

COVID Update: Key Takeaways from New FFCRA Regulations and the Paycheck Protection Program

I hope that you and your families and workers are safe and well. I understand the challenges that businesses and workers are facing with this new normal, including forced closures due to shelter orders, adjusting to work from home, making difficult workforce decisions, and navigating the new laws, federal leave and loan programs, and constantly changing updates. Please feel free to call or email with questions anytime – I'm here for you.

Last week, DOL issued a "Temporary Rule," which are the new regulations for implementing and enforcing the Families First Coronavirus Response Act (FFCRA.) The new CARES Act paycheck protection program ("PPP") loan program began on Friday. Here are the key takeaways for employers based on the Temporary Rule and PPP.

1. Effect of Business Closures, Layoffs, Furloughs: If a business has closed - before or after April 1 - and employees are laid off, FFCRA requirements do not apply after the layoff. If a business is open now, but lays off or furloughs (unpaid leave) part of its workforce later, employees who are laid off or furloughed are not entitled to leave under the FFCRA. Unemployment benefits are available instead. Note that an employee cannot get both tax credit-applicable FFCRA and unemployment benefits for the same period.

My clients have been very creative in balancing the business and financial issues with protection of employees in an effort to avoid closures, layoffs and furloughs. Many have structured rotating shifts and part-time schedules, not only for distancing protection on-site, but also for work from home if business is down. This retains employees, provides them with continued work, pay and benefits, and FFCRA if qualifying reason, and it boosts morale in this difficult time. In many states like Illinois, employees can get partial unemployment benefits if their weekly earnings are less than the weekly unemployment benefit allowance they would receive.

2. Effect of Shelter-in-Place Order: The effect of shelter-in-place and similar orders has been a matter of legal discussion and changing opinions. The Temporary Rule now includes shelter orders with government quarantine and isolation orders. But an employee is not eligible for FFCRA if employer closes because it's not an Essential Business under the order. Similarly, no FFCRA leave if an employee is furloughed or laid off because employer has no work for the employee, as a result of a shelter-in-place (or quarantine or isolation) order. DOL reasons that the employee would be unable to work even if he or she were not required to comply with the order. Specifically, the inability to work is not due to the shelter order, but due to the employer's closure of the place of employment, or furlough/layoff for lack of work. Again, unemployment benefits would be available.

What if employer volunteers paid leave/supplemental pay?

Some employers may have voluntarily chosen to continue to pay/supplement employees for whom they have no work due to a shelter order - because company is not Essential Business, or the employee does not perform Essential duties, or the employee's work can't be done from home. Under these circumstances, according to the DOL Director, FFCRA sick leave is available due to shelter order (FFCRA reason #1) as long as employer is not a PPP loan recipient (can't double dip by getting FFCRA and PPP.) Practically, this applies to the 10 days of paid sick leave, as employees using family leave under FFCRA (FMLEA leave) already meets the condition regarding school closure/child care. This principle also clarifies the "unable to work or telework" concept.

The regulations emphasize that "nothing in the (new law) diminishes the rights or benefits that an employee is entitled to under any other Federal, State, or local law (e.g. Chicago or Cook County paid sick

leave); collective bargaining agreement; or existing employer policy.” An employer must pay the employee the full accrued amount under the employer’s preexisting paid leave policy, even if greater than the FFCRA caps. (The employer’s eligibility for tax credits is still limited to the cap.)

Moreover, DOL specifies that “existing employer policy” includes a COVID-19 related offering of paid leave that the employer voluntarily issued. If employers voluntarily provide such leave to help their employees in this time of emergency, FFCRA still requires them to provide the entirety of FFCRA to which employees are eligible.

3. Unable to Work or Telework: Employee must be unable to (work or) telework (their normal schedule) to get FFCRA. Per above, inability to work on-site due to shelter order, which causes closure, furlough or layoff, is not a qualifying condition for FFCRA. As far as telework, the new regulations specify that an employee is able to telework if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

DOL examples: if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer’s computer. But she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

4. No paid sick leave for voluntary decision: Employees who choose not to go to work out of fear of contracting coronavirus, even if he may have symptoms, or believes he had possible exposure are not entitled to FFCRA leave. Self-quarantine must be based on advice from a health care provider. Even if employee has symptoms (fever, dry cough, shortness of breath), he must still be seeking a medical diagnosis. Sick leave will apply to the time the employee is unable to work because he is taking steps to obtain a medical diagnosis (e.g. time spent making, waiting for, or attending an appointment for a test for COVID-19.)

