave is to be taken. The Q&A requires employers to count full-time and part-time employees, *temporary employees* who are jointly employed (for example, by the employer and a staffing agency), *day laborers* supplied by a temporary agency, and employees on leave. Independent contractors are not counted toward the total.

The DOL's Q&A also discusses the concept of "integrated employers." Under that concept, in certain situations separate entities will be deemed to be parts of a single employer for purposes of FMLA (meaning the employees of all the entities making up the integrated employer will be counted in determining employer coverage and employee eligibility). Importantly, the DOL Q&A notes that this concept only applies when counting for purposes of the expanded FMLA leave only (not for paid sick leave). The factors for the integrated employer analysis are common management, interrelation between operations, centralized control of labor relations and degree of common ownership/financial control.

[As we previously wrote](#), employers with fewer than 50 employees may be exempt where "the imposition of such requirements would jeopardize the viability of the business." The Q&A asks for documentation of such position and notes that the DOL will provide more detail in its anticipated regulations.

All employees are eligible for paid sick leave. Employees on the payroll for 30 calendar days are eligible for the expanded FMLA leave. In the Q&A, the DOL noted that for Temp-to-Perm employees, employers must count their days worked as temporary employees toward the 30-day total.

Calculating Hours for Paid Sick Leave/Enhanced FMLA Leave

Paid leave is calculated on the number of hours an employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the employee's schedule varies, you may use a six-month average to calculate the average daily hours. If this

calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

The Q&A clarifies that the hours-worked calculation includes any overtime hours the employee would normally have been scheduled to work. However, while overtime hours will be counted toward the hours an employee should be compensated, paid sick leave need only be paid as straight time – not at the overtime rate.

Calculating Rate of Pay for Paid Sick Leave

Employers will calculate the regular rate of pay used to calculate paid leave by taking the employee's average regular rate over a period of six months before the date of leave. For employees who have worked less than six months, the employer will calculate the average regular rate of the weeks they worked. Of note, tips, piece rates and commissions paid will be incorporated into the calculation. The DOL says that employers "can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period." In sum, all compensation is part of an employee's "regular rate" for purposes of paid sick leave.

Leave for Childcare due to COVID-19

The DOL confirms that employees unable to work or telework because they need to care for a child as a result of a school or childcare closure due to COVID-19 related reasons may be eligible for both paid sick leave *and* expanded FMLA. In that circumstance, employees would be eligible for up to 12 continuous weeks of paid leave. Eligible employees may choose to take the two weeks of paid sick leave during the initial two weeks of expanded FMLA leave (which are otherwise unpaid), following that leave with the final 10 weeks of expanded FMLA leave. While the DOL reiterates that both types of leave are available, there is not yet further guidance on what "COVID-19 related reasons" will mean when determining eligibility.

Distinguishing Expanded FMLA from Regular FMLA

The DOL states that the expanded FMLA benefit of two-thirds the rate of pay (up to \$10,000 total) does not change regular FMLA to a paid benefit. All other types of FMLA leave remain unpaid.

New Poster Available

Each covered employer must post a notice of the FFCRA requirements in a conspicuous place on its premises. An employer may 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](#).

Alert! Employer Feedback Welcome

Now through Sunday, March 29, 2020, employers and employees alike are invited to contribute to an "[online dialogue](#)" administered through the Office of Compliance Initiatives. "USDOL will use the ideas and comments gathered from this dialogue to develop compliance assistance guidance, resources, and tools, and outreach approaches that assist employers and employees in understanding their responsibilities and rights, respectively, under the FFCRA."

Gould & Ratner Coronavirus/COVID-19 Response Team

Gould & Ratner's [Human Resources and Employment Law Practice](#) has established a Coronavirus/COVID-19 Response Team to assist its clients with any questions they may have regarding the impacts of Coronavirus/COVID-19. Please contact [David Michael](#), or [Mark Brookstein](#).