Families First Coronavirus Relief Act (FFCRA): Additional Guidance

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AUTHORS

Michael A. Katz | Andrew Spital | Jill K. Grant

On April 10, 2020, the United States Department of Labor (DOL) amended its recently issued temporary rule concerning the application of FFCRA's Paid Sick Leave Act (PSLA) and Emergency Family and Medical Leave Expansion Act (FMLEA), and the DOL continues to expand its Q&A resource on an ongoing basis. In addition, the IRS has published a Q&A on the tax credits available under FFCRA. This alert summarizes key aspects of the latest guidance published since our initial FFCRA alert, dated March 19, 2020.

- Overview. FFCRA provides that private employers with fewer than 500 employees (and many public employers) must provide two weeks of paid sick leave and twelve weeks of family leave, ten of which are paid, for certain COVID-19-related reasons. FFCRA provides a tax credit to employers that will cover 100% of qualifying paid sick and family leave.

- Effective Date. The leave provisions of FFCRA took effect on April 1, 2020 and they are not retroactive. Therefore, any paid leave taken before April 1 will not be eligible for reimbursement through tax credits. In addition, any leave taken before April 1 will not reduce the amount of FFCRA leave any employee may take, except that any bona fide leave under the Family Medical Leave Act (FMLA) taken prior to April 1 will count against an employee's allotment of FMLEA leave.

- Non-Enforcement Period. The DOL will not bring enforcement actions for FFCRA violations that occur prior to April 18, 2020 against an employer who has made reasonable, good-faith compliance efforts. However, if an employer commits a willful violation, fails to provide a written commitment to comply in the future, or fails to remedy a violation,

the DOL may exercise its enforcement powers with respect to violations that occurred between April 1 and April 17. After April 17, the DOL will lift its limited stay of enforcement.

- Covered Employer. Private employers with fewer than 500 employees are subject to FFCRA. Critically, furloughed employees do not count for purposes of determining coverage under FFCRA.
    - *Counting Employees*.
        - Employers must count all U.S. employees regardless of tenure; non-U.S. employees do not count.
        - Anyone who is on the employer's payroll must be counted, including full-time, part-time, and employees on leave of any kind, except furloughed employees while on furlough.
        - Temporary employees who are jointly employed by two separate employers (regardless of which entity's payroll the individual is on), and day laborers supplied by a temporary agency should also be counted.
        - Independent contractors do not count.
        - All common employees of joint employers must be counted as employees of each entity. A joint employer is an entity that is jointly and severally liable for payment of wages to a worker, even if the worker is on another entity's payroll for all or part of the time he or she performs work. The DOL recently updated the joint employer test under the Fair Labor Standards Act, which is the applicable test under FFCRA.
        - All employees of integrated employers must be counted together. The four factors of the integrated employer test are: (i) common management, (ii) interrelation between operations, (iii) centralized control of labor relations, and (iv) degree of common ownership/financial control. The entire relationship is reviewed in its totality; no single factor is dispositive.
        - Typically, a corporation (including its separate establishments or divisions) is considered a single employer and all of its employees must be counted together.
        - Where one corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers with respect to certain employees or are integrated employers.
        - Whether an employer satisfies either the joint or integrated employer test is fact-specific and could have ramifications in other contexts. To the extent FFCRA coverage depends on one of these tests, you should consult with counsel.

  - *Timing*. To determine coverage, an employer must count its employees at the time leave is taken. Therefore, whether an employer is subject to FFCRA's paid leave requirements (and is eligible for the associated tax credits) will change if its employee population fluctuates above or below 500.

- Notice. Covered employers must post a notice of employees' FFCRA rights in a conspicuous place on its premises. This requirement is satisfied by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. The DOL published a model notice and a specific set of Q&As regarding the notice.

- Furloughs or Worksite Closures. Employees who are fully furloughed (*i.e.*, not working at all) or laid off temporarily are not entitled to FFCRA leave. Additionally, employees may be furloughed or terminated while on paid sick or family leave, but only if the furlough or layoff would have affected the employee regardless of whether he or she took leave.

- Intermittent Leave. Employees may take paid sick and family leave intermittently (*i.e.*, in separate periods of time, rather than one continuous period) only if the employer and employee agree. Intermittent leave is permitted while an employee is teleworking for any qualifying reason. However, employees who report to a worksite may only take intermittent leave if the qualifying reason for the leave is due to school or childcare closures.

- Telework. Employees are only eligible for leave under FFCRA if they cannot work or telework. The DOL defines "telework" as "work the employer permits or allows an employee to perform while the employee is at home or at a location other than the employee's normal workplace."

