



# School Law FYI

MARCH 26, 2020

## ***School Districts Be Aware: DOL Issues First Guidance on the Families First Coronavirus Response Act***

On Tuesday, March 24, the Department of Labor (DOL) issued its first guidance documents related to the Families First Coronavirus Response Act (FFCRA). For our earlier article on this law, please [see here](#). The DOL's new guidance is in the form of a Questions and Answers document and is [available here](#).

Most importantly, the DOL's guidance states that the leave portions of the will be effective on **April 1, 2020**, not April 2, 2020 as was previously anticipated.

Additionally, the guidance provides some information on calculating the amount of pay owed to employees under the FFCRA.

More guidance and formal regulations are still expected from the DOL. Additionally, the DOL might revise its existing guidance to provide further clarity. It appears that the DOL is continuously revising the websites containing the guidance documents related to the FFCRA without providing notice of the revisions or indicating the date on which the DOL made revisions. These revisions have created inconsistencies between the various guidance documents, and we recommend that employers consult with legal counsel to ensure that they are in compliance with the latest and most accurate DOL guidance related to the FFCRA.

One issue where DOL guidance is needed is with respect to whether FFCRA leave can be used intermittently. The FFCRA is silent on this issue, which means there is currently potential legal risk if an employer allows the use of such leave intermittently. For instance, if the DOL takes the position that FFCRA leave cannot be used intermittently, intermittent leave might not qualify for tax credits and employers might have to restore improperly taken intermittent leave to the employees' applicable FFCRA leave banks. Additionally, issues could arise under the Fair Labor Standards Act salary basis test if employers deduct less than a full-day's pay from the salary of certain types of exempt employees, if the FFCRA leave was not to be taken intermittently.

### **FACT SHEETS**

The DOL has created a fact sheet on the FFCRA for employees [available here](#) and a fact sheet on the FFCRA for employers [available here](#). In a footnote on these FFCRA fact sheets, the DOL states that the DOL's FFCRA regulations are "expected April 2020."

### **NOTICE FOR POSTING**

The DOL has also created the notice of FFCRA requirements that employers must conspicuously post on their premises. The notice is [available here](#). School districts should post this notice where it posts other employment notices. The DOL has also posted a Frequently Asked Questions (FAQ) regarding the notice which is [available here](#). The DOL FAQ states that because most employees are working remotely, an employer may satisfy the posting requirement by emailing or direct mailing the notice to employees, or posting this notice on an internal or external website.

The DOL changed this notice on March 26, 2020 without indicating the change on the notice itself. The DOL

recommends that employers sign up for “Key News Alerts” to ensure they remain current with all notice requirements or visit its website at [www.dol.gov/agencies/whd](http://www.dol.gov/agencies/whd). Employers who sent out the old version of the notice should post and distribute this new version of the notice in same manner as they did previously. This new notice still does not provide completely clear guidance to employees on all aspects of the FFCRA. Therefore, there is a chance the notice might be revised again by the DOL in the future. If that happens, employers will likely have to post and distribute the new notice in the same manner as they did previously.

## TEMPORARY NON-ENFORCEMENT PERIOD

On March 24, 2020, the DOL published a Field Assistance Bulletin specifying that the DOL would observe a temporary period of non-enforcement of violations of the FFCRA occurring within 30 days of the enactment of the FFCRA, which is from March 18 through April 17, 2020 (non-enforcement period). The DOL is providing this non-enforcement period in order to enable employers covered by the FFCRA to come into compliance with the new paid leave benefits. The link to the field bulletin can be found here [found here](#).

This means the DOL will not bring enforcement actions against any employer for any FFCRA violations that occur through April 17, 2020 provided the employer has made reasonable, good faith efforts to comply with the FFCRA. Employers will be found to have acted “reasonably” and “in good faith” when all of the following are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practical if FFCRA payments were missed or paid incorrectly.
2. Violations of the FFCRA were not “willful,” which the DOL defines as the employer either knew or showed reckless disregard for the matter.
3. The DOL receives a written commitment from the employer that it will comply with the FFCRA in the future.

If the employer violates any of the three conditions above, the DOL is authorized to fully enforce the FFCRA during the non-enforcement period. This Field Assistance Bulletin does not restrict an employee’s right to file a private cause of action for violations during the non-enforcement period.

At this time, it does not appear there will be any “grace period” for unintentional FFCRA violations that occur after April 17, 2020.

The Boardman Clark School Law Practice Group will continue to monitor the constantly changing legal landscape caused by the Coronavirus and will continue assist clients with navigating through this public health emergency.

---

---

## PRIMARY AUTHORS



**Brian P. Goodman**

(608) 283-1722  
MGOODMAN@BOARDMANCLARK.COM

- |                      |                |                           |                |                          |                |
|----------------------|----------------|---------------------------|----------------|--------------------------|----------------|
| ■ Michael J. Julka   | (608) 286-7238 | ■ Steven C. Zach          | (608) 283-1736 | ■ Matthew W. Bell        | (608) 286-7239 |
| ■ James K. Ruhly     | (608) 283-1738 | ■ Richard F. Verstegen    | (608) 283-7233 | ■ Christopher T. Schmidt | (608) 286-7157 |
| ■ William L. Fahey   | (608) 286-7234 | ■ David P. Weller         | (608) 286-7235 | ■ Brian P. Goodman       | (608) 283-1722 |
| ■ JoAnn M. Hart      | (608) 286-7162 | ■ Jennifer S. Mirus       | (608) 283-1799 | ■ Daniel T. Fahey        | (608) 286-7216 |
| ■ Eileen A. Brownlee | (608) 822-3251 | ■ Rhonda R. Hazen         | (608) 283-1724 | ■ Eric B. Hagen          | (608) 286-7225 |
| ■ Doug E. Witte      | (608) 283-7529 | ■ M. Tess O’Brien-Heinzen | (608) 283-1798 |                          |                |

*Disclaimer: Boardman & Clark LLP provides this material as information about legal issues. It does not offer legal advice with respect to particular situations and does not purport that this newsletter is a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.*