

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

MARCH 31, 2020

DOL Releases Additional FFCRA Guidance Clarifying Common Areas of Concern (Part 2)

Last week, we reported in [Part One](#) of this series of articles that the Department of Labor (DOL) is continuing to release additional guidance on the Families First Coronavirus Response Act (FFCRA) ahead of the law taking effect on April 1, 2020. Additionally, our original summary of the FFCRA's paid leave provisions can be [found here](#).

On March 24th, the DOL released its first set of question and answer guidance on the FFCRA (questions #1-14). Our summary of that guidance can be [found here](#).

The DOL released a second set of FAQs (questions #15-37) on March 26th and a third set of FAQs (questions #38-59) on March 28th. Sometimes when the DOL issues new guidance it also revises its previous guidance, which makes tracking the latest guidance challenging. A list of all the DOL's FAQs can be [found here](#). However, this DOL guidance continues to remain subject to change. This article addresses the DOL guidance as it existed on March 31, 2020.

In Part Two of this series of articles, we will analyze the second set of FAQs and what they mean for employers. The primary topics covered in questions #15-37 are:

- Required documentation
- Questions on teleworking
- Use of intermittent leave
- Worksite closures, layoffs, furloughs, and reductions in hours
- Unemployment insurance
- Stay at home orders
- Health insurance continuation
- Treatment of existing paid leave benefits and FFCRA leave

EMPLOYEES MUST PROVIDE DOCUMENTATION FOR LEAVE

Questions #15 and 16 address documentation requirements. The DOL guidance clarifies that employees requesting FFCRA leaves must provide documentation of their need for leave. The DOL states that employees must support their need for FFCRA leave with "specified applicable IRS forms, instructions, and information," which likely at a minimum will require the employee's name, his/her qualifying reason for leave, a statement that the employee is unable to work or telework due to their reason for leave, and provide the dates of leave. However, employers, particularly private employers seeking to take advantage of the tax credits in the FFCRA, must provide any additional information required to complete the required IRS forms that are not yet available.

Employers can require that employees provide documentation to support their need to take FFCRA leave to care for

the employee's son or daughter if the "school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions." Such documentation might include information substantiating the child's school or child care provider's closure which could include public notices posted on a website or received in an email.

ADDITIONAL GUIDANCE ON TELEWORKING

Questions #17 through 19 address teleworking. Employers may, but are not required to, allow employees to work from home ("teleworking"). If an employee is able to telework, he/she are not eligible for FFCRA leave while teleworking. For example, if an employer offers an employee the ability to telework for the same number of hours per day he/she normally works and the employee is able to work those hours, the employee is not eligible for FFCRA leave.

Employees may only take FFCRA leave if they are "unable" to either work or telework. The DOL explains that being "unable" to work means that the employer has work for the employee, but one of the qualifying reasons set forth in the FFCRA prevents the employee from being able to perform that work, either under normal circumstances at the employee's regular worksite or through teleworking. For example, if the employee cannot work or telework due to the need to care for the employee's son or daughter, the employee may be eligible for FFCRA leave. If the employee can telework while caring for the son or daughter, however, the employee does not qualify for leave.

INTERMITTENT LEAVE

Questions #20 through 22 address intermittent leave. The DOL also clarified that employers may permit employees to use FFCRA leave intermittently in certain circumstances. Employers are not required to allow the use of intermittent leave, however. The DOL signaled there may be different rules for intermittent leave depending on whether the employee is working at their usual worksite or teleworking.

Intermittent Leave and Teleworking

If an employee is teleworking, the employer may permit the use of intermittent leave for either emergency paid sick leave or leave under the expanded provisions of the FMLA. The employee can take intermittent leave in any increment, provided the employee and employer agree on the increment. The DOL encourages employers to be flexible with employees in setting intermittent leave schedules if the employer allows the use of intermittent leave. Employers should be cautious about deducting from the salaries of certain salaried employees subject to the salary basis test that are classified as exempt from the overtime pay requirements of the FLSA if such employees miss less than a full day of work. Such a deduction could result in the loss of the employee's exemption from overtime pay requirements.

Intermittent Leave and Worksites

If an employee is not teleworking and working at their usual worksite, the DOL has signaled that the employee's ability to take FFCRA leave intermittently may depend on certain circumstances.

Employees who begin emergency paid sick leave for the following reasons may be required to continue to take leave each day until (1) they use their full allocation of emergency paid sick leave or (2) they no longer have a qualifying reason for taking leave:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (There is currently no guidance available on clarifying what might qualify under this provision of the law).

The DOL's reasoning for this limitation is that if an employee is possibly sick with COVID-19 or caring for an individual who is possibly sick with COVID-19, limitations on intermittent leave are necessary to contain the spread

of the virus. However, the guidance seems to imply that if such employees are teleworking, they likely are eligible for intermittent leave, if the employer allows it.

If an employee takes FFCRA leave and is unable to report to the worksite for reason of childcare unavailability and is not sick or caring for someone who is sick, the DOL guidance states that such an employee may take that leave intermittently if the employer allows them to do so.

In regards to time increments in which FFCRA leave may be taken, the DOL's guidance appears to imply that employers and employees may agree to intermittent leave in less than full day work increments if the employee is taking FFCRA leave due to childcare unavailability. However, the DOL's guidance indicates that employees taking emergency paid sick leave due to one of the five reasons listed above may be required to take the leave in full-day increments when being asked to report to the employer's premises.

