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## **Families First Coronavirus Response Act Supplemental Guidance**

April 7, 2020

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The Families First Coronavirus Response Act (“FFCRA” or the “Act”) became effective on April 1, 2020. For a detailed description of the Act, see our Updated Guidance, attached.

Between March 24 – April 1, 2020, the Department of Labor (“DOL”) issued various guidance as well as regulations interpreting the FFCRA. (29 C.F.R. § 826.10 et seq.) This Supplemental Guidance summarizes key clarifications and additions.

### **Eligibility**

The DOL guidance, including the recently published regulations, clarifies that FFCRA benefits are limited to employees whose worksites remain open and who (1) continue to have work available but are unable to work, including remotely, due to COVID-19; or (2) were furloughed solely due to a state or local quarantine or isolation order. No employee whose workplace is closed is eligible for emergency paid sick leave or emergency family leave. In addition, employees furloughed due to lack of work are similarly ineligible for both types of emergency leave.

### **Quarantine or Isolation Order for Emergency Paid Sick Leave**

While the FFCRA lists inability to work because of a “Quarantine or Isolation Order” as the first of six qualifying reasons that trigger emergency paid sick leave, that term was not defined in the statute. The DOL regulations now define “Quarantine or Isolation Order” for purposes of the FFCRA as any federal, state, or local governmental order, including quarantine, isolation, containment, shelter-in-place, or stay-at-home order, that causes an employee to be unable to work. Again, an employer must be open, operational, and have work available for the employee. Under that circumstance, an employee who is prevented from working solely due to a governmental order—and not for any other extenuating circumstance—will be entitled to emergency paid sick leave. The DOL regulations on this point conflict with the current IRS guidance, which states that no corresponding tax credit is available for FFCRA payments made to furloughed employees. We expect further clarification on this issue in the days to come.

### **Caring for a Child Whose School or Child Care Provider is Closed or Unavailable**

Emergency paid sick leave is triggered when an employee is unable to work or telework because the employee must care for a child whose school or child care provider is closed (or is unavailable) because

of COVID-19. This is the only reason that also triggers an employee's entitlement to emergency family leave under the Act.

Under the new DOL regulations, emergency paid sick leave for this event and emergency family leave are only available when there is no alternative "suitable person" available to care for the child. The DOL explained that a "suitable person" is a co-parent, co-guardian, or another person who regularly cares for the child.

The DOL also explained the interaction between emergency paid sick leave taken for this qualifying reason and emergency family leave:

- Emergency paid sick leave will run concurrently with emergency family leave for the first two unpaid weeks of emergency family leave.
- Although emergency family leave is expressed as ten days in the statute, to harmonize this with emergency paid sick leave, this period of time is interpreted as two weeks (regardless of an employee's schedule).
- An employee is entitled to a maximum of 12 weeks of paid leave at 2/3 the employee's regular rate, subject to an employee's available leave under the Family and Medical Leave Act ("FMLA") for the current year. Paid sick leave, combined with FMLA, is capped at \$200 per day and \$12,000 in the aggregate.
- If an employee has previously exhausted FMLA leave for the current year, the employee is still eligible for the two weeks of emergency paid sick leave.

Under the pre-existing FMLA regulations, FMLA leave is considered to be "paid" if the employee is receiving benefits during the leave such as disability payments or workers' compensation insurance. If the FMLA leave is "paid," the general rule is that the employer may not then require the employee to use any other accrued leave (sick, vacation, paid time off) to supplement the remaining unpaid portion of the leave.

The new DOL regulations now contain a possible exception to this general rule. Section 826.23 allows an employer to require an employee to use leave that would be available to an employee in the event of a school closure or lack of day care to supplement the otherwise unpaid portion of emergency family leave. Under most employer policies, an employee could use vacation or paid time off for this type of absence, but not sick leave. Thus, an employer could require an employee to use vacation or paid time off to supplement the unpaid portion of the leave.

