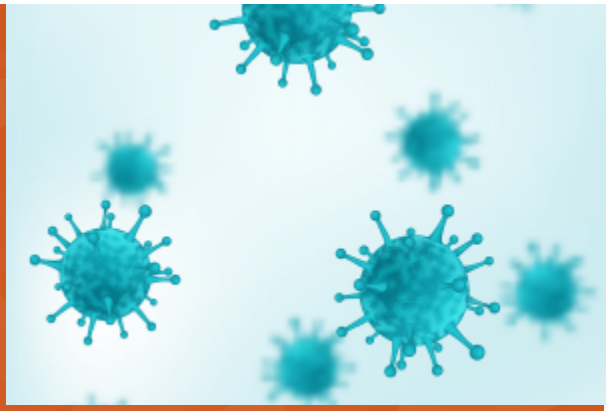
COVID-19 Alert: Families First Coronavirus Response Act

DOL Posts Temporary Rule Issuing Regulations on Families First Coronavirus Response Act

April 02, 2020



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On April 1, 2020, the U.S. Department of Labor (DOL) posted a temporary rule issuing regulations on the Families First Coronavirus Response Act (FFCRA). In particular, the new regulations deal with implementation of the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA) portions of the FFCRA. The regulations are temporary and will expire December 31, 2020, and will not affect the Family Medical Leave Act beyond that date.

The new regulations shed light on several important areas of the FFCRA. Below are a ***few key takeaways:***

Subject to Governmental Orders

Under the FFCRA, employees are eligible for up to two weeks of emergency paid sick leave if they are unable to work because they are "subject to a quarantine or isolation order" related to COVID-19. The new regulations make clear that these orders include shelter-in-place or stay-at-home orders issued by any Federal, State, or local government authority. However, the employee is only eligible in this situation if the employee would be able to work or telework "*but for*" being required to comply with the governmental order. If the employer does not have work for that employee, the employee does not qualify for emergency paid sick leave. The regulations explain that in that situation "the employee would be unable to work even if he or she were not required to comply with the…order." (p. 14).

The regulations provide an example of a coffee shop employee where the coffee shop temporarily closes due to a downturn in business. The coffee shop does not have work for that employee, and thus the employee is not eligible for emergency paid sick leave. A footnote goes on to explain that the same analysis would apply even if the reason for the closure was because *customers or the shop itself* was subject to a governmental order ("the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order," p. 14, *fn.* 1).

Self-quarantine

Employees may also qualify for emergency paid sick leave if the employee is *advised by a health care provider* to self-quarantine. An employee may qualify under this reason if a health care provider believes that:

- the employee has coronavirus;
- the employee may have coronavirus; or
- the employee is particularly vulnerable to coronavirus.

The regulations also require that the self-quarantine advice must prevent the employee from being able to work, either at the employee's normal workplace or by telework.

Effect on FMLA Leave and Paid Time Off Used Concurrently

The regulations clarify that leave pursuant to the FFCRA counts towards the twelve weeks available under the Family Medical Leave Act; however, if the employee has already exhausted their twelve weeks under the FMLA, the employee may still take FFCRA leave for a qualifying COVID-19 reason.

Additionally, an employer may require an employee (or an employee may elect) to use accrued leave under the employer's existing policies to care for a child, such as vacation, personal leave, or paid time off concurrently with the expanded family and medical leave available under FFCRA.

Small Business Exemption

The FFCRA included a provision exempting businesses with fewer than 50 employees from granting *certain* paid leave under the FFCRA relating to school, place of care, or child care provider closings or unavailability if it would "jeopardize the viability of the business as a going concern." The new regulations offer *three* ways for a small employer to qualify for this exemption:

- If such leave would cause the employer's expenses to exceed revenue and cause the employer to stop operations;
- If the absence of the employees requesting leave would pose "substantial risk" to the finances or operations because of the employees specialized skills, knowledge, or responsibilities; or
- The employer cannot find enough available employees to perform the work of the employees requesting leave to continue operations.

If an employer meets any of the above three reasons, it may deny paid sick leave or expanded family and medical leave relating to school or childcare unavailability. If the employer denies paid sick leave or expanded family and medical leave to an employee whose child's school or care facility is closed, the regulations state that the employer must document its reasoning surrounding that denial and retain those records.

Intermittent Leave

The regulations clarify that employees can only use paid sick leave or expanded family and medical leave intermittently by agreement with their employer, and only in the case of school or childcare leave related to COVID-19. The employer does not need to have the agreement in writing, but the regulations otherwise mandate a "clear and mutual understanding" between the employer and employee. The FFCRA otherwise prohibits employees from taking intermittent leave because of the high likelihood of transmitting COVID-19 to other employees at the worksite. The regulations afford more flexibility for employees who are teleworking because these employees present little risk of spreading COVID-19 in the workplace or to colleagues, and does allow such teleworking employees to take intermittent leave for other reasons, by agreement with the employer.

Notice and Leave Documentation

The DOL's regulations provide guidance to employers on leave documentation and notice of leave under the FFCRA as well. The DOL notes that "specific notice" obligations under the FMLA were not adopted as part of the FFCRA, but encourages employers with established practices to continue those practices in administering FFCRA leave.

An employer may require employees to follow reasonable notice procedures as soon as practicable. Employees may provide notice *orally*, and employers may not require an employee's

leave notice request to include documentation beyond what is allowed in the DOL regulations, which include:

- Employee's name;
- Dates requested for leave;
- Qualifying reason for leave under the FFCRA;
- Oral or written statement from the employee that he or she is unable to work because of the qualifying reason;
- Name of the governmental entity that issued the quarantine or isolation order (if that is the qualifying reason being used);
- Name of the health care provider advising the employee to self-quarantine (if that is the qualifying reason being used);
- Name of the dependent being cared for because of school or childcare facility closure, including the name of the school or facility, and a representation that no other suitable person is available to care for the dependent during the requested leave (if that is the qualifying reason being used).

An important caveat here is that because the employee may provide the notice and documentation orally, the employer should document all leave request information – especially if the employer wishes to take advantage of the payroll tax credit, which requires documentation of the qualified sick and family leave paid to eligible employees and documentation supporting eligibility.

The new regulations take effect immediately and contain many more details concerning the implementation of the FFCRA. Please see our previous Alert on the FFCRA for additional requirements under the new law, or reach out to our Morse Employment Law Team for help.

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