



March 30, 2020

COVID-19's Impact on Employers: DOL's Updated Q&A (Update #3)

The FFCRA goes into effect on April 1, 2020. As we get closer to that date, the Secretary of Labor has been updating its Questions and Answers [guidance on the FFCRA](#). The DOL has provided guidance on some burning questions, such as how a small business (fewer than 50 employees) may qualify for an exemption, how the "health care provider" and "emergency responder" exemptions are defined, what documentation may be requested, whether an employer has to maintain health coverage during paid leave, and whether an employee can supplement the PSL or paid FMLA with paid sick leave otherwise provided by the employer.

This guidance also confirms that, absent military caregiver leave, an employer is only required to provide a total of 12 workweeks of FMLA leave, whether paid or unpaid, and the FFCRA does not create a separate entitlement to an additional 12 weeks of leave. Additionally, paid leave under the FMLA or PSL cannot be taken intermittently unless the employer agrees to it and key employees under the FMLA can be denied reinstatement after taking paid FMLA leave. The DOL also expanded the definition of "son" or "daughter" under the FFCRA.

A summary of the guidance is below. Please remember that this Q&A is guidance, not the regulations, which are still forthcoming. These issues are complex and we are available to answer your questions.

Small Business Exemption

Any employer, including a religious or nonprofit organization, with fewer than 50 employees may claim the exemption for expanded FMLA leave and emergency paid sick leave if an authorized officer of the business has determined that:

- Complying with the FFCRA's leave provisions would result in expenses exceeding available revenues and cause the business to cease operating at a minimal capacity;

- Absence of employees requesting FFCRA leave would entail substantial risk to the financial health or operation of the business due to the employees' specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient qualified workers to replace the employees seeking FFCRA leave and the labor or services of the employees are needed for the business to operate at a minimal capacity.
- **The exemption only applies to FFCRA leave to care for a son or daughter due to school closures and/or child care unavailability.**
- No application is required. The business simply denies the leave.

Definition of "Son or Daughter"

The DOL now includes a child for whom the employee is standing [in loco parentis](#) as well as an adult child who has a mental or physical disability and is incapable of self-care because of that disability.

"Health Care Provider" Exemption

- The DOL has expanded the definition for the exemption to include anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, or any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.
- It includes any temporary or permanent facility where medical services are provided and any entity that contracts with any of the above institutions to provide services or maintain the covered facility.
- This is a broader definition than "health care provider" under the FMLA. The FMLA definition still applies to determine who can provide advice to self-quarantine as a covered reason for leave under PSL
- The employer makes the decision whether to exclude an employee as a "health care provider." There is no application.

"Emergency Responder" Exemption

- The DOL has defined "emergency responder" as an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients or whose services are otherwise needed to limit the spread of COVID-19.
- It provides a non-exhaustive list to include military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- The employer makes the decision whether to exclude an employee as an "emergency responder." There is no application.

Health Insurance Continuation

Employers must continue to provide health coverage (if the employee previously elected such coverage) during paid FMLA leave and PSL, but employees are required to make any normal premium contributions.

Benefits in Excess of FFCRA Requirements

Employers who exceed the paid leave requirements of the FFCRA will **not** receive tax credits for the amounts in excess of the FFCRA's statutory limits.

Employer Benefits Concurrent with FFCRA Benefits

Employees may not receive FFCRA paid leave and employer-provided sick leave for the same hours. Thus, if the employee is receiving full pay under the FFCRA, he or she may not use employer-provided sick leave. However, if the employee is receiving 2/3 pay under the FFCRA, the employee may supplement with accrued employer-provided leave, **if the employer agrees**, in order for the employee to receive the remaining 1/3 pay.

Questions?

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