

March 30, 2020

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

Human Resources & Employment

The U.S. Department of Labor issued a series of additional Q&A on March 27, 2020, updating initial guidance for the recently passed Families First Coronavirus Response Act, which covers most employers with fewer than 500 employees. We anticipate the DOL will be issuing implementing regulations on the Response Act in the coming days.

Who is Eligible and when?

30 Days Explained

[As we wrote in a previous blog post](#), all employees of covered employers are eligible for paid sick leave, and employees on the payroll for 30 calendar days are eligible for the expanded FMLA leave. The supplemental Q&A clarifies that an employee need only be employed 30 calendar days *immediately prior to* the date leave would begin. Therefore, new employees who have not reached the 30-day threshold by April 1 will be eligible for expanded FMLA once they complete their 30th calendar day of work.

Calculating Available Hours and Days

For purposes of calculating available hours of paid sick leave, the DOL clarifies that full-time employees are defined as normally scheduled to work 40 hours or more per week, with part-time employees defined as normally scheduled to work fewer than 40 hours per week. Thus, if your salaried employees' regular workweek is less than 40 hours (say 37.5 hours) then their maximum hours would be 75 (rather than 80).

Employees are eligible for paid sick leave regardless of how much FMLA they took in the past 12 months. However, for purposes of expanded FMLA, this leave is included in and not in addition to the total FMLA leave entitlement of 12 weeks in a 12-month period (as measured by the employer's policy). For example, if an employee has already taken six weeks of FMLA leave, that employee would only be eligible for another six weeks of expanded FMLA leave (until it expires on December 31, 2020).

Eligibility Requires Opportunity to Work

The DOL also clarifies that paid sick leave and expanded FMLA are only available where an employer can offer the employee work. Paid leave is not available for furloughs, temporary layoffs, closed worksites, or reduced hours. If an employee is furloughed or their hours are reduced after April 1, they are not eligible for paid leave to supplement wages. If an employee is on leave when the office closes, no additional leave is provided after the closure. Where an employer communicates to staff that the worksite closure is temporary, the analysis is the same: if the worksite is closed, the DOL guidance provides that employees should look to unemployment, not paid leave, for relief. [As we previously wrote](#), the rules of unemployment in Illinois (and many other states) have been relaxed to benefit more employees. Additionally, the recently passed CARES Act provides an additional \$600 per week of unemployment benefits through July 21, 2020.

Factors Affecting Paid Sick Leave Refined

[As we discussed in a previous blog post](#), employees may request paid sick leave due to a health care provider recommending self-quarantine. The DOL clarifies that a health care provider must be a "licensed doctor or medicine, nurse practitioner, or other health

care provider permitted to issue a certification for purposes of the FMLA. We anticipate further guidance on the factors, including an explanation of what it means for a childcare provider to be “unavailable due to COVID-19 precautions.”

Definition of Son or Daughter

The DOL clarifies that “son or daughter” for purposes of both types of paid leave under the Response Act includes both a minor child and an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability.

Confirming that Teleworking is Working

Where an *employer and employee agree* that the employee will telework a different schedule, but the same number of hours, the employee is able to telework and is not eligible for paid sick leave unless a COVID-19 reason prevents the employee from working that schedule. In the case of expanded FMLA, if an employee is able to telework while caring for a child, they are not eligible for expanded FMLA. Employees are eligible for paid sick leave where telework is permitted by the employer and the employee is not able to telework due to a qualifying reason.

Intermittent Leave at the Discretion of the Employer

The Response Act amends the Family Medical Leave Act (FMLA) and therefore adopts its terms. However, the DOL clarifies that intermittent leave for purposes of expanded FMLA requires employer consent. The DOL encourages employers and employees “to collaborate to achieve flexibility and meet mutual needs,” and is “supportive” of flexible work arrangements. For purposes of expanded FMLA, the DOL states that intermittent leave can be taken at any increment, whether the employee is onsite or teleworking, so long as the employer agrees.

However, the DOL notes that paid sick leave must be taken in full-day increments where teleworking, and where an employee takes paid sick leave and wants to return to the worksite, public health comes into consideration. If the employee takes paid sick leave for a qualified reason related to illness or possible illness, they may be contagious. Citing the intent of the FFCRA to “provide such paid sick leave as necessary to keep you from spreading the virus to others,” the DOL states that employees who take paid sick leave due to symptoms, illness, or to care for an individual in quarantine, must continue to take paid sick leave each day until they either use the full amount of paid sick leave or no longer have a qualifying reason for taking paid sick leave. Employees taking paid sick leave due to a school or childcare closure may take paid sick leave intermittently with the employer’s permission.

