

# HRW CLIENT ALERT

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## **DOL Publishes Additional Question & Answer Guidance Regarding the FFCRA**

The United States Department of Labor (“DOL”) has provided additional clarifying information prior to the April 1 effective date of the Families First Coronavirus Response Act (“FFCRA”) by adding new “question and answers” about the FFCRA. This updated guidance, which is available [here](#), provides much needed clarification and direction regarding a variety of key areas:

### **Intermittent Leave**

According to the DOL’s guidance, employers are not required to provide FFCRA leave on an intermittent basis. However, an employer may agree to provide FFCRA leave intermittently except when an employee is working at their usual worksite (as opposed to teleworking) and needs leave for one of the following reasons:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Intermittent leave is not available in these circumstances because “the intent of the FFCRA is to provide such paid sick leave as necessary to keep [an employee] from spreading the virus to others.” Accordingly, leave in these instances must be taken in full day increments.

### **Furloughed Employee (and whether they can apply for paid leave)**

Employees furloughed on or after April 1 are not eligible for FFCRA paid leave. The guidance also states that “[if] prior to the FFCRA’s effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave.” Furloughed employees may, however, be eligible for unemployment benefits.

Similarly, if an employer reduces an employee's work hours because it does not have work for the employee to perform, the employee may not use paid leave under the FFCRA for hours that the employee is no longer scheduled to work.

## **Reinstatement Rights and Non-Discriminatory Layoffs**

New guidance confirms that an employee is not protected from employment actions such as layoffs that would have affected the employee regardless of whether the employee had taken FFCRA leave. As stated by the DOL, "[t]his means your employer can lay you off for legitimate business reasons, such as the closure of your worksite" so long as the employer can demonstrate that the employee would have been laid off even had the employee not taken leave.

## **Documentation Requirements to Support FFCRA Leave**

If an employee wishes to take FFCRA leave, an employer must require the employee to provide "appropriate documentation" to support the reason for leave, including:

- Employee's name,
- The qualifying reason for which leave is needed,
- A statement that the employee is unable to work (including telework) for that qualifying reason,
- The date(s) for which leave is requested, and
- Documentation of the reason, which may include:
  - The source of any quarantine or isolation order,
  - Written documentation by a health care provider advising the employee to self-quarantine,
  - In the case of expanded FMLA leave, "notice of closure or unavailability from [the employee's] child's school, place of care, or child care 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 employee] from an employee or official of the school, place of care, or child care provider.

If an employer plans to seek a tax credit under the FFCRA, the employer should retain this documentation. Employers should consult applicable IRS forms, instructions and information about the procedures for claiming a tax credit, which may include additional information about the documentation needed to support the credit.

## **Application of Accrued Time to FFCRA Paid Leave**

Employers may allow, but cannot require, an employee to supplement the amount the employee receives from paid leave under the FFCRA with other employer-provided paid leave, up to the employee's normal earnings. For example, if Rory needs leave to care for a child due to a school closure, Rory will receive 2/3 of their normal pay (up to \$200/day or \$12,000 in the aggregate) and Rory's employer may allow Rory to supplement that amount with other paid leave under the employer's regular paid time off or leave policies (e.g., Massachusetts Earned Sick Time, vacation time, personal time, PTO, etc.). Employers will not receive tax credits for any supplemental amounts an employee elects to use.

## **Paid Leave and Unemployment**

If an employee is on paid FFCRA leave, the employee is not eligible for unemployment benefits. However, partial unemployment benefits may be available to employees whose hours or pay have been reduced.

## **“Health Care Workers” and “First Responders” Excluded from the FFCRA**

An employee may be exempted from coverage under the FFCRA if the employee is a “health care provider” or “emergency responder.” The DOL has finally provided guidance as to what these terms mean. The definitions in DOL’s guidance appear below, and the DOL has encouraged employers to be “judicious” when applying these definitions:

A health care provider is:

anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

An emergency responder is:

an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

## **Small Business Exemption for Child Care-Related Leave**

A small business (under 50 employees) may claim an exemption from the FFCRA if (1) the reason for an employee's leave request is child-care related (i.e., closure of the child's school or place of care, or unavailability of care provider, due to COVID-19 related reasons); (2) allowing such child care-related leave would jeopardize the viability of the small business as a going concern; and (3) "an authorized officer of the business" has determined one of the following:

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

### **April 1, 2020 Effective Date**

DOL guidance continues to indicate that the paid leave provisions of the FFCRA will be effective April 1, 2020. There have been no regulations promulgated to this effect, but the IRS has issued guidance indicating that employers will be able to take a tax credit as of April 1, 2020. Accordingly, employers should prepare to provide FFCRA paid leave as of April 1, 2020.

### **For Questions/More Information**

For any questions, including compliance assistance, please contact any member of the HRW COVID-19 Team:

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