



## Employment & Labor Law FLASHPOINTS May 2020

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### Examining DOL Rule on New Employee Leave Rights

Last month's publication examined employee leave rights under the Families First Coronavirus Response Act (FFCRA), Pub.L. No. 116-127, 134 Stat. 178 (2020). The FFCRA requires private employers with less than 500 employees, and non-federal public sector employers to provide eligible employees with new paid leave benefits for reasons related to COVID-19. These temporary, new leave provisions raised many questions from employers. Preliminary informal guidance was published by the Department of Labor (DOL) shortly thereafter (last month's publication was based on the informal guidance). On April 1, 2020, the DOL published a rule regarding paid leave under the FFCRA. [See 85 Fed.Reg. 19,326 \(Apr. 6, 2020\)](#). The rule clarifies the prior informal guidance from DOL and answers many common questions from employers, including whether an employee may take paid sick leave because of Governor Pritzker's stay-at-home executive order. This publication summarizes some of the key provisions of the rule.

#### *Background*

Under the FFCRA, a full- and part-time employee is entitled to emergency paid sick leave if he or she is unable to work or telework because he or she

1. is subject to a federal, state, or local quarantine/isolation order related to COVID-19;
2. has been advised by a healthcare provider to quarantine due to concerns related to COVID-19;
3. is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. is caring for an "individual" who is subject to a quarantine order or advisement by a healthcare provider, as described above;
5. is caring for a son or daughter if the child's school or place of care has been closed or the child's care provider is unavailable due to a COVID-19 related reason; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Full-time employees are entitled to two weeks of paid sick leave and part-time employees are entitled to the number of hours they normally work, on average, over a two-week period.

Also, under the FFCRA, individuals employed with an employer for at least 30 calendar days have the right to take up to 12-weeks of job protected leave if the employee is unable to work or telework for Reason 5 above (emergency Family and Medical Leave Act of 1993 (FMLA), Pub.L. No. 103-3, 107 Stat. 6 expansion). The first 2 weeks are unpaid, but the employee may substitute available

paid leave. The remainder of the qualifying leave is paid by the employer at two thirds of the employee's FFCRA pay rate.

These new leave provisions are effective from April 1, 2020, to December 31, 2020. 85 Fed.Reg. at 19,332. Employers may elect to exempt healthcare providers and emergency responders from these new leave provisions. 29 C.F.R. §§826.30(c)(1), 826.30(c)(2). Also, private employers with fewer than 50 employees may claim a small business exemption from providing leave for Reason 5 above 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; or
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. 85 Fed.Reg. at 19,336.

To elect the small business exemption, the DOL states that employers should document why their business meets one of the above criteria. No materials should be sent to the DOL. 29 C.F.R. §§826.40(b)(1), 826.40(b)(2).

#### *Ten Key Provisions of DOL's Rule*

1. There is no entitlement to leave unless the employee would have been scheduled to work or the employer has work available for the employee. *This is repeatedly stated throughout the rule.*

2. For Reason 1 above, the DOL rule indicates that a shelter-in-place order is not enough, by itself, for an employee to take paid sick leave. An employee may take paid sick leave *only* if the employer has work for the employee and being subject to a quarantine or isolation order prevents the employee from working or teleworking. 29 C.F.R. §826.20(a)(2). Regarding this issue, the following main concepts apply:

- a. If the employer does not have work for the employee, they are not entitled to leave.
- b. Essential businesses and operations are exceptions under the Governor's stay-at-home orders. In general, employees of those businesses and institutions are permitted to work (this includes, but is not limited to, doctor's offices, educational institutions, and most governmental entities) and, thus, are not eligible for leave for Reason 1.
- c. There is no prohibition on teleworking under the Governor's stay-at-home order. Thus, generally, employees required or allowed to telework will not be eligible for leave for Reason 1. For example, a teacher performing duties in accordance with a school district's remote learning days plan would not be prevented from working by Governor Pritzker's stay-at-home order and, thus, may not take paid sick leave as a result of being subject to that order.

If the business is closed because it is not an "essential business or operation" under the Governor's stay-at-home order, the employee is not entitled to paid leave for Reason 1 because there is no work available for that employee.

In most instances, employees will not qualify for paid sick leave solely as a result of the Governor's stay-at-home order.

3. For Reason 3, paid leave is limited to the time the employee is unable to work or telework because the employee is taking "affirmative steps" to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19. 29 C.F.R. §826.20(a)(4).