Unfortunately, the new regulations contain an internal inconsistency. Section 826.70 follows the pre-existing general rule, which prohibits the employer from requiring the use of any accrued leave to supplement the otherwise unpaid portion. Until this inconsistency is resolved, we recommend that employers continue to follow the general rule and not require the employee to use accrued leave to supplement the otherwise unpaid portion of the FMLA leave.

### **Calculating Amount of Emergency Paid Sick Leave**

A full-time employee is entitled to a maximum of 80 hours of emergency paid sick leave under the FFCRA. An employee is considered full-time if the employee is regularly scheduled to work at least 40 hours per workweek. For an employee with a variable schedule, the employer must look to the average weekly hours that an employee worked in the six months preceding the employee's first day using emergency paid sick leave. If the employee has worked, on average, at least 40 hours per week, then the employee should be treated as a full-time employee who is entitled to 80 hours of emergency paid sick leave.

A part-time employee is any employee who is regularly scheduled to work fewer than 40 hours per workweek, or who has worked fewer than 40 hours per week on average in the case of an employee with a variable schedule. A part-time employee is entitled to the number of hours the employee typically works over a two-week period.

For a part-time employee with a variable schedule, the regulations provide two permissible methods to calculate the employee's emergency paid sick leave hours. First, an employer may compute a daily average of hours worked over the six-month lookback period and multiply that by 14 days. The second method, which better aligns with the text of the FFCRA, is to calculate a weekly average number of hours worked in the six-month lookback period and multiply that by two.

The first method can lead to a surprisingly high amount of emergency paid sick leave. For example, an employee who has worked six hours a day, on average, would be entitled to 80 hours of emergency paid sick leave ( $6 \times 14 = 84$ , but sick leave is capped at 80 hours). In our opinion, the DOL should have used 10 as the multiplier, not 14. Thus, we recommend employers use the second method to calculate the number of paid sick leave hours available to a part-time employee with a variable schedule.

### **FFCRA Rate of Pay**

The DOL's regulations are also inconsistent with the FFCRA's plain language regarding the rate of pay for emergency paid sick leave and emergency family leave. The Act states that FFCRA leave will be calculated using an employee's regular rate of pay, as defined in the Fair Labor Standards Act ("FLSA").

However, the FFCRA regulations create a new calculation method not included in the FLSA. The DOL has instructed employers to pay FFCRA leave at an hourly rate calculated by dividing total compensation by total hours worked over the full pay periods in the six months preceding the first day of the employee's leave. "Total compensation" means all compensation includable in an employee's regular rate of pay for overtime purposes. "Total hours worked" similarly means hours worked used to calculate the overtime regular rate (and thus do not include hours of vacation, sick leave, jury duty, holidays, etc.). The usual exclusions from the overtime regular rate of pay calculation should be used in calculating an employee's FFCRA rate of pay.

It is possible that, under the DOL's new calculation method, an employee's FFCRA rate of pay may be lower than the employee's current regular rate for overtime purposes. This would be true, for example, if an employee received a raise in the past six months. The most prudent approach is for employers to calculate the rate of pay using each method and to pay emergency paid sick leave and emergency family leave under the FFCRA at the higher of the two rates.

When calculating an employee's pay for emergency paid sick leave and emergency family leave, employers should keep in mind both the daily and aggregate tax credit limits. In a situation in which an employee will hit the daily cap of \$200 for emergency family leave, an employer can permit an employee to supplement wages for that day using employer-provided accrued leave, such as vacation, that is available for an employee to care for a child.

### **Intermittent Leave**

Under the FFCRA, an employee does not have a right to take intermittent leave for either emergency paid sick leave or emergency family leave. This differs from regular FMLA leave, which allows intermittent leave.

Employers can permit employees to take FFCRA leave intermittently or employers can require an employee to use FFCRA leave only in full-day increments. However, requiring full-day increments of FFCRA leave may be administratively more difficult (and more costly) than permitting intermittent leave, as all California employers are required to do with state-mandated sick leave. Notably, employees who must physically report for work are required to use full-day increments for all emergency paid sick leave qualifying events other than to care for a child whose school or childcare provider is closed due to COVID-19. This requirement furthers one of the FFCRA's purposes, which is to limit the spread of COVID-19 in the workplace.

