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UPDATE:
DEPARTMENT OF LABOR & INTERNAL REVENUE SERVICE GUIDANCE
REGARDING THE FFCRA

On April 2, 2020, the U.S. Department of Labor’s Wage and Hour Division published a temporary rule (available [here](#)) issuing regulations pursuant to the Families First Coronavirus Response Act (“FFCRA”). The Internal Revenue Service (“IRS”) has also issued guidance (available [here](#)) regarding COVID-19 related tax credits available to employers who are required to provide paid leave under the FFCRA.

Much of the temporary rule repeats prior guidance published by the DOL, but there are a few new takeaways worth mentioning:

Temporary Rules Regarding the FFCRA

- **Child Care Provider.** The temporary rule states that under the FFCRA, an eligible child care provider **need not** be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee’s child. (§ 826.10). This temporary rule appears to expand the protections afforded under the FMLA Expansion Act, which expressly defines child care provider as “a provider who receives compensation for providing child care services on a regular basis.”
- **Quarantine or Isolation Order.** For purposes of the Emergency Paid Sick Leave Act, the temporary rule clarifies that a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. A quarantine or isolation order also includes when a federal, state, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them. (§ 826.10).

Note that an employee may take emergency paid sick leave due to a quarantine or isolation order only if the employee would be able to perform available work but for the order (i.e., the employer still has work for the employee to perform). An employee subject to a quarantine or isolation order may **not** take emergency paid sick leave if the

employer does not have work for the employee, whether because the employer has been forced to close due to a government order or for other reasons. (§ 826.20(2)).

- Caring for an Individual. The temporary rule clarifies that caring for an “individual” means caring for the employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. It does not include persons with whom the employee has no personal relationship. The temporary rule also makes clear that an employee caring for an individual may not take paid emergency sick leave if the employer does not have work for the employee. (826.20(5)).
- Documentation. The DOL briefly published guidance regarding what type of documentation an employee would be required to provide to his or her employer in order to take paid emergency sick leave or FMLA childcare leave, but took the guidance down shortly after publication without explanation. The temporary rule now clarifies that employees must provide the following when taking either type of leave under the FFCRA:
 1. The employee’s name;
 2. The date(s) for which leave is requested;
 3. An oral or written statement that the employee is unable to work because of a qualified reason for the leave; and
 4. The qualifying reason for the leave.
 - a. If the reason is because the employee is subject to a federal state, or local quarantine or isolation order related to COVID-19, the employee must also provide the name of the government entity that issued the quarantine or isolation order.
 - b. If the reason is because the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, the employee must also provide the employer with the name of the health care provider who advised the employee to self-quarantine.
 - c. If the reason is because the employee is caring for an individual who is subject to an federal state, or local quarantine or isolation order related to COVID-19 or has been directed by a healthcare provider to self-quarantine due to concerns related to COVID-19, the employee must also provide the name of the government entity that issued the quarantine or

isolation order or the name of the health care provider who advised the individual to self-quarantine.¹

- d. If the reason is because the employee needs to care for a son or daughter whose school or place of care has closed for reasons related to COVID-19, the employee must also provide (1) the name of the child being cared for; (2) the name of the school, place of care, or childcare provider that has closed or become unavailable; and (3) a representation that no other suitable person will be caring for the child during the FMLA childcare leave period.

In addition to this information, an employer may request that an employee provide additional material needed for the employer to support a tax request for credits pursuant to the FFCRA. (§ 826.100).

IRS Guidance Regarding FFCRA Tax Credits

On the topic of tax credits, new guidance from the IRS informs us that *in addition to* the information employees must provide to their employers under the DOL's temporary rule, for an eligible employer to substantiate eligibility for sick leave and FMLA childcare credits, the employer *must also* do the following:

- Obtain the employee's request for emergency paid sick leave or FMLA childcare leave in writing. Although a verbal statement that the employee is unable to work for a qualifying reason may be enough to satisfy the DOL, it is not sufficient for the IRS. We presume the DOL will not object to an employer requiring an employee to provide a written request (in addition to any verbal request) for purposes of adequately documenting the employer's entitlement to an FFCRA tax credit.

¹ This Section 826.100(d) discusses what documentation an employee who is acting as a caretaker must provide when seeking leave under Section 826.20(a)(1)(iii), which refers to leave an employee who is experiencing symptoms of COVID-19 must take in order to seek a medical diagnosis from a healthcare provider. We presume Section 826.100(d) intended to cite Section 826.20(a)(2)(iv), which addresses leave taken for caretaking purposes, and will be corrected when the final version of the rule is published. Section 826.100 does not address what documentation, if any, is required for leave taken when an employee is experiencing symptoms of COVID-19 and needs leave to seek a medical diagnosis under Section 826.20(a)(1)(iii). This is likely an oversight that will be corrected in subsequent guidance, and we anticipate that an employee will be required to provide the name of the health care provider from whom the employee sought a medical diagnosis. For now, however, the temporary rule does not require an employee to submit additional information when he or she is experiencing symptoms of COVID-19 and needs leave to seek a medical diagnosis.

- Require an employee to include not only a statement of the COVID-19 related reason the employee is requesting leave, but also provide written support for such reason. The IRS has not yet provided guidance on what written support would be sufficient. Previous guidance posted by the DOL (which it later took down) indicated that documentation could include a copy of the federal, state, or local quarantine or isolation order related to COVID-19 applicable to the employee, or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19. However, we will await further definitive guidance from the IRS on this written support requirement.
- Require an employee to include in his or her written request a representation that the employee is unable to work (including by means of telework) because of the COVID-19 related reason.
- If the employee requests leave to care for an individual who is subject to quarantine or who has been advised to self-quarantine, the employee must identify (1) the name of the individual, and (2) the individual's relation to the employee.
- If an employee requests leave to care for a son or daughter due to a school closure or because a child care provider is unavailable, the employee should include the age(s) of the child(ren) to be cared for.
- If the employee is unable to work or telework because of a need to provide care for a child older than 14 years of age during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care.

(IRS FAQ [No. 44](#)).

The IRS also advises that for purposes of substantiating eligibility for FFCRA tax credits, an employer should create and maintain records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
3. Copies of any completed Forms 7200 (Advance of Employer Credits Due To COVID-19) that the employer submitted to the IRS.
4. Copies of the completed Forms 941 (Employer's Quarterly Federal Tax Return) that the employer submitted to the IRS. (For employers that use third party payers to meet

their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

(IRS FAQ [No. 45](#)).

We encourage you to review the Department of Labor's website at www.dol.gov and the IRS's website at www.irs.gov for additional guidance regarding the FFCRA and other resources on preparing your workplace for the COVID-19 virus.

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.