



March 26, 2020

## COVID-19's Impact on Employers: DOL's Model Notice and Additional Frequently Asked Questions About the FFCRA (Update #2)

On Wednesday, March 25, 2020, the Department of Labor [issued its model notice](#) for the emergency paid sick leave act (PSL). All covered employers must post this notice by **April 1, 2020**, in a conspicuous place where notices are customarily posted. The DOL also has provided some [guidance to employers](#) on how to satisfy the posting requirement, including the following key points:

- How to provide the posting to remote workers (by e-mail, direct mail, or intranet)
- No obligation to translate the notice into another language
- No obligation to provide the notice to laid off employees or job applicants
- All private entities with fewer than 500 employees and public agencies with 1 or more employees must comply with the posting requirement

In addition to the model notice and guidance, the DOL has [published a field assistance bulletin](#) on its non-enforcement policy. It confirms that the DOL will not issue enforcement actions against covered employers until **April 17, 2020**, if the employer has made good-faith efforts to comply with the act. The field bulletin explains that, if a business does not have adequate cash flow to pay the sick leave, it can still comply during this period by making the sick leave payments within 7 calendar days of receipt of the payroll tax deposits or a refund from the IRS if the payroll deposits are insufficient.

We will continue to monitor the DOL's actions. We also are continuing to compile some of the frequently asked questions and answers that we have received regarding COVID-19 and the FFCRA. We encourage you to reach out to us if you would like to discuss any of these challenging and frequently-evolving issues.

1. **How do private employers calculate the number of employees when determining whether they have fewer than 500 employees?**

The calculation is made at the time each employee takes leave. The calculation includes all employees in the United States, District of Columbia, or any territory or possession of the U.S. It also includes employees on leave, temporary employees

who are jointly employed, and day laborers supplied by a temporary agency. This calculation is impacted by joint employment relationships [as defined under the FLSA](#) where the common employees are counted and the integrated employer test [under the FMLA](#) where all employees of the entities are counted.

## 2. **Do employers need to provide paid FMLA or PSL on an intermittent basis?**

For paid FMLA, the answer is no, but for PSL, the answer is probably yes (subject to further guidance from DOL). With respect to the paid FMLA, the FFCRA expanded the covered reasons to provide leave for childcare when a school or care provider is closed or unavailable. This amendment was made to 29 U.S.C. § 2612(a)(1). However, the FFCRA did not amend 29 U.S.C. § 2612(b), which identifies the covered reasons for when leave may be taken intermittently or on a reduced schedule. The new provision, therefore, is not identified as a type of leave that may be taken intermittently. The FFCRA also does not otherwise state that leave may be taken intermittently under the FMLA. As a result, employers are not required to provide paid FMLA leave on an intermittent or reduced-schedule basis.

With respect to the PSL, the FFCRA also does not expressly state that the emergency paid sick leave can be taken intermittently. However, the act contains several references suggesting that interpretation. It provides the amount of paid sick time available in hours, not days or weeks, and it defines "paid sick time" as "an increment of compensated leave that is provided by an employer for use during an absence." As a result, without further guidance from the DOL, it appears that PSL can be taken intermittently.

## 3. **Are newly hired employees entitled to paid FMLA or PSL?**

For paid FMLA, the employee must be employed for 30 calendar days before he or she is eligible for paid leave. For PSL, the paid leave is available immediately to all employees, including new hires.

Under the expanded FMLA, if an employee has not been employed for 30 calendar days as of April 1, 2020, he or she can become eligible thereafter when he or she has been employed for 30 calendar days. Additionally, consistent with the DOL's FMLA guidance, the time spent working as a temporary employee can count towards the 30 calendar days if the employee is later hired as a full-time employee.

## 4. **Are employers required to provide both PSL and paid FMLA? How does that work?**

If the employee qualifies for both, then yes. However, the DOL has clarified that the total paid leave available under both PSL and FMLA is 12 weeks.

For full-time employees, the employees are entitled to 80 hours of leave under the PSL. There are 6 qualifying reasons for which this leave must be granted. If an employee is regularly scheduled for 50 hours of work and he or she takes this leave continuously, then the employee will receive 50 hours of pay in the first week and 30 hours of pay in the second week under the PSL.

There is only one qualifying reason for paid FMLA – certain childcare for minor children due to a school closure or unavailability of a care provider. The first ten days of this leave are unpaid. The employee may elect, but is not required, to substitute accrued paid leave. In addition, assuming the PSL has not been exhausted at the time of the FMLA leave, the employee may receive the 80 hours of PSL during this 10-day period.

While paid FMLA is limited to one qualifying reason, if an employee seeks leave for a reason unrelated to childcare, such as one of the other qualifying reasons under the

PSL, that leave also may qualify as unpaid FMLA leave and therefore the employer should consider whether to designate such leave in accordance with its typical FMLA procedures. This assumes, of course, the employer is an otherwise covered employer and the employee is an otherwise eligible employee under the FMLA as we knew it prior to March 18, 2020.

5. **Does the paid FMLA entitlement provide an additional 12 weeks of leave or is it a total of 12 weeks for all FMLA-covered reasons (except military caregiver leave)?**

The FFCRA is unclear as to whether it provides 12 weeks of emergency FMLA leave in addition to the 12 weeks of unpaid FMLA leave for other covered reasons. While that appears to be the intent of the act, the actual language of the FMLA does not support that conclusion. Specifically, the FFCRA provides that it is amending 29 U.S.C. § 2612(a)(1) to add a new covered reason in subparagraph (F). The language of § 2612(a)(1) states that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following.” As a result, this language suggests that the paid leave is not an additional 12 workweeks. However, before reaching that conclusion, the DOL needs to clarify this issue, which has been requested by many attorneys and other interested parties. We are still awaiting the regulations from the DOL under the FFCRA.

For the PSL, the DOL has provided guidance that the leave is a one-time entitlement to a total of 80 hours even if the employee qualifies under several different categories. In addition, an employer will not get credit for any paid sick leave provided prior to April 1, 2020.

## Questions?

Contact the [GrayRobinson Labor and Employment Team](#).

Boca Raton | Fort Lauderdale | Fort Myers | Gainesville | Jacksonville | Key West | Lakeland  
Melbourne | Miami | Naples | Orlando | Tallahassee | Tampa | Washington, DC | West Palm Beach

[www.gray-robinson.com](http://www.gray-robinson.com)