5. Unemployment benefits vs. PSL: Even if an employee meets a qualifying condition for FFCRA paid sick leave, she might be better off furloughed or laid off and pursuing extended unemployment benefits (trading 10 days of salary vs. up to 39 weeks of unemployment and a \$600 federal kicker.)

6. Shorter tenure for FMLEA: An employee must be employed for 30 calendar days for the FFCRA paid family leave (the FMLA requirements of 1 year and 1250 hours does not apply.)

7. Intermittent Leave: How does intermittent leave align with the requirement that employee is “unable to work or telework” and when can employee take such leave?

An employee must be unable to work or telework her normal schedule per #3 above, but can work part-time.

Whether the employee can take intermittent (periodic or reduced) leave differs for on-site and telework, and must be mutually agreed by employer and employee.

For employees working on-site:

- Intermittent paid and family leave is allowed for school and childcare related leave if the employer and employee agree to intermittent leave and increments of time.
- For paid sick leave for any other reason, paid sick leave, the employee must use the permitted full days of leave consecutively until the FFCRA reason ends or leave is exhausted. This reduces risk by keeping sick or exposed employees out of the workplace.

For employees who are teleworking, the employer and employee may agree that the employee may take any leave available under the Act intermittently, and in any agreed increment of time (but only for periods when the employee is unavailable to telework because of a coronavirus related reason).

8. Using Up or Substituting Employer-Provided Leave: Employers can't require employees to use up employer-provided leave (e.g. vacation, sick leave) before they use paid sick leave under the FFCRA. But the regulations clarify that employers can require (and employees can otherwise choose) to take company leave concurrently with family leave for child care.

9. Prior Use of FMLA Leave Offsets FMLEA but not Sick Leave

In addition, if an employee used (regular) FMLA leave during the 12-month period that the employer uses for its FMLA leave policy, the employee may only take the remaining portion, if any, up to 12 weeks for family leave under FFCRA. If the employee used all 12 weeks, he may not take additional expanded family and medical leave. This does not affect eligibility for FFCRA sick leave.

Notably, DOL outlined 2 scenarios where an employee might be able to use 14 weeks of FFCRA leave:

(1) Employee can use 80 hours (or the proportionate equivalent) of sick leave for non-childcare purposes (2 weeks). Assuming the employee has not used any FMLA or FMLEA leave during the applicable FMLA 12-month period, the employee can then take up to 12 weeks of FMLEA childcare leave (2 weeks + 12 weeks = 14 weeks).

(2) During the initial unpaid 10-day period of FMLEA leave, the employee can use pre-existing, non-FFCRA employer-provided benefits instead of EPSL benefits (2 weeks). The employee gets up to another 10 weeks of FMLA+ paid childcare leave (2 weeks + 10 weeks = 12 weeks). After that, assuming no sick leave was used to date, the employee could use sick leave for childcare for an additional two weeks (2 weeks + 10 weeks + 2 weeks = 14 weeks).

10. Denial of Reinstatement After FMLEA – Two Circumstances: Similar to FMLA, under FMLEA employers can deny reinstatement to the same or equivalent position to an individual who qualifies as an FMLA "key" employee (salaried employee who is among the highest-paid 10% of all the employer's employees within 75 miles of the employee's worksite.)

But DOL recognizes a second exception for employers with less than 25 employees, when employee takes school closure/childcare leave, and all four of the following hardship conditions exist:

1. The position no longer exists due to economic or operating conditions that affect employment and are due to COVID-19-related reasons during the leave period;
2. Employer made reasonable efforts to restore the employee to the same or an equivalent position;
3. Employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and

4. Employer continues to make reasonable efforts to contact the employee for one year, beginning on the date COVID-19 leave ends or the date 12 weeks after leave began (whichever is earlier).