4. For Reason 4, the employee must have some personal relationship to the "individual" that creates an expectation that the

employee would care for them if subject to a quarantine (*i.e.*, immediate family member or a person that regularly resides with the employee). 29 C.F.R. §826.20(a)(5).

5. For Reason 5, son/daughter means “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.” 29 C.F.R. §826.10(a).

6. An employee is required to provide their employer with the following information when taking leave under the FFCRA:

a. If for all reasons: employee name; proposed leave date(s); qualifying reason for leave, and oral/written statement that the employee is unable to work or telework because of the qualifying reasons for leave. 29 C.F.R. §§826.100(a)(1) – 826.100(a)(4).

b. Additional information, depending on the reasons for leave:

i. For Reasons 1 and 4, the name of the government entity that issued the quarantine or isolation order. 29 C.F.R. §§826.100(b), 826.100(d).

ii. For Reasons 2 and 4, the name of the healthcare provider. 29 C.F.R. §§826.100(c), 826.100(d).

iii. For Reason 4, the name of the individual and the employee’s relationship to the individual. 29 C.F.R. §§826.20(a)(5), 826.100(d).

iv. For Reason 5, the name of the son/daughter being cared for, the name of the school, place of care (day care, summer camp, etc.) or childcare provider that has closed or become unavailable due to a COVID-19 related reason, and a representation that no other suitable person will be caring for the son/daughter during the period for which the employee seeks to take leave. 29 C.F.R. §826.100(e). (Note for employers eligible for refundable tax credits: for employees taking leave to care for a child age 15 to 17, employers should ask them to explain the “special circumstances” as to why that child needs care during daytime hours and the employer should document same. [IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#).)

c. Employers must retain all records related to an employee’s request for, grant, or denial of FFCRA leave for at least four years. Any information provided orally by employees should be reduced to writing by the employer and retained accordingly. 29 C.F.R. §826.140.

7. Calculating of the amount of emergency paid leave an employee is entitled to is as follows (29 C.F.R. §§826.21(a), 826.21(b)):

a. Full-time employees are entitled to up to 80 hours of emergency paid sick leave. Full-time employees include

i. those employees normally scheduled to work at least 40 hours each workweek; as well as,

ii. those employees whose average number of hours per workweek (including hours taken for any type of leave) is at least 40 hours over a period that is the lesser of the 6-month period ending on the date the employee takes the leave or the entire period of employment.

b. Part-time employees with a normal weekly schedule are entitled to up to the number of hours the employee is scheduled to work over two workweeks.

c. For part-time employees that lack a normal schedule:

i. If employed at least 6 months, the employee is entitled to up to the number of hours equal to 14 times the average number of hours the employee was scheduled to work (including hours taken for any type of leave) each calendar day over the 6-month period ending on the date on which the employee takes the leave.

ii. If employed fewer than 6 months, the employee is entitled to up to 14 times the number of hours agreed to at the time of hiring that the employee would work, on average, each calendar day. Absent an agreement, up to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of

employment (including hours taken for any type of leave).

8. Employees may use leave intermittently if the employer and employee agree for Reason 5. Use of emergency sick leave for other COVID-19 reasons can only be used intermittently if there is an agreement *and* if the employee is teleworking, as the purpose is to slow and contain the virus. 29 C.F.R. §826.50.

9. Expanded FMLA leave is limited to Reason 5 above and for a maximum total of up to 12 workweeks during the period from April 1 to December 31, 2020. 29 C.F.R. §§826.70(a) – 826.70(e). This is true even if there is more than one FMLA year during this period. (By way of example, if an employer's FMLA year is September 1 to August 31, and an eligible employee uses 12 workweeks of leave for Reason 5 for the period between May 1 – August 15, they would not be entitled to another (up to) 12 workweeks of leave between September 1 and December 31, 2020, for Reason 5.)

10. Employers must use the employee's weighted average regular rate to compute pay for leave taken under the FFCRA. If this rate is less than the applicable minimum wage rate, use the applicable minimum wage rate. 29 C.F.R. §826.25.

a. Add up the employee's compensation over the relevant period (the lesser of the six-month period ending on the date the employee first takes FFCRA leave or the entire term of employment) and divide that sum by all hours worked over the same period.

b. Pay for leave taken for Reasons 1 – 3 is capped at \$511 per day per employee (\$5,110 in aggregate). For Reasons 4 – 6, paid leave is two thirds of employee's pay rate, and is capped at \$200 per day per employee (\$2,000 in aggregate). 85 Fed.Reg. at 19,327.

Employers should review existing policies and modify as necessary to address these temporary paid leave benefits.

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