

BARSAMIAN & MOODY

A Professional Corporation

Attorneys at Law

1141 West Shaw Avenue, Suite 104

Fresno, California 93711-3704

E-mail: laborlaw@theemployerslawfirm.com

Tel: (559) 248-2360

Fax: (559) 248-2370

DOL Releases FFCRA Regulations and More FAQs

Late yesterday, March 31, 2020, the Department of Labor (“DOL”) published a new regulation covering paid leave under the Families First Coronavirus Response Act (“FFCRA”), which answers questions that were left unanswered and unclear in the statute itself. Additionally, the DOL published a series of 59 FAQs. We are addressing the most critical parts of the regulation and the new FAQs. A copy of the regulations can be found at: <https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>. A copy of the FAQs is located at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

DOL's FFCRA Regulations

The FFCRA regulations confirmed that employees must give notice to their employers of the need to take leave and provide documentation to support paid sick leave and emergency family and medical leave.

Qualifying Reasons for Leave Related to COVID-19

Under FFCRA, an employee at a business with fewer than 500 employees is entitled to take leave related to COVID-19 if the employee is unable to work because he or she:

1. Is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. Has been advised by a health care provider to self-quarantine related to COVID-19.
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
4. Is caring for an individual subject to a quarantine or isolation order.
5. Is caring for his or her child whose school or place of care is closed or unavailable due to coronavirus-related reasons.
6. Is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services (HHS). The HHS has not specified any other substantially similar condition as of yet.

Up to two weeks of paid sick leave based on the higher of employees' regular rate of pay or applicable state or minimum wage is to be paid at 100 percent for the first three reasons up to \$511 daily and \$5,110 total. Up to two weeks of paid sick leave is to be paid at two-thirds of employees' regular rate of pay or applicable state or minimum wage for the fourth and sixth reasons up to \$200 daily and \$2,000 total.

Employees who have been employed for at least 30 days prior to their leave request may be receive up to an additional 10 weeks of partially paid expanded family and medical leave when their children's school or place of child-care is closed. The partially paid rate for them is two-thirds of the employees' regular rate or applicable

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state or minimum wage, whichever is higher, up to \$200 daily and \$12,000 total (\$10,000 plus up to \$2,000 of unused paid sick leave if applied to the first 10 days).

Note that an individual generally is entitled to FFCRA's paid sick leave regardless of how much leave has been taken under the FMLA, the DOL said in recent guidance. But if someone takes paid sick leave concurrently with the first two weeks of emergency family and medical leave, which otherwise would be unpaid, those two weeks do count toward the 12 workweeks in the 12-month period.

Documentation of Need for Leave

The DOL regulations explain that for paid sick leave or expanded family and medical leave, an employer may require employees to follow reasonable notice procedures as soon as practical. That can be after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave, the DOL stated in the preamble to the regulations.

The DOL said that the employee must provide a signed statement containing:

- The employee's name.
- The date(s) for which leave is requested.
- The coronavirus-qualifying reason for leave.
- A statement that the employee can't work or telework because of this reason.

In addition, an employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject, if that is the reason for paid sick leave, according to the DOL.

An employee seeking leave because he or she is self-quarantined must provide the name of the health care provider making the quarantine recommendation. Someone caring for a person who is quarantined must provide either the government entity that issued the quarantine or isolation order or the name of the health care provider who advised the individual to self-quarantine.

The DOL said that an individual requesting expanded family and medical leave must provide:

- The name of the child being cared for.
- The name of the school, place of care or child care provider that closed or became unavailable due to coronavirus reasons.
- A statement representing that no other suitable person is available to care for the child during the period of requested leave.

The normal FMLA certification rules apply to an employee's own serious health condition related to the coronavirus, or to care for the employee's spouse, son, daughter or parent with a serious health condition.

If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave, the regulations state.

ADDITIONAL DOL FAQs

Employee Rights to Return to Work Following Leave

The DOL clarified that employers are required to provide the same (or a nearly equivalent) job to an employee who returns to work following leave. Thus, employers are prohibited from firing, disciplining, or otherwise discriminating against employees because they take paid sick leave or expanded family and medical leave.

However, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. This means employers can lay people off for legitimate business reasons, such as the closure of a worksite. An employer must be able to demonstrate that the employee would have been laid off even if he had not taken leave.

Employers may also refuse to return an employee to work in the same position if he or she is a highly compensated “key” employee as defined under the FMLA, or if the employer has fewer than 25 employees, and the employee took leave to care for a child whose school or place of care was closed, or whose child care provider was unavailable, 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 due to COVID-19 related reasons during the period of leave;
2. the employer made reasonable efforts to restore the employee to the same or an equivalent position;
3. the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
4. the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after leave began, whichever is earlier.

Are Employees Eligible for EFLMA if They Have Exhausted Regular FMLA?

No, if an employer was covered by the FMLA prior to April 1, 2020, eligibility for expanded family and medical leave depends on how much leave an employee has already taken during the 12-month period that the employer uses for FMLA leave. Employees may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If an employee has taken some, but not all, 12 workweeks of leave under FMLA during the current 12-month period determined by the employer, he may take the remaining portion of leave available. If he has already taken 12 workweeks of FMLA leave during this 12-month period, he may not take additional expanded family and medical leave.

For example, assume an employee is eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. The employee therefore has 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, he would be entitled to

take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. And any expanded family and medical leave the employee takes would count against his entitlement to preexisting FMLA leave.

If an employee takes paid sick leave under the EPSL, does that count against other types of paid sick leave to which he is entitled under State or local law, or an employer's policy?

No. Paid sick leave under the Emergency Paid Sick Leave Act is in addition to other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or an employer's existing company policy.

When does the small business exemption apply to exclude a small business from the provisions of the EPSL and EFLMA?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

What This Means for Employers:

We remain open and available to answer your questions. As legislation and DOL guidance is rapidly evolving, please feel free to contact us with your concerns or for further clarification. We will continue to keep you up to date as further developments surface and new regulations are enacted. Contact Barsamian & Moody for any questions on the Emergency Family Medical Leave Act and Paid Sick Leave.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.