11. Definitions

Individual: Employees can take paid sick leave to care for an “individual” who is subject to governmental or self-quarantine. In this case, “individual” means an 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. “Individual” does not include persons with whom the employee has no personal relationship.

Son or Daughter: Leave to care for a son or daughter whose school is closed or child care provider is unavailable includes children under 18 as well as older children incapable of self-care because of a mental or physical disability. For children ages 15-18, the employee must provide special justification of the need for leave. Note child care leave is not available if another parent, guardian or other suitable person is available to provide care, although spouses or parents with shared custody can split their leaves.

Child Care Provider: A provider who receives compensation for providing child care services on a regular basis, including a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law. A family member, friend, or neighbor who regularly cares for the employee’s child need not be compensated or licensed.

Health Care Providers: Broad definition, including workers needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency.

12. Employee Notice and Documentation: To support the leave and tax credits, the employee must make a written request for paid leave and provide supporting documentation, after providing oral notice of the need for leave. The written request and supporting documentation must be maintained for four years. Employers can require employees to comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

The written documentation should contain:

1. Employee’s name;
2. Date(s) for which leave is requested;
3. Qualifying reason for the leave; and
4. Oral or written statement that the employee is unable to work because of the qualified reason for leave.
5. For paid sick leave relating to a government quarantine or isolation order, the employee must also provide the name of the government entity that issued the order.
6. For paid sick leave based on the advice of a health care provider to self-quarantine due to concerns related to coronavirus, the employee must also provide the name of the advising health care provider.
7. For paid sick leave relating to the care of an individual who is subject to governmental or self-quarantine order, the employee must also provide the name of the government entity that issued the order or the name of the advising health care provider.

8. For paid sick leave relating to the care of the employee's child because the child's school or child-care provider is closed, the employee must also provide: (i) the name of the child being cared for; (ii) the name of the school, place of care, or child care provider that has closed or become unavailable; and (iii) a representation that no other suitable person will be caring for the child during the period for which the employee takes leave under the Act.

13. **Enforcement Period/Grace Period DOL:** DOL will not bring enforcement actions against any employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, provided that 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 with the Act, or fails to remedy a violation upon notification by the Department, the Department reserves its right to exercise its enforcement authority during this period. After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

14. **Violations and Penalties:** Violations of FFCRA paid sick leave requirements are considered to be violations of the minimum wage requirements of the Fair Labor Standards Act (FLSA), and violations of the FFCRA prohibition on discharge, discipline, or discrimination violate FLSA as well.

Violations of FFCRA family leave rules, including interfering with, restraining, or denying an employee's exercise of or attempt to exercise such rights, will be treated like FMLA violations. However, an employee may not bring a private action against an employer under the EFMLEA if the employer is not covered by FMLA.

15. **CARES Act Paycheck Protection Program**

Title I of the CARES Act focuses on supporting U.S. small businesses by, among other things, amending the Small Business Act to establish the "Paycheck Protection Program" (PPP), which is designed to incentivize workforce continuity during the ongoing pandemic by providing forgivable SBA loans to eligible businesses (each such loan a "Loan" and, collectively, the "Loans").

The intended goal is to keep employees paid (even if not working or fully working) during the pandemic situation. Generally, if the employer does not reduce employee headcount or pay under the parameters set forth by PPP, or cures by 6/30, the loan is completely forgivable. If a borrower has already furloughed or laid off employees due to COVID-19, employers are encouraged to rehire them by not being penalized for having a reduced payroll at the beginning of the covered period, which means the initial eight-week period after the loan's origination date.

PPP loan recipients cannot "double dip" and also receive FFCRA tax credits so FFCRA leave does not apply. PPP loan recipients are subject to loan forgiveness restrictions on layoffs and pay reductions, as well as required uses for funds.

