

## **Monthly Minute Memo: *More Guidance from the DOL regarding the Families First Coronavirus Relief Act***

The DOL has provided additional guidance on the Families First Coronavirus Relief Act (“FFCRA”). On March 26, 2020, the DOL updated its previously issued question and answer guidance regarding the employee’s use of FFCRA leave. The following is a summary of the new information released by the DOL.

### **Documentation is Required**

An employee must provide information and documentation for the FFCRA leave. This information includes the employee name, qualifying reason for the leave, a statement that the employee is unable to work (including telework) and dates leave is requested. Additionally, the employee must provide documentation, such as the source of any quarantine or isolation order or the name of the health care provider who has advised the employee to self-quarantine. When using the Sick Leave for the first two weeks of unpaid leave under Emergency Family and Medical Leave Expansion Act (“E-FMLA”), an employee must also provide documentation.

Employers need to be mindful of the Americans with Disabilities Act’s confidentiality requirements for documentation for any kind of leave, including the FFCRA. All information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record.

### **Unable to work further defined**

Under the DOL guidance, an employee is unable to work if work is available but one of the coronavirus qualifying reasons prevents the employee from performing the work at the worksite or working from home.

### **No leave if an employee can work from home**

If an employee is required and able to work from home, the employee is not entitled to paid leave under FFCRA. If there is an agreement where the employee will work the same amount of hours but not during his or her normally scheduled hours, the employee is able to work and not entitled to leave *unless* a coronavirus qualifying reason prevents an employee from working.

**However**, if an employee is unable to telework due to a coronavirus qualifying reason, the employee is allowed leave under the FFCRA. The DOL did note that if an employee is able to telework while caring for a child, leave under the FFCRA is not available.

### **Intermittent leave by agreement**

In situations where an employee is teleworking, intermittent leave (both Sick Leave and E-FMLA) is allowed *only* if the employer permits.

*However*, if an employee is working at the employer's worksite, paid sick leave (not for childcare) due to the coronavirus must be taken in full-day increments and cannot be taken intermittently. E-FMLA may be used intermittently only with the employer's permission.

### **No leave if the employer is closed**

An employee is not eligible to leave under the FFCRA if the employer is closed. The DOL addressed the following situations where an employee is not entitled to leave:

- Employer is closed before April 1, 2020.
- Employer is closed on or after April 1, 2020 but before the employee goes on leave.
- Employer closes while an employee is on sick leave – only entitled to leave before closure.
- Employer closed but planning to reopen – not entitled to leave while business is closed.

### **Furloughed employees not entitled to leave**

Under the new DOL guidance, an employee furloughed on or after April 1, 2020 is not entitled to leave under the FFCRA.

### **Reduction of hours by employer**

In the event the employer reduces an employee's hours, but the employee is not prevented from working the reduced hours, an employee is not entitled to FFCRA leave.

### **Unemployment and FFCRA**

An employee cannot be FFCRA leave and collect unemployment insurance benefits. However, eligibility for unemployment varies by state and given the new laws and regulations regarding the COVID-19, these state eligibility rules could change.

### **Health Coverage**

If the employer provides group health coverage, the employee is still entitled to group health coverage while on FFCRA leave. If an employee does not return from FFCRA leave, the employee needs to check with the employer if he or she is entitled to keep coverage on the same terms or if the employee is eligible for COBRA.

### **Concurrent use of FFCRA leave and leave under an employer's policy is not permitted**

An employee must choose one type of leave – either FFCRA leave or an employer's leave. However, an employer may agree to concurrent use to supplement FFCRA leave up to an employee's normal earnings. If an employer agrees, an employee could use his or her preexisting employer-provided paid leave to get the additional 1/3 of the earnings not allowed under FFCRA. An employer is not required to allow an employee to supplement this amount and if an employer does allow it, it will not receive the tax credit for the supplemental amounts. Furthermore, an employer cannot require an employee to supplement or adjust the pay mandated under FFCRA with paid leave under the employer policy.

**Employer can give leave above and beyond the FFCRA**

An employer may give employees more than what they are entitled to under the FFCRA, however, the employer cannot claim or receive tax credit for the amounts in excess of the FFCRA limits.

**Multiemployer Collective Bargaining Agreements**

Employers may satisfy their obligations under the FFCRA by making contributions to a multiemployer fund, plan or other program in accordance with existing collective bargaining obligations. These contributions must be made based on the amount of FFCRA leave an employee is entitled under the FFCRA based on the employee's work under the collective bargaining agreement. The fund, plan or program must allow employees to obtain their pay for the related leave under the FFCRA. Employers can satisfy their FFCRA obligations by other means, so long as those means are consistent with collective bargaining obligations and collective bargaining agreement.

**Important Note:** The DOL has issued a Field Assistance Bulletin stating there is a non-enforcement period of the FFCRA from March 18, 2020 through April 17, 2020. No enforcement actions will be taken by the DOL if the employer made reasonable, good faith efforts to comply with the FFCRA. Such reasonable, good faith efforts include remedying any violations (making all affected employees whole), violations were not willful, and the employer issues a written commitment to the DOL to comply with the Act in the future.

We will continue to notify our clients on any new DOL guidance and regulations issued regarding the Families First Coronavirus Response Act.

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