

## Monthly Minute Memo: *New Guidance from the DOL regarding the Family First Coronavirus Relief Act and Notice for Posting Issued*

As expected, the Department of Labor began the process of issuing guidance to assist employers with the new leave laws under the Families First Coronavirus Relief Act (“FFCRA”): Emergency Paid Sick Leave Act (“Sick Leave”) and the Emergency Family Medical Leave Expansion Act (“E-FMLA”). The DOL guidance states that it will issue the regulations in the upcoming weeks. Below is a summary of the recent DOL guidance some of which is a question and answer format:

### **I. The FFCRA Notice (Issued March 25, 2020)**

As required under the FFCRA, all covered employers are required to post a notice of the FFCRA to their employees by March 26, 2020. A model notice for non-federal employers is provided on the DOL website:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

In addition to the model notice, the DOL has provided the following guidance regarding the FFCRA’s notice requirement in a question and answer format. Some of the questions are summarized below:

***Where does an employer post this notice?*** Taking into consideration that many employees are working from home, the following places are considered appropriate:

- A conspicuous place on the employer’s premises.
- Emailing or direct mailing the notice to remote employees.
- Posting the notice on an employee information internal or external website.

***Who does the employer have to give notice to?***

- This notice only applies to current employees.
- Employer is required to give this notice to new hires.

**Important Note:** The question and answer guidance from the DOL states that employers do not have to share the notice with recently laid-off individuals as the “FFRCA requirements explained on this notice apply only to current employees.”

While the DOL has issued a temporary non-enforcement period (March 18, 2020 through April 17, 2020), this model notice does provide contact information for the employee to file a complaint with the DOL.

## II. New DOL Guidance (Issued March 24, 2020)

***What is the effective date of these Acts?*** Both paid leave provisions are effective on April 1, 2020 (most prior interpretations of the effective date by other sources were April 2, 2020) and apply to leave taken between April 1, 2020 and December 31, 2020. ***The requirements under these Acts are not retroactive.***

***How do I calculate the number of employees?*** The determination of whether an employer is under the 500-employee threshold should be determined at the time of an employee's leave. While an employer may be above this 500-employee threshold when the Act becomes effective, situations could arise where the employer may fall below 500 employees which may trigger compliance requirements. The following employees are considered in determining the number of employees an employer has:

- Full and part-time employees.
- Only those employees who work within the United States, the District of Columbia or any Territory or possession of the United States.
- Employees on leave.
- Temporary employees who are jointly employed.
- Day workers supplied by a temporary agency.

Independent contractors **are not** employees and not considered in the 500-employee threshold.

For purposes of Sick Leave and E-FMLA, employers need to be cognizant of any (or lack of) joint employer status when calculating the number of employees. For purposes of the Act, the DOL will follow the FLSA test which considers whether the employer (1) hires or fires an employee; (2) supervises or controls the employee's work schedule or conditions of employment; (3) determines the employee's pay; and (4) maintains the employee's employment records. Thus, unless there is a joint employer relationship, a business that has an ownership interest in another business is considered a separate employer for purposes of calculating the number of employees to determine employer coverage.

Additionally, for purposes of E-FMLA, the DOL will use the "integrated employer" test under the FMLA to determine if two or more businesses are separate employers under the Act. This test considers (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. If two or more entities are considered