FFCRA LEAVE IS GENERALLY UNAVAILABLE DURING WORKSITE CLOSURES, FURLOUGHS, REDUCTIONS IN HOURS, AND LAYOFFS

Questions #23 through 28 address worksite closures, furloughs, reductions in hours, and layoffs. If a worksite closes, employees are not eligible to take FFCRA leave. Per the DOL, if the employee's worksite closes and the employer has no work for the employee, employees are not eligible to take FFCRA leave. This is true regardless of whether the employer closes the worksite before or after April 1, 2020.

If an employer closes the worksite while the employee is out on FFCRA leave, the employer must pay the employee for any FFCRA leave the employee used before the employer closed. After the date of the employer's closure, the employee is no longer eligible for paid leave, even if the employee requested the leave prior to the closure.

Similar eligibility rules apply to employees who are furloughed, reduced in hours, or laid off and are not scheduled to perform work for the employer. These terms are used differently by different employers in a variety of contexts, and the DOL does not specifically define these terms. However, the overall direction of the guidance appears to be that only employees that are offered work hours by their employer and are unable to work those hours for qualifying reasons are eligible for FFCRA leave.

Therefore, if a 40-hour per week employee is reduced to 20 hours per week, the employee is not entitled to FFCRA leave for the 20 hours by which the employee's schedule has been reduced. However, if that employee continues to work 20 hours per week and then is unable to work due to an FFCRA qualifying reason, such as a doctor's order to quarantine due to COVID-19, then the employee will be eligible for FFCRA paid leave based on the employee's reduced work schedule.

Notwithstanding the DOL guidance summarized above, employers should remember that they cannot retaliate against an employee for taking FFCRA leave, nor can they interfere with an employee's right to take FFCRA leave.

UNEMPLOYMENT BENEFITS

Question #29 addresses unemployment. Generally, employees who receive FFCRA paid leave will not be eligible for unemployment benefits. However, the new Federal CARES Act contains several provisions that potentially increase the amount of unemployment benefits to which employees are entitled. How this new expansion of unemployment benefits will interact with FFCRA paid leave is unclear at this time. Before states are eligible for the federal expanded unemployment benefits, they must enter into agreements with the federal government. Additional guidance is therefore needed from both the federal and state government before employers and employees can know with certainty the impact on unemployment benefits.

STAY AT HOME AND BUSINESS CLOSURE ORDERS LIKELY DO NOT QUALIFY EMPLOYEES FOR FFCRA LEAVE

Although the DOL did not specifically address the question of whether a state "stay at home" order trigger FFCRA paid leave entitlements, in the DOL's guidance on business closures, in question #21, the DOL notes that employees are not eligible for FFCRA leave "whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive."

This language implies that FFCRA leave is not available if an employer closes the worksite due to the state "Safer at Home Order" or a similar order and as a consequence the employer has no available work for the employee, either on site or through teleworking. There may be further guidance on this issue.

HEALTH INSURANCE COVERAGE CONTINUES DURING LEAVE

Question #30 addresses health insurance continuation. Employees are generally entitled to continue their health

insurance coverage while on FFCRA leave on the same terms (including contribution rates) as if they continued to work.

If the employee does not return to work at the end of their FFCRA leave, the employer's health insurance plan will determine whether they are still eligible to be on the plan and at what contribution rate.

Employers are strongly advised to consult with their health insurance carriers to confirm employee eligibility while on reduced hours, furlough, temporary layoff, and FFCRA leave, contribution obligations and rates, and employee eligibility if an employee does not return from FFCRA leave.

EXISTING PAID LEAVE BENEFITS

Questions #31 through 34 address employees' use of existing paid leave benefits. During FFCRA paid emergency leave, the employee may decide whether to use that paid leave or instead use any other form of accrued paid leave provided by the employer. The employer cannot dictate which leave the employee uses during this period.

However, paid leave provided by the employer and paid leave under the FFCRA may not run concurrently unless permitted by the employer and elected by the employee. The employee can take both at the same time only if the employer agrees to allow the employee to supplement the amount of pay the employee gets from the FFCRA to equal their normal level of pay with any other existing accrued paid leave provided by the employer.

For example, the employer can agree to allow the following (but does not have to permit it, nor does the employee have to elect to do so): If the employee receives 2/3 of his/her normal earnings under the FFCRA, the employer can allow the employee to use his/her other accrued employer-provided paid leave to get the additional 1/3 of the employee's normal earnings so that the employee receives his/her full normal earnings.

While employers can agree to pay their employees in excess of the FFCRA requirements if they choose, they cannot claim tax credits for amounts they pay in excess of the FFCRA's statutory limits. Additionally, any amount of pay in excess of the FFCRA limits is subject to FICA and Medicare taxes.

REQUIRED NOTICE

In [our previous article](#), we discussed the requirement that employers post a notice regarding the FFCRA. That notice is now available in [Spanish here](#).

Employers with employees whose first language is Spanish should strongly consider posting and disseminating the Spanish poster in addition to the English poster.

CONCLUSION

The DOL continues to put out rapidly changing guidance on the FFCRA even mere days before the law's effective date of April 1, 2020. Boardman Clark will continue to release articles discussing the additional guidance provided by the DOL. The Boardman Clark Labor & Employment team is here to assist employers as they navigate through this uncertain legal landscape.

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