

The Families First Coronavirus Response Act: Twenty (Or So) Questions With Dorsey's Labor and Employment Team

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Since the Families First Coronavirus Response Act ("FFCRA") was passed into law on March 18, 2020, crucial questions about the Act's requirements have remained unanswered. Yesterday (on March 26, 2020), the United States Department of Labor issued a new, expanded set of FAQs that provides further guidance on employers' paid leave obligations. Dorsey's Labor & Employment team has parsed the text of the FFCRA and the DOL's FAQs to answer many of your urgent questions.

Although the DOL's expanded FAQs provide a useful resource for employers, other questions remain unanswered, and employers must continue to analyze the application of the FFCRA to their individual facts and circumstances. Please do not hesitate to contact a Dorsey employment expert to help tackle the many employment-related issues created by the COVID-19 pandemic and federal, state and local efforts to respond.

Applicability

1. When does the FFCRA take effect? April 1, 2020.

2. Does the FFCRA apply to leave taken before April 1, 2020? No, the FFCRA only applies to leave taken between April 1, and December 31, 2020. In other words, neither form of leave in the FFCRA (or the related tax credits for businesses) is retroactive. Employers may provide leave benefits before April 1, 2020, but those benefits will not count against the employer's leave obligations under the FFCRA and the employer will not be eligible for tax credits to offset the value of paid leave benefits provided before April 1, 2020.

3. To which employers does the FFCRA apply? The FFCRA applies to employers with fewer than 500 employees. Employers that have fewer than 50 employees may request an exemption from the Secretary of Labor if compliance would jeopardize the viability of the business. To determine if a business has fewer than 500 employees, it should count

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employees on leave, temporary employees (including those who are jointly employed with another employer), and day laborers as of the day the employee requests the leave. Independent contractors do not count as employees for purposes of determining whether the employer clears the 500-employee threshold.

Generally speaking, separate corporate entities will be treated as separate employers for purposes of determining whether each entity is subject to the FFCRA. However, distinct business entities may be counted as a single employer in different circumstances. In situations such as parent-subsidiary companies, affiliated companies or companies that share or lease employees, the employees of distinct entities *may* be counted together if the distinct entities share common management, interrelation between operations, centralized control of labor relations, or some common ownership or financial control, or if the different entities share control over employees (i.e., hiring and firing authority, day to day supervision, and control over the terms of employment). These determinations turn on fact-specific application of multiple tests and should be made with the advice of counsel.

4. How does the FFCRA apply to employers with 500 or more employees? It does not. Private sector employers need only comply with the FFCRA if they have fewer than 500 employees. Larger employers may provide paid leave benefits consistent with those available to smaller employers under the FFCRA, but they are not required to do so and will not be eligible for tax credits to reimburse them for the paid sick-leave benefits they pay to employees.

5. Are employers with fewer than 50 employees exempt from the FFCRA? No. Small businesses are eligible to apply to the Secretary of Labor for an exemption if providing paid leave would “jeopardize the viability” of the business as a going concern, but they are not automatically exempt from the FFCRA’s paid leave provisions or exempt from liability. The DOL has not yet advised on how to apply for such an exemption, but in the FAQs it instructs employers to document the reasons why that employer believes it qualifies for an exemption.

6. Are employees who have been furloughed (or whose businesses have closed) entitled to FFCRA leave? No. Employees are only “unable to work” (including telework) if the employer has work for them to do and if one of the qualifying reasons listed in Question 8 applies. Thus, employees who are on a furlough (short-term layoff) are not eligible for paid leave as of the effective date of the furlough (they may be eligible for FFCRA paid leave benefits up to the effective date of a furlough, if after April 1). Similarly, if a business shuts down based on a business need or as required under a federal, state, or local “stay at home” order, its employees are not eligible for leave under the FFCRA after the effective date of the shut-down.

However, employees who are on a furlough or are out of work because of a shutdown may be eligible for unemployment insurance benefits.

Employers who furlough employees, but do not terminate their employment, should consult benefits counsel to ensure proper treatment of health and welfare benefits during

the period of furlough. Employers must also be aware of state requirements for furloughed employees. By way of example only, California employers generally must pay out accrued but unused PTO when an employee is furloughed, if such furlough will last longer than the current pay period.

Emergency Paid Sick Leave

7. Which employees are eligible for emergency paid sick leave? All employees of companies with fewer than 500 employees, as long as they satisfy the conditions discussed below.

