

## HR Tracker, ¶46,842, Updated Q&As address more nuances of FFCRA emergency FMLA leave and paid sick time requirements — AGENCY REGULATION, (Apr. 7, 2020)

The Department of Labor has once again updated its question and answer series on the protections and relief available under the Families First Coronavirus Response Act (FFCRA), with this most recent update likely prompted by clarifications provided in the temporary rule that the DOL released on April 1, currently scheduled for publication in the *Federal Register* April 6.

**Temporary rule.** The temporary rule implements the newly available public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and the similarly new emergency paid sick leave available to assist working families facing public health emergencies arising out of the COVID-19 crisis. These new leave protections are established by a time-limited statutory authority set to expire on December 31, 2020. The temporary rule was effective April 2, although it became operational on April 1.

**Q&A additions.** The new additions to the Q&A guidance track many of the clarifications made in the temporary rule (see Temporary rule fleshes out FFCRA leave requirements, April 2, 2020). Here is a sampling of information from the latest Q&A additions that has not previously been discussed by *Labor and Employment Law Daily*:

- **Online school instruction.** When the school or place of care of an employee's child has moved to online instruction or to another model in which children are expected or required to complete assignments at home, the school is still considered "closed" if the physical location where the child received instruction is closed.
- **Staffing companies.** Staffing companies, regardless of how they classify or count internal or staffed workers, must provide paid sick leave and expanded family and medical leave to workers who are their "employees" for purposes of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Note that a joint employer must include in its count all employees on its payroll, even if the joint employer provides or refers such employees to other employers.
- **On workers' comp or disability.** A person who is receiving workers' compensation or temporary disability benefits through an employer or state-provided plan is *not* entitled to paid sick leave or expanded family and medical leave *unless* the individual was able to return to light duty *before* taking leave and a *qualifying reason* prevented them from working.
- **Employer-approved leave.** Employees who are on a mandatory, employer-approved leave of absence may not take paid sick leave or expanded family and medical leave under the FFCRA because it is not a *qualifying reason* for leave that prevents the employee from working (or teleworking). If the leave of absence is *voluntary*, however, the employee may end the leave of absence and begin taking paid sick leave or expanded family and medical leave under the FFCRA *if* a *qualifying reason* prevents the employee from being able to work (or telework).
- **Delayed enforcement, immediate compliance.** The DOL will *not* bring enforcement actions against employers for violations of the FFCRA occurring within 30 days of the enactment (March 18 through April 17, 2020), *provided* the employer has made *reasonable, good faith efforts* to comply with the Act. If the employer violates the Act *willfully*, fails to provide a written commitment to future compliance, or fails to remedy a violation upon notification, the DOL reserves its right to exercise enforcement authority during this period. However, note that the leave provisions are *effective* April 1; employers must comply with these provisions on the effective date despite the limited stay of enforcement until April 17. Once the DOL fully enforces the FFCRA, it will retroactively enforce violations to April 1, *if* employers have not remedied the violations.

**Seasonal employees.** The Q&A also lays out the steps that an employer with a seasonal employee who has an irregular schedule must take in order to calculate the amount of pay for each day of paid sick leave or expanded family and medical leave that the employee takes:

1. Calculate how many hours of leave the seasonal employee is entitled to take each day. Because the employee works an irregular schedule, this is equal to the average number of hours each day that he or she was scheduled to work over the period of employment, up to the last six months.
2. Calculate the seasonal employee's regular hourly rate of pay. This is calculated by adding up all wages paid over the period of employment, up to the last six months, and then dividing that sum by the number of hours actually worked over the same period.
3. Multiply the daily hours of leave (first calculation) by the employee's regular hourly rate of pay (second calculation) to compute the base daily paid leave amount.
4. Determine the actual daily paid leave amount, which depends on the type of paid leave taken and the reason for such paid leave.

**Pay per type of leave.** A seasonal employee must be paid the full base daily paid leave amount, up to \$511 per day and \$5,110 in total, if the employee is taking paid sick leave because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

The seasonal employee must be paid *two-thirds* of the base daily paid leave amount, up to \$200 per day and \$2,000 in total, if the employee is taking paid sick leave because the employee is:

- Caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Caring for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or
- Is experiencing any other substantially similar condition, as determined by the Secretary of Health and Human Services.

Note that where seasonal employees *are not scheduled to work*, for example, because it is the off-season, the employer does not have to provide paid sick leave or expanded family and medical leave.

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