

March 25, 2020

**UPDATE:**  
**FIRST ROUND OF DEPARTMENT OF LABOR PUBLISHED GUIDANCE**  
**FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

On March 24, 2020, the U.S. Department of Labor’s Wage and Hour Division published its first round of guidance to assist employers with complying with the Families First Coronavirus Response Act (“FFCRA”). The DOL has indicated that it will continue to provide guidance on a rolling basis going forward, so watch for additional guidance in the future.

The DOL’s first round of guidance includes a fact sheet for employers (available [here](#)) and a questions and answers document (available [here](#)). Among other things, the guidance clarifies (1) how employees are counted for purposes of the 500-employee threshold; (2) how to calculate the regular rate of pay, including for employees who receive commissions, tips, or piece rates; and (3) how emergency paid sick leave will interact with FMLA emergency childcare leave. Finally, on March 25, 2020, the DOL published its model FFCRA notice (available [here](#)).

The guidance is fairly straightforward and will not be repeated unnecessarily here, but the following are a few key takeaways:

- **Start Date:** The start date for the FFCRA is now **April 1, 2020**.
- **Emergency Paid Sick Leave for Caretakers:** All emergency sick leave taken in order to care for an individual who is subject to a quarantine or isolation order or to care for a child because the child’s school or place of care has been closed due to COVID-19 precautions—referred to in our [March 19, 2020 update](#) as “Category 2” leave—will be paid at two-thirds the employee’s regular rate of pay. The Act originally appeared to make a distinction between payment rates for family members vs. other individuals, but the guidance clarifies that the rate is the same for all caretaking responsibilities.
- **Clarification Regarding Full-Time Employees:** With regard to full-time employees who are regularly scheduled to work more than 40 hours per week, the guidance clarifies that employers only need to provide paid emergency sick leave for up to 80 hours over a two-week period. In other words, an employee who is regularly scheduled to work 50 hours each week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. (Contrast this with the FMLA Expansion Act, which requires employers to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.)

Using the same analysis, full-time employees who are regularly scheduled to work *fewer* than 40 hours per week presumably will be entitled to the same type of calculation. In other words, a full-time employee who is regularly scheduled to work 35 hours each week would be entitled to take 35 hours of paid sick leave in the first week, 35 hours of paid sick leave in the second week, and 10 hours of paid sick leave in the third week.

Note that these examples do not apply to employees who are classified as part-time employees. Part-time employees are only entitled to sick leave in an amount equal to the number of hours the employee works on average over a two-week period.

- Intermittent Leave: The Emergency Paid Sick Leave Act appears to contemplate that paid emergency sick leave may be used intermittently, but it remains an open question whether FMLA emergency childcare leave may be used on an intermittent basis, similar to other types of FMLA leave. We believe that intermittent use of FMLA emergency childcare is likely, given the purpose of the FMLA Expansion Act, but we will provide any additional guidance on that issue when it becomes available.
- Small Employer Hardship Exemption: The DOL anticipates providing more substantive guidance on the hardship exemption available to small employers in April 2020, which exempts small businesses with fewer than 50 employees from providing paid emergency sick leave and FMLA emergency childcare leave if doing so would jeopardize the viability of the business as a going concern. We know this is an important issue for many small employers and are continuing to monitor developments closely. In advance of providing more substantive guidance, however, the DOL has signaled two things about the exemption: (1) employers will be required to document why their businesses meet the to-be-issued criteria; and (2) employers will not be required to submit materials to the Department of Labor in order to take advantage of the small business hardship exemption.
- No Offset for Pre-FFCRA Leave: We noted in our [March 19, 2020 update](#) there was an open question whether employers who voluntarily offered paid leave to employees for reasons covered by the Emergency Paid Sick Leave Act would be given credit for that leave once the Act went into effect. The DOL guidance clearly states the answer is no. Employers will be required to offer the full amount of paid emergency sick leave mandated by the Act on April 1, 2020.
- Tax Credits: The DOL reiterates in its guidance that employers will be able to recoup 100% of every dollar of required paid leave, plus the cost of the employer's health insurance premiums during leave, through a refundable tax credit. The DOL directs employers to the Department of Treasury's website for more information, but as of the date of this posting, the Treasury has yet to post guidance regarding administration of the tax credits. We will provide additional guidance regarding tax credits when it is available.

- 30 Day Grace Period: Employers who fail to comply with the FFCRA are subject to penalties under the Fair Labor Standards Act and Family and Medical Leave Act, but the DOL will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect (i.e., through April 30, 2020) for all employers who act reasonably and attempt to comply with the FFCRA in good faith. Good faith exists when (1) the employer remedies the violations and makes the employee whole as soon as practicable; (2) the violations are not willful; and (3) the Department receives a written commitment from the employer to comply with the Act in the future. We expect additional guidance with regard to this last requirement (including where to submit the written commitment) in future guidance.
- Notice Posting: Every covered employer must post and keep posted the DOL's notice referenced above in a conspicuous place on the employer's premises. For employers with workforces who telework, the DOL has stated that an employer may satisfy the posting requirement by emailing or directly mailing the notice to employees, or by posting the notice on an employee information internal or external website.

*The foregoing legislative update is designed to be accurate and authoritative but is not intended to provide and should not be construed as providing legal advice or as creating any attorney-client relationship with the author or Parr Brown Gee & Loveless, P.C. For legal advice regarding the Families First Coronavirus Response Act, you should consult with your legal counsel.*