Exempted Small Businesses, Health Care Providers, and Emergency Responders

Applying for Small Business Exemption

[As we wrote in a previous blog post](#), employers with fewer than 50 employees are exempt from providing paid sick leave and expanded FMLA when doing so would jeopardize the viability of the small business as a going concern. The DOL provides that an “authorized officer” may claim this exemption by showing that one of the following is true:

- 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;
- 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
- 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.

There is no further explanation on whether the exemption will be applied for, recorded, or otherwise reported. We expect more guidance soon.

Expanded Definition of Health Care Provider

Employers may exempt health care workers from coverage under the Response Act. The DOL stated that the following employees will be considered health care workers: “*anyone 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.*”

Additionally, the definition includes *any individual* employed by an entity that contracts to provide services or to maintain the operation of the facility of one of the above entities and anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The DOL also references the multiple executive orders released in the past few weeks, stating that “any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19” may be excluded.

Expanded Definition of Emergency Responder

Employers may also exempt emergency responders from coverage. The DOL clarifies that the Response Act defines an emergency responder as an employee who is necessary for the provision of “transport, care, health care, comfort, and nutrition” of COVID-19 patients, or whose services are otherwise needed to limit the spread of COVID-19, including such persons as emergency medical services personnel, physicians, nurses, emergency medical technicians, paramedics, emergency management personnel, and persons with skills or training in operating specialized equipment. The definition also includes “individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.”

Relationship Between FFCRA and Other Benefits

Employees who receive employer-provided paid sick leave benefits continue to have access to them in addition to Response Act benefits, but *may not* use them at the same time. However, an employer may agree to allow employees to supplement the amount received from paid sick leave or expanded FMLA by using preexisting paid leave to compensate employees up to their full normal earnings (although they only receive a tax credit for that amount provided under the Response Act). The Q&A makes clear, however, that employers may not require employees to use existing paid vacation, personal, medical, or sick leave to supplement or adjust paid leave under the Response Act.

Employees who take expanded FMLA are entitled to remain on any employer-provided health insurance during that leave, provided they make any normal contributions as required. Employees who take paid sick leave must also remain on their health insurance during leave. If an employee is on the employer health plan’s waiting period and takes paid sick leave, the DOL states that the days the employee is on paid sick leave will count towards completion of the waiting period.

Employees provided paid sick leave and expanded FMLA will not simultaneously receive unemployment in most cases. However, the DOL notes that it recently gave states greater flexibility to extend partial unemployment benefits where employees are working but on a reduced schedule.

Employer Obligations to Reinstate

The DOL clarifies that the Response Act requires employers to “provide the same (or a nearly equivalent) job to an employee who returns to the workplace following leave for both expanded FMLA and paid sick leave.” However, the DOL states that employees are not protected from employment actions that would have affected them regardless of leave, such as a layoff or worksite closure, which would be legitimate business reasons for not reinstating. For expanded FMLA leave, the DOL states that employers may also refuse to reinstatement to highly compensated key employees (salaried, FMLA eligible employees among the highest paid 10% of all

employees working for the employer within 75 miles of the worksite). Additionally, for purposes of expanded FMLA reinstatement only, if an employer has fewer than 25 employees and can show that the following hardship conditions exist, reinstatement is not required:

- 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 their leave;
- employer made reasonable efforts to restore employee to the same or an equivalent position;
- employer made reasonable efforts to contact employee if an equivalent position becomes available; and
- 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 their leave began, whichever is earlier.

Recordkeeping and Documentation

Finally, as employers clamor for more information on how to track paid leave in order to receive the tax credit, the DOL states only that employers should "consult with Internal Revenue Service (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."

For now, the DOL states that employers may require employees to provide proof of school or childcare closures, including a notice posted on a government, school, day care website, or in a newspaper, or an email from a childcare provider or school official. The DOL also confirms that all certification requirements under the FMLA remain, and employers may require that employees taking leave beyond the two weeks of emergency paid sick leave due to a medical condition for COVID-19, must provide a medical certification of the serious health condition.