



RECENT DEVELOPMENT

# DOL Releases Q&A Guidance on Families First Coronavirus Response Act

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On March 24, 2020, the U.S. Department of Labor released an initial set of questions and answers (Q&As) concerning the recently enacted Families First Coronavirus Response Act (FFCRA). The Q&As focus on the law's provisions relating to new emergency paid sick leave (EPSL) and emergency paid Family and Medical Leave Act benefits (FMLA+). As it continues to accept feedback regarding the FFCRA, the DOL may release additional Q&As on more issues, or clarify issues in the existing guidance, before the law takes effect on April 1, 2020.

Signed into law on March 18, 2020, the FFCRA generally provides that private-sector employers with 499 or fewer employees, and covered public entities of any size, must provide eligible employees with up to 80 hours of EPSL (subject to certain dollar amount caps) for certain specified reasons relating to the COVID-19 public health crisis. The law also requires these employers to provide up to 12 weeks of FMLA+ leave (the first two of which are unpaid, the remaining 10 weeks paid at 2/3 of the employee's regular rate, again, subject to certain caps), where an employee is unable to work (or telework) due to a need to care for a child if the child's school or place of child care has been closed or is unavailable due to the current public health emergency. Employers will receive a refundable tax credit from the federal government for the full cost of these leaves provided to eligible employees.

The DOL's Q&As provide additional information, although many questions are yet unanswered, and further guidance and regulations implementing these laws are expected in the near future.

***Effective Date: April 1, 2020***

First and foremost, the Q&A guidance sets the effective date of the new law as **April 1, 2020**. It is scheduled to expire on December 31, 2020.

***Employee Threshold: When Does an Employer Count its Workforce, and Which Employees Count?***

As noted, the law is applicable to a private-sector employer with 499 or fewer employees. The Q&As provide additional information as to how employers may calculate whether they fall under that threshold.

The guidance states that an employer should calculate its coverage threshold at the time an employee's leave is to be taken. This may present a practical challenge for employers whose headcount may fluctuate above and below 500 during the period employees are seeking leave under the statute. It further specifies that employers should count:

- full-time and part-time employees within the United States;
- employees on leave;
- temporary employees who are jointly employed by the employer and another company (regardless of whether the jointly-employed employees are maintained on only one employer's payroll); and
- day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship).

Workers who are independent contractors under the Fair Labor Standards Act (FLSA) are not considered employees for purposes of the threshold (nor are they eligible for benefits under the new law).

### ***Are Related Businesses Aggregated for the Threshold Count?***

The guidance states that typically, a corporation (including its separate establishments or divisions) will be considered a single employer and all of its employees must each be counted towards the employee threshold for that single corporation. Where a corporation has an ownership interest in another corporation, the two corporations are still typically separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether EPSL and FMLA+ leave must be provided.

In addition, the DOL's Q&As adopt the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA) to determine whether two or more entities are separate, or combined, for FMLA+ purposes. Those factors under the FMLA include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/control. See 29 CFR 825.104(c)(2). If two entities constitute an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of FMLA+ requirements.

### ***Small Business (Fewer than 50 Employees): Future Regulations Expected***

The law provides that businesses with fewer than 50 employees may be able to obtain an exemption when offering these leave benefits would jeopardize the viability of the business as a going concern. The DOL's guidance does not offer further information as to the exemption at this time, other than to say that employers should document why this standard applies to them. The DOL indicates that detailed regulations will be forthcoming.

### ***Calculating Hours Leave Required for Part-Time Employees; Overtime Hours Included in Scheduled Hours, Subject to 80-Hour Cap***

Under the law, part-time employees are entitled to leave for their average number of work hours in a two-week period. For purposes of determining this number, the DOL's guidance requires employers to calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, the DOL's guidance allows employers to use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, the DOL instructs employers to use the number of hours that the company and employee agreed that the employee would work upon hiring; if there is no such agreement, an employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of employment.

The guidance makes clear that employers are required 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. The DOL explains, however, that EPSL benefits are capped at 80 hours total over a two-week period, and notes by way of example that an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week, but that in any event, the total number of hours paid is capped at 80.

### ***Regular Rate of Pay***

Consistent with the statute, the DOL's guidance provides that an employer must pay employees at their regular rate of pay (or 2/3 that regular rate, depending on the reason for which leave is taken). The guidance further states that the regular rate of pay used to calculate paid leave under the FFCRA is, generally, the average of the employee's regular rate over a period of up to six months prior to the date on which they take leave, and that commissions, tips, or piece rates, are included in this calculation. This is different from the traditional workweek-by-workweek regular rate calculation under the FLSA.

Alternately, an employer can compute an employee's regular rate by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

### ***No Retroactivity, and Prior Leave Granted is Not Counted Against New Entitlement***

The guidance provides that EPSL and FMLA+ benefits are not retroactive, and that the EPSL and FMLA+ requirements for employers are effective beginning on April 1, 2020. The guidance also makes clear that paid leave provided prior to the effective date of the law (even for reasons covered under the FFCRA) would not count towards the new requirements (and presumably would therefore not be eligible for the tax credits under the FFCRA).

As noted above, the DOL is expected to publish additional guidance and regulations implementing these new laws in the near future. Littler's WPI will monitor this issue and report on significant developments.

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