Authorized Uses

The proceeds of Loans under the Program may be used during the "Covered Period" (the first 8 weeks after the origination of the loan, probably when the loan funds become available) only for the following purposes: payroll costs, group health care benefits during periods of paid sick, medical or family leave and insurance premiums, employee compensation, mortgage interest payments, rent, utilities and interest on

debt incurred prior to February 15, 2020.¹² Payroll costs expressly exclude: (a) compensation of an individual employee in excess of an annual salary of \$100,000 as prorated for the Covered Period, (b) withholding taxes, (c) compensation of persons whose principal place of residence is outside of the US, and (d) qualified sick leave and family leave for which a credit is allowed under the “phase 2” bill.¹³ (FFCRA credit.)

Employers must use at least 75% of the loan proceeds for payroll and benefits costs. The 25% non-payroll portion of the forgivable loan amount was intentionally limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. DOL felt that using 75% for payroll is an appropriate percentage for keeping workers paid and employed.

Employer must certify:

- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments (and 75% must be used for “payroll costs” i.e. wages, benefits, etc.)

Must provide documentation verifying the number of full-time equivalent employees on payroll (being paid in full or at least 75% pay, whether they work or not), as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period.

One question clients have been asking is whether an employer can require employees to use employer-provided accrued PTO/leave during the period?

Employees who are not working are already being paid salary/wages (or at least 75%) during the PPP period. They would have no need or basis for also using accrued sick leave/vacation/PTO. Employees who are working and receiving full pay should certainly be allowed to use accrued leave during the PPP period, if needed for reasons covered by company policy (e.g. illness, child care, FMLA leave if applicable.) PPP loan proceeds will pay for such paid leave. But since the non-working employees are not using up their accrued leave, it would be unfair to penalize working employees (who may already feel penalized since they have to work for pay while the others get paid to stay home) by counting these absences against their accrued leave. We believe the accrued leave should be saved until after the PPP period.

If the current situation continues beyond the PPP period (very likely since the pandemic and likely shelter orders will likely last a few months), we may need to revisit next steps, as FFCRA will then apply to COVID-related leave. FFCRA allows employers to require employees to use up accrued leave before taking child care family leave under FFCRA, but not for sick leave. Whether the employer can or should then require employees to use accrued leave for non-COVID leave is an open question.

Loan Forgiveness

Perhaps the most notable feature of the Program is that borrowers are eligible for forgiveness of indebtedness on their Loan in an amount equal to the sum of payroll costs, mortgage interest, rent payments, and utility payments made by the borrower during the Covered Period. Forgiveness amounts will be considered canceled indebtedness by a lender and are not deemed income to the borrower. The amount of forgiveness available to the borrower will be reduced by both (1) a percentage related to the

number of employees laid off during the Covered Period as compared to the same period during the prior year or during January and February 2020 (with a cure for employees rehired by June 30, 2020), and (2) an amount related to reductions in salaries and wages of employees (total) in excess of 25% during the Covered Period (with a cure for salaries and wages restored by June 30, 2020).¹⁶ Borrowers must provide their lenders with complete documentation of the calculation of their forgiveness amounts.

Any reduction in the amount of loan forgiveness can be reduced or eliminated if the business restores the reduced wages or brings back any laid off employees by June 30, 2020. (i.e. by 6/30, must rehire or pay deferred pay if cut >25%) So, employer could lay off certain employees and rehire by 6/30 without penalty (these employees would get unemployment benefits), as long as 75% of loan proceeds were used for payroll and benefit costs. Similarly, an employer could reduce total salaries up to 25%, or could reduce by more than 25% if they repay employees the difference over 25% by 6/30 (and again use 75% loan for payroll/benefits.) Or the employer could also choose not to rehire or reinstitute pre-pandemic pay by 6/30, and the forgivable amount would be reduced by that much.

Other Loan Terms

The maximum amount for which Loans may be issued is the lesser of (i) \$10,000,000 and (ii) 2.5 times the average total monthly payments for payroll costs incurred during the 1-year period before the date the Loan is made.¹⁸

The interest rate on the Loans is capped at (changed to 1%) per annum.¹⁹ Any amount outstanding after forgiveness is granted pursuant to the CARES Act will have a maximum maturity of up to two (2)(was 10) years from the date on which the borrower applies for Loan forgiveness under the CARES Act.²⁰

Recipients of economic injury disaster loans (“EIDLs”) from the SBA for COVID-19-related purposes are unable to receive Loans under the Program.¹⁰

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