8. When may an employee use emergency paid sick leave? Emergency paid sick leave is available for employees who are “unable to work (or telework) due to a need for leave” for any of six reasons:

(1) the employee is subject to a “Federal, State, or local quarantine or isolation order” related to COVID-19;

(2) the employee has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;

(3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(4) the employee is caring 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 due to COVID-19;

(5) the employee is caring for a son or daughter of such employee due to a school or child care closure or unavailability due to COVID-19 precautions; or

(6) the employee is experiencing a “substantially similar condition” to be specified by the Secretary of Health and Human Services.

9. How are the qualifying reasons for emergency paid sick leave likely to be interpreted? The six reasons that trigger the right to emergency paid sick leave, listed above, have been subject to interpretation questions since the FFCRA was passed. Particularly, the first reason, that the “employee is subject to a ‘Federal, State, or local quarantine or isolation order’ related to COVID-19” has been the source of confusion, since terms like “isolation” and “quarantine” do not typically appear in federal employment statutes.

The DOL’s March 26, 2020, updates to the FAQs shed some light on this topic. They suggest that a “quarantine” or “isolation” order is an order that an individual employee receives related to an exposure or suspected exposure to COVID-19. See Q. 21 (the “intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others”). Similarly, the second enumerated reason—that the “employee has been advised by a health care provider to self-quarantine due to

COVID-19-related concerns”—likely refers to advice related to an individual employee’s potential exposure to COVID-19, in addition to medical advice for an individual to self-quarantine due to an underlying health condition. The DOL’s guidance also suggests that emergency paid sick leave would not be triggered by compliance with the multiple “stay at home” orders issued by state governors and local officials, which limit excursions only to “essential” activities and business. See Q. 27 (stating that emergency paid sick leave would not be available if employees could not report to work “because [the employer] was required to close pursuant to a Federal, State, or local directive”).

The FFCRA has a broad remedial purpose to provide benefits to workers who are adversely impacted by COVID-19. Because several of the qualifying reasons for leave are ambiguously worded, an employer faces some risk if they deny an employee benefits, even under a reasonable interpretation of the statutory text. To mitigate this risk for employers, the DOL has established a 30-day temporary period of non-enforcement after the FFCRA takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.

10. How much emergency paid sick leave do employees receive? Effective immediately on April 1, full-time employees are eligible for up to 80 hours to use for the purposes described in Question 8. Part-time employees are entitled to leave in the amount of the average number of hours they work in a two-week period.

11. What about employees who earn overtime hours? Under the EFMLEA, an employer must pay the employee for the hours they would have normally been scheduled to work—even if that work exceeds 40 hours in a week. However, emergency paid sick leave need only be paid up to 80 hours over a two-week period, so an employee who regularly works overtime might reach the 80-hour cap before the end of the second week. Employers should also keep in mind the daily and aggregate caps discussed in Question 12 below.

12. How much will an employee be paid while taking emergency paid sick leave? The amount an employee receives will depend on the reason for his or her leave:

When taking leave for their own use, (reasons 1-3 in Question 8), employees are entitled to receive the greater of the regular rate of pay, the federal minimum wage in effect under the FLSA, or the applicable state or local minimum wage. For these employees, emergency paid sick leave wages are limited to \$511 per day, or \$5,110 in the aggregate, over the entire paid sick leave period.

When taking leave to care for others (reasons 4-6 in Question 8), employees are entitled to receive two-thirds of their pay, calculated from the greater of the three tests listed above. Emergency paid sick leave used to care for others is limited to \$200 per day, or \$2,000 in the aggregate, over the entire paid sick leave period.

13. Is an employee entitled to 80 hours for every qualifying reason under the FFCRA? No, he or she is entitled to 80 hours total, regardless of the reason(s) for his or her leave.

14. What if an employer gave an employee paid leave for COVID-19 before April 1? That leave would not be subject to the FFCRA, or eligible for reimbursement via tax credits. The FFCRA imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

15. Are employees who are teleworking able to use emergency paid sick leave benefits? Employees who can telework, but who are unable to perform their tasks or work the required hours because of one of the qualifying reasons listed in Question 8, are entitled to take emergency paid sick leave. To the extent that employees can telework while caring for their child, emergency paid sick leave is not available.

16. Are employees who are teleworking able to use emergency paid sick leave benefits on an intermittent basis? Teleworking employees who are eligible to take emergency paid sick leave may take such leave intermittently or on a reduced schedule, in any increment, provided they receive permission from their employer.

17. Are employees who are working at their usual work site able to use emergency paid sick leave benefits on an intermittent basis? Generally no. Unless the employee is teleworking, emergency paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently. However, if the employer and employee agree, emergency paid sick leave may be taken intermittently if the employee requests intermittent leave or a reduced schedule to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable.

18. If an employee's qualifying reason for using emergency sick leave ends before the employee has used all 80 hours, does the employee retain the balance for later use? Yes. If an employee no longer has a qualifying reason for taking emergency paid sick leave before the leave is exhausted, the employee may take any remaining emergency paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

Emergency FMLA ("EFMLEA") Leave

19. What is EFMLEA leave, and which employees are eligible? All employees of companies with fewer than 500 employees who have been employed for at least 30 calendar days by the employer are eligible for EFMLEA leave. EFMLEA leave is available for only one purpose: to allow an employee who cannot work (or telework) due to a need for leave to care for a son or daughter under 18 years of age because of a COVID-19-related school or child care closure or unavailability. EFMLEA leave consists of twelve total workweeks of leave; the first two weeks of leave are generally unpaid (but may be eligible for emergency paid sick leave at a two-thirds rate), and the remaining ten weeks are paid at a two-thirds salary level (prorated for part-time employees).

20. An employee's daughter is home because her school closed due to COVID-19. Is the employee eligible for emergency paid sick leave, EFMLEA leave, or both? Both. The employee could use his or her 80 hours of emergency paid sick leave in place of the two weeks of unpaid leave under the EFMLEA (at a two-thirds rate of pay), then use the

remaining 10 weeks of two-thirds paid leave under the EFMLEA.

21. Can an employee use the entirety of their EFMLEA leave, then use 12 weeks of FMLA leave? No. The EFMLEA only adds another permissible category of FMLA leave, as well as a requirement that the leave be paid at a two-thirds level (as opposed to unpaid leave) for the qualifying reason. Once an employee uses their 12 workweeks of leave—whether those 12 weeks are under the FMLA, the EFMLEA, or any combination—they have exhausted their FMLA/EFMLEA leave. Similarly, if an employee has used any or all of his or her FMLA leave in the previous 12-month period, the amount of leave available under the EFMLEA is reduced by the amount already used. If an employee has exhausted his or her FMLA leave for the previous 12-month period, the employee is not eligible for EFMLEA leave until the next 12-month period begins.

22. Are employees who are teleworking able to use EFMLEA leave benefits? Employees who can telework, but who are unable to do so because of the need to care for their child whose school or place of care is closed or child care provider is unavailable for COVID-19-related reasons, are entitled to take EFMLEA leave. To the extent that employees can telework while caring for their child, EFMLEA leave is not available.

23. Are employees able to use paid EFMLEA leave on an intermittent basis? Yes, with the employer's permission. The DOL encourages employers and employees to work together to agree on an adjusted work schedule.

General Questions

24. I am a business with fewer than 50 employees; how do I apply for an exemption? This is not yet known. The DOL has said it will address this issue in more detail in forthcoming regulations. However, businesses should begin documenting why they meet the criteria for an exemption.

25. How does the FFCRA apply to employees who are able to telework for all or part of their normal workday? Employees who are permitted and able to telework (i.e., work from home or at a location other than their normal workplace) must be paid their normal wages and are not compensated under the paid leave provisions of the FFCRA.

26. What kind of documentation do employees need to provide, and do employers need to keep, relating to the emergency paid sick leave and EFMLEA leave? Employees must provide documentation to support the claim that they are unable to work or telework for a qualifying reason. For emergency paid sick leave, such documentation 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 advising you to self-quarantine due to concerns related to COVID-19. For EFMLEA leave, such documentation may include a notice of closure or unavailability from the applicable school, place of care, or child care provider.

Employers granting paid leave to employees under the FFCRA must retain the following:

1. The employee's name;
2. The qualifying reason for requesting leave;
3. A statement that the employee is unable to work, including telework, for that reason;
and
4. The date(s) for which leave is requested.

Employers must also retain the documentation provided by the employee, just as they would with a traditional FMLA request. Employers that will seek tax credits or other reimbursement from the IRS must retain this information and consult the applicable IRS forms and procedures, which are expected to be released in the coming days.