

Key Takeaways from the U.S. DOL's Temporary Rule for the Families First Coronavirus Response Act

On April 6, 2020, the U.S. Department of Labor ("US DOL") issued the Temporary Rule ("Rule") to assist employers in the interpretation and implementation of the Families First Coronavirus Response Act providing guidance as to the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (jointly, the "FFCRA Paid Leaves"). Below are some of the key takeaways of the Rule.

1. What process must employees follow to request FFCRA Paid Leaves? Generally, it will be reasonable to require oral notice and sufficient information to determine employee's eligibility. Employees must provide documentation to evidence the need for leave, including a signed statement by the employee specifying: (1) name of employee; (2) date(s) for which leave is requested; (3) Qualifying Reason for leave; (4) and a statement with reasons why she is unable to work (or telework) due to the Qualifying Reason. This notice may be provided prior to using the FFCRA Paid Leave and may be required by the employer as soon as practicable after the first workday is missed. Employers may require, absent unusual circumstances, compliance with the usual internal notice procedures. If the employee fails to notify properly, the employer should notify the failure and grant her another opportunity to comply prior to denying the request of leave.

2. The FFCRA Paid Leaves are available under various circumstances. In each of those circumstances the employee will have to provide additional information and documentation to the employer. How do these requirements vary?

Note: In all circumstances below the employee's eligibility for leave depends on the employer having work for the employee, either in-person or telework. When no work is available, either in-person or telework, the employee will not be eligible for FFCRA leave under any of the Qualifying Reasons.

(1) Employee is subject to a federal, state or local quarantine or isolation order

- **Paid leave entitlement:** The order must prevent the employee from working or teleworking when the employer has work available. The Rule's reasoning being that the employee would be unable to work even if she was not required to comply the order.
- **Additional documentation:** The employee must provide the name of the government entity that issued the order.

(2) Employee is advised by a health care provider to self-quarantine for a COVID-19 reason

- **Paid leave entitlement:** The advice must be based on the health care provider's belief that the employee has, may have or is particularly vulnerable to COVID-19 and the self-quarantine must prevent the employee from working or teleworking.
- **Additional documentation:** The employee must provide the name of the health care provider that gave the advice.

(3) Employee is experiencing COVID-19 symptoms and is seeking medical diagnosis

- **Paid leave entitlement:** The leave is limited to the time the employee is unable to work or telework because she is experiencing COVID-19 symptoms and is taking affirmative steps to obtain a medical diagnosis. For example, the employee is eligible for FFCRA Paid Leave for the time spent making, waiting for, or attending an appointment to obtain a medical diagnosis. This Qualifying Reason does not include a self-quarantine without seeking a medical diagnosis.
- **Additional documentation:** The employer may also require the signed request to include a statement with the dates and hours the employee used or expects to use to seek medical diagnosis.

(4) Employee needs to care for an individual who is subject to a federal, state or local quarantine order or who has been advised by a health care provider to self-quarantine for a COVID-19 reason.

- **Paid leave entitlement:** The individual must be someone with whom the employee has a personal relationship such as an immediate family member, roommate or another person with whom the employee has a relationship that creates an expectation that the employee would care for them and the individual must be subject to Qualifying Reasons (1) or (2) above.
- **Additional documentation:** The employee must comply with the same requirements as for Qualifying Reasons (1) and (2) above.

(5) Employee needs to care for his or her son or daughter because the child's school or place of care is closed or the childcare provider is unavailable

- **Paid leave entitlement:** The employee must be unable to work or telework because she is caring for her child. Generally, this Qualifying Reason does not apply if another suitable individual, such as a co-parent, co-guardian or the usual childcare provider, is available to care for the child.
- **Additional documentation:** The employee must provide (1) name of the child being cared for; (2) name of the school, place of care, or childcare provider that is closed or became unavailable; (3) a statement representing that no other suitable person is available to care for the child during the requested period; and (4) in case of children older than age 14, a statement with the special circumstances requiring the employee to provide care during daylight hours. This last requirement is of particular importance with respect to the employer's ability to substantiate eligibility for the FFCRA Paid Leaves tax credits.

(6) *Employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.*

- **Paid leave entitlement:** Employee must be unable to work or telework because of a similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
Additional documentation: Although the Rule does not specify, the employer may require the employee to provide sufficient information to determine the employee’s FFCRA Paid Leave eligibility.

3. **When is an employee able to telework?** An employee can telework when (a) the employer has work for her to perform; (b) the employer permits her to perform the work from her location; and (c) there are no extenuating circumstances preventing her from working remotely.
4. **Which employees can I exclude under the “health care provider” and “emergency responders” exclusion?** The Rule expanded the FMLA definition of “health care provider” to include, in addition to medical professionals, workers needed to keep hospitals, doctors’ offices, clinics, health care facilities and others, well supplied and operational and those involved in the research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency. The Rule also defined “emergency responders” to include employees necessary for the provision of transport, care, healthcare, comfort and nutrition of patients or others needed for the COVID-19 response.
5. **How much paid sick leave are my employees entitled to?** Full-time employees are entitled to 80 hours of paid sick leave and part-time employees are generally entitled to the number of hours that such employee works, on average, over a 2-week period.

¿Who is a full-time employee?

- Employees with a regular weekly schedule: work at least 40 hours each workweek
- Employees with an irregular weekly schedule: you must calculate:
 - (1) The average hours per workweek over the 6-months period prior to the date on which leave is requested; or
 - (2) If employed for less than 6 months, the average hours per workweek over the entire period of employment.

¿How much paid leave are part-time employees whose schedule varies from week to week entitled to?

- Part-time employees who have been employed for 6-months or more: 14 times the average number of hours the she was scheduled to work per calendar day over the 6-month period ending on the date on which the employee takes the FFCRA Paid Leave, including hours for which she took leave of any type, or twice the average number of the employee’s scheduled hours per workweek, over the 6-month period.
- Part-time employees who have been employed for less than 6-months: If the employee has been employed for less than six months, 14 times the average number of hours reasonably expected by the employee at the time of hiring as evidenced by an agreement at the time of hiring or twice the average number of hours that the employee would be expected to work each workweek. In the absence of an agreement at the time of hiring as to the hours the employee would regularly be expected to work, 14 times the employee’s average daily hours over the entire period of employment, including hours for which the employee took leave of any type or twice the number of the employee’s scheduled hours per workweek, averaged over the 6-months period.

6. **Is my business exempt from the FFCRA Paid Leaves if I have fewer than 50 employees?** Businesses with fewer than 50 employees can deny leave only under Qualifying Reason (5) when an authorized officer of the business has determined that:
 - Granting the leave would result in the employer’s expenses and financial obligations to exceed available business revenue and, consequently, cease operating at a minimal capacity;
 - The leave-related absences would pose a substantial risk to the financial health or operational capacity of the employer because of the employee’s specialized skills, knowledge of the business, or responsibilities; or
 - The employer cannot find enough workers who are able, willing, and qualified, and who will be available, to perform the labor the employees requesting the leave and these labor or services are needed for the employer to operate at a minimal capacity.
7. **What are my recordkeeping responsibilities?** Employers must retain all documentation related to the FFCRA Paid Leave, including documents related to the small business exemption, for 4 years, regardless of whether it was granted or denied and must also document oral statements given by an employee to support the leave request.

This document has been prepared for information purposes only and is not intended, and should not be relied upon, as legal advice. If you have any questions or wish to obtain more information related thereto, or about its possible effects, please contact us at your convenience.

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