### **Poster**

The DOL issued the required [workplace poster](#). This must be posted in a conspicuous place with other workplace postings. Alternatively, it may also be emailed or posted on an employee website, internal or external, to satisfy the posting requirement. Employers with employees who have been furloughed or who are working remotely should both post a physical copy and distribute the poster electronically as a best practice. Though not required regardless of the number of Spanish-speaking employees at a worksite, the DOL also issued a [Spanish language poster](#).

### **Exemption for Small Employers (Under 50 Employees)**

The DOL's regulations provide the parameters of when a small business with fewer than 50 employees may be exempt if paying the benefits would "jeopardize the viability of the business as a going concern."

This exemption applies if an officer of the business determines one or more of the following to be true:

1. Providing emergency paid sick or family leave would cause expenses to exceed business revenue and cause the business to cease operating at a minimal capacity;
2. The absence of the employee(s) requesting leave would entail substantial risk to the financial health or operations of the business; ***or***
3. There are not enough available workers who are willing, able, and qualified to work at the time and place needed, and the work is needed for the business to operate at minimal capacity.

This determination is made internally; there is no application process, and no documentation need be submitted to the DOL. However, documentation should be maintained in the event of a DOL audit.

Importantly, this provision does not categorically exempt a business that makes one of the above determinations. Instead, the exemption applies only to the specific employee(s) to which one or more criteria apply.

### **Documentation and Certification**

An employer is not required to approve emergency paid sick or family leave under the FFCRA if an employee fails to provide documentation sufficient for the employer to prove its entitlement to the corresponding tax credit. At a minimum, the employee must provide the employee's name, the dates of the leave, the qualifying reason for the leave, and a statement that the employee is unable to work (or telework) because of that reason. The DOL regulations do not prohibit an employer from requesting a note from a health care provider. We recommend requiring these notes as long as medical providers remain able to issue them.

There are other specific documentation requirements depending on the nature of the leave, including the name of the health care provider, details about the employee's child care or school closure, as well as a statement that no other suitable person is available to care for the child.

An employee who requests emergency paid sick leave for the employee's own medical condition related to COVID-19 or that of a family member must comply with the existing FMLA medical certification requirements.

### **Other Key Takeaways**

- There is a temporary grace period on DOL enforcement until April 17 for employers who make reasonable efforts to comply with the law.
- The DOL expanded the definitions of "health care provider" and "emergency responder" exemptions.

- Employers are not required to, but they are permitted to, use traditional FMLA paperwork to notify employees of eligibility and rights and responsibilities associated with the leave.
- Violation of the emergency paid sick leave provisions will be treated as a minimum wage violation under the Fair Labor Standards Act.
- Violations of the emergency family leave provisions are subject to penalties under the FMLA.

If you have questions regarding this Supplemental Guidance or our complete Updated Guidance, please contact an attorney in our Employment Law group by phone at (916) 321-4444 or via email.

Julia Jenness	<a href="mailto:jjenness@boutinjones.com">jjenness@boutinjones.com</a>
Kim Lucia	<a href="mailto:klucia@boutinjones.com">klucia@boutinjones.com</a>
Lissa Oshei	<a href="mailto:loshei@boutinjones.com">loshei@boutinjones.com</a>
Jim McNairy	<a href="mailto:jmcnairy@boutinjones.com">jmcnairy@boutinjones.com</a>
Bruce Timm	<a href="mailto:btimm@boutinjones.com">btimm@boutinjones.com</a>
Errol Daus	<a href="mailto:edaus@boutinjones.com">edaus@boutinjones.com</a>
Andrew Ducart	<a href="mailto:aducart@boutinjones.com">aducart@boutinjones.com</a>
Kendall Fisher	<a href="mailto:kfisher@boutinjones.com">kfisher@boutinjones.com</a>