  - *Able to Telework.* According to the DOL, "an employee is able to telework if: (a) his or her employer has work for the employee; (b) the employer permits the employee to work from the employee's location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work. Telework may be performed during normal hours or at other times agreed by the employer and employee." The only examples the DOL provides of "extenuating circumstances" are COVID-19 symptoms and a power outage, although there are no doubt others.

  - *Childcare*. Employees cannot take FFCRA leave that would otherwise be permitted for childcare if (i) another suitable person is available to care for the child; or (ii) if the employee is able to telework while caring for the child. Unfortunately, the DOL does not provide any guidance on when an employee would be considered able or unable to telework while caring for a child.

  - *Flexibility Encouraged.* However, the DOL encourages "employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related

reasons." In light of this directive, and the lack of guidance on when an employee could be considered unable to telework for childcare or other reasons, employers should be cautious before denying an employee FFCRA leave who provides a plausible explanation as to why he or she is unable to telework. At a minimum, the employer should engage in an open and constructive dialogue with the employee about his or her particular situation and try to find a solution that works for both parties.

- *Compensable Time*. All telework is compensable. That said, the DOL specifically noted that the "continuous workday" rule, *i.e.*, when all time between performance of the first and last principal activities is compensable work time, is not applicable when a non-exempt employee works at odd hours over the course of a day. Additionally, an employer is not required to compensate non-exempt employees for unreported hours worked while teleworking for COVID-19 related reasons, unless the employer knew or should have known about such telework.

- Interaction With Other Leave Entitlements. There are several important clarifications in the guidance about how FFCRA leave interacts with other leave entitlements.

  - *PSLA Leave*. Paid sick leave under the PSLA is in addition to other leave provided under federal, state, or local law, an applicable collective bargaining agreement, or the employer's existing company policy. Employers cannot force employees to exhaust any of their other paid time off (PTO) before using PSLA or vice versa. An employer may allow, but cannot require, employees who are on PSLA leave to supplement any shortfall between their PSLA pay and their regular earnings with PTO.

  - *FMLA*. An employee is only entitled to 12 weeks of FMLEA and FMLA leave in a 12-month period. In other words, if an employee exhausted some or all of his or her FMLA leave entitlement in the 12 months prior to his or her requested FMLEA leave, the FMLEA leave entitlement is limited or unavailable until the 12-month period expires. FMLA leave does not impact sick leave under the PSLA.

  - *Using PTO with FMLEA*. An employer may require employees to use accrued PTO or other sources of paid leave that would otherwise be available for childcare purposes concurrently with FMLEA leave, except during the first two weeks of FMLEA leave, if the employee is using PSLA leave during that time. Employees may voluntarily use accrued PTO to make up any shortfall between paid FMLEA leave and their regular earnings. An employer's tax credit for FMLEA leave is capped at $200 per day per employee, regardless of whether an employee is supplementing his or her earnings while on FMLEA leave with accrued PTO.

- Employee Documentation. Employees requesting paid sick or family leave are required to provide employers with documentation that includes (i) the employee's name, (ii) date(s) for which leave is requested, (iii) qualifying reason for the leave, and (iv) an oral or written statement that the employee is unable to work because of the qualified reason

for leave. Further information may be required depending on the qualifying reason. For example, if the qualifying reason is due to school or childcare closure, the employee must also document: (i) the name of the child being cared for, (ii) the name of the school, place of care, or childcare provider that has closed or become unavailable, and (iii) a representation that no other suitable person will be caring for the child during the period for which the employee will take leave. Employers are required to retain the documentation for four years, regardless of whether leave was granted or denied.

- Tax Documentation. To receive the tax credits under FFCRA, in addition to the employee documentation submitted in connection with a leave request, an employer should also keep the following: (i) documentation that shows how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave; (ii) documentation that shows how the employer determined the amount of qualified health plan expenses that the employer allocated to wages; (iii) copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS; and (iv) copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on Form 941). An employer should keep all records of employment taxes, including the records described above, for at least four years after the date the tax becomes due or is paid, whichever comes later. These documents and records should be available for IRS review.

- Exception for Small Businesses. FFCRA gave the DOL the authority to exempt small businesses with fewer than 50 employees from providing paid sick leave for childcare reasons or paid family leave where "such requirements would jeopardize the viability of the business as a going concern." To meet this exemption, an employer must show: (i) the 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," (ii) the requesting employee's absence "would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities," and (iii) there is no one who is "able, willing, and qualified, and who will be available at the time and place needed" to keep the business minimally operating. Importantly, this determination is made on a case-by-case basis.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Michael A. Katz
212 728 8204
mkatz@willkie.com

Andrew Spital
212 728 8756
aspital@willkie.com

Jill K. Grant
212 728 8774
jgrant@willkie.com