



# National Compliance Update

## USI EMPLOYEE BENEFITS

April 1, 2020

## DOL Issues Additional FFCRA Guidance

On March 27, 2020 and over the weekend, the DOL issued further guidance on the Families First Coronavirus Response Act (the "FFCRA") on their [COVID-19 and the American Workplace](#) website.<sup>1</sup> Notably, additional detail was provided with respect to:

- Specific substantiation and recordkeeping requirements related to leave requests
- Intermittent leave
- The small employer exception

A Spanish version of the required posted notices was also released.

Following is additional information on these and other topics that the DOL clarified.

### EMPLOYEE SUBSTANTIATION

- Employees must provide the employer with documentation in support of the reasons for paid sick leave which may include a copy of the federal, state, or local quarantine or isolation order related to COVID-19 or written documentation by a health care provider<sup>2</sup> advising the employee to self-quarantine due to concerns related to COVID-19.
- The employee must provide documentation in support of the expanded family and medical leave taken which may include a notice of closure or unavailability from the child's school, place of care, or childcare provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the employer from an employee or official of the school, place of care, or childcare provider.

---

<sup>1</sup> Please see USI's March 26, 2020 Compliance Update, "[DOL Issues Guidance for Families First Coronavirus Response Act](#)," for more information.

<sup>2</sup> The term "health care provider," for this purpose, means a licensed Doctor of Medicine, Nurse Practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

## EMPLOYER RECORDS

If the employer intends to claim a tax credit under the FFCRA, it should retain the employee's substantiating documentation. Employers should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason.

## INABILITY TO WORK

To qualify for FFCRA leave, the employee must experience an inability to work.

An inability to work means the employer has work for the employee and one of the qualifying reasons prevents the employee from being able to perform that work, either under normal circumstances at the employee's normal worksite or by means of telework.

- Different Work Hours. If the employer and employee agree that the normal number of hours will be worked, but outside of the normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work, and leave is not necessary.
- Reduced Work. If the employer reduces work hours because it does not have work for the employee to perform, the employee may not use FFCRA leave for the hours that he or she is no longer scheduled to work.
- Worksite Closure. If the employer closes while employees are on FFCRA leave, paid leave ceases. This is true even when the employer intends to reopen soon.
- Furloughs. If the employer furloughs an employee because it does not have enough work or business, the employee is not entitled to take FFCRA leave.

## UNEMPLOYMENT COMPENSATION

Employees provided FFCRA leave are not eligible for unemployment insurance. However, each state has its own unique set of rules. Individuals should contact their state workforce agency or state unemployment insurance office for specific questions about eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

## INTERMITTENT LEAVE

In general, intermittent leave is only an option while teleworking or for childcare related reasons.

- Intermittent leave while teleworking is allowed if the employer agrees and the employee is unable to telework his or her normal scheduled hours due to one of the qualifying reasons.
- For intermittent leave while not teleworking, paid sick leave is generally not allowed. Qualifying reasons related to COVID-19 must be taken in full-day increments until either (1) the full amount of paid sick leave is used or (2) the employee no longer has a qualifying reason for taking paid sick leave.<sup>3</sup> This limit is imposed because the intent of FFCRA is to provide such paid sick leave as necessary to keep employees from spreading the virus to others.
  - However, if the employer and employee agree, the employee may take paid leave intermittently for childcare-related reasons. For example, if the employee's child is at home because his or her school or place of care is closed, or childcare provider is

---

<sup>3</sup> If the employee no longer has a qualifying reason for taking paid sick leave before exhausting paid sick leave, he or she may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

unavailable, because of COVID-19 related reasons, the employee may take paid sick leave on Mondays, Wednesdays, and Fridays to care for the child.

The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs.

### **SUPPLEMENTING SICK LEAVE**

Employees may only supplement FFCRA leave with existing employer-provided leave if the employer and employee agree and only up to normal earnings. For example, if the employee is receiving 2/3 of normal earnings under the FFCRA and the employer permits, the employee may use preexisting employer-provided paid leave to receive the additional 1/3 of normal earnings.

### **JOB PROTECTION**

Employees generally have a right to return to the same or equivalent position after taking FFCRA leave. Employers are prohibited from firing, disciplining, or otherwise discriminating against employees because they take FFCRA leave. However, employees are not protected from employment actions such as layoffs, that would have affected them regardless of whether they took leave. Employers may also refuse to return employees to work in the same position if:

1. They are key employees as defined under the FMLA; or
2. If the employer has fewer than 25 employees and the employee took leave to care for his or her own son or daughter whose school or place of care was closed, or whose childcare provider was unavailable, and all four of the following hardship conditions exist:
  - the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19-related reasons during the period of leave;
  - the employer made reasonable efforts to restore the employee to the same or an equivalent position;
  - the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
  - the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after leave began, whichever is earlier.

### **MULTIPLE QUALIFYING REASONS**

FMLA leave is a total of 12 weeks in a 12-month period. This includes any expanded family and medical leave and including any time taken before April 1, 2020.

For example, assume the employee is eligible for traditional FMLA leave (e.g., for the employee's own serious health condition) and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. The employee therefore has 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, the employee would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. If the employer only becomes covered under the FMLA on April 1, 2020 (due to the FMLA expansion), this analysis does not apply.

Employees are entitled to paid sick leave regardless of how much leave is taken under the FMLA; paid sick leave 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.

Paid family leave and paid sick leave are not taken concurrently.

### **FULL-TIME EMPLOYEES**

For purposes of sick pay, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

For purposes of expanded family leave, there is no distinction between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

### **EFFECT ON MEDICAL COVERAGE**

- Under HIPAA, if an employee is absent from work on paid sick leave during the waiting period, his or her health coverage still takes effect after completion of the waiting period on the same day that the coverage would otherwise take effect.
- Under FMLA leave, health coverage must continue on the same terms as for active employees.
- The DOL FAQ states that health coverage must continue while an employee is on sick leave unless an employee fails to make any required contributions. Further guidance in this area would be helpful.

### **EMPLOYEE EXCEPTIONS**

Health care providers<sup>4</sup> and emergency responders<sup>5</sup> may be excluded by their employer from being able to take paid leave under the FFCRA.

To minimize the spread of the virus associated with COVID-19, the DOL encourages employers to be judicious when using these definitions to exempt health care providers and emergency responders from the provisions of the FFCRA.

### **POSTER**

Spanish versions of the required posted notices were also released, in addition to the previously issued English version. Both versions can be found at <https://www.dol.gov/agencies/whd/pandemic>.

### **SMALL EMPLOYER EXEMPTION**

An employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing paid sick leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons and expanded family and medical leave when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical 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;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of

---

<sup>4</sup> See Q&A 56 at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

<sup>5</sup> See Q&A 57 at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

the small business because of their specialized skills, knowledge of the business, or responsibilities; or

- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers taking advantage of this relief should document the reasoning, but should not send materials or other information to the DOL.

## **PUBLIC SECTOR EMPLOYERS**

Public sector employees are generally entitled to paid sick leave if they work for a public agency or other unit of government.<sup>6</sup> However, the Office of Management and Budget has the authority to exclude some categories of U.S. Government Executive Branch employees from taking certain kinds of paid sick leave. Health care providers and emergency responders may also be excluded.

For expanded family and medical leave, the employee must generally be an employee of a non-federal public agency.

## **MULTIEMPLOYER PLANS**

Employers part of a multiemployer collective bargaining agreement may satisfy their obligations under the FFCRA by making contributions to a multiemployer fund, plan, or other program in accordance with their existing collective bargaining obligations. These contributions must be based on the amount of paid family and medical leave to which each employee is entitled under the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under FFCRA. Alternatively, an employer may also choose to satisfy its obligations under the FFCRA by other means, provided they are consistent with bargaining obligations and collective bargaining agreement.

These contributions must be based on the hours of paid sick leave to which each of the employees is entitled under FFCRA based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under FFCRA.

The employer may satisfy its obligations under both Acts by other means, provided they are consistent with its bargaining obligations and collective bargaining agreement.

## **RESOURCES**

The new guidance, including the DOL's FFCRA Fact Sheets, Questions and Answers, Posters, and a Field Assistance Bulletin, can be found at <https://www.dol.gov/agencies/whd/pandemic>. Many of the tools on this page are offered in both English and Spanish. The DOL is regularly updating this list of FAQs and employers should visit this information often for answers to questions.

---

<sup>6</sup> For example, the government of the United States, a state, the District of Columbia, a territory or possession of the United States, a city, a municipality, a township, a county, a parish, or a similar government entity.

A dedicated USI website on public health emergencies can be found at <https://www.usi.com/public-health-emergencies/>.

**USI** [usi.com/locations](https://www.usi.com/locations)

This summary is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops. USI does not provide legal or tax advice. For advice specific to your situation, please consult an attorney or other professional.

These materials are produced by USI Insurance Services for educational purposes only. Certain information contained in these materials is considered proprietary information created by USI. Such information shall not be used in any way, directly or indirectly, detrimental to USI and/or their affiliates.

Neither USI nor any of its respective representatives or advisors has made or makes any representation or warranty, expressed or implied, as to the accuracy or completeness of these materials. Neither USI nor their respective representatives or advisors shall have any liability resulting from the use of these materials or any errors or omission therein. These materials provide general information for the use of our clients, potential clients, or that of our clients' legal and tax advisors.

IRS Circular 230 Disclosure: USI Insurance Services and its affiliates do not provide tax advice. Accordingly, any discussion of U.S. tax matters contained herein (including any attachments) is not intended or written to be used, and cannot be used, in connection with the promotion, marketing or recommendation by anyone unaffiliated with USI of any of the matters addressed herein or for the purpose of avoiding U.S. tax-related penalties.

© 2020 USI Insurance Services. All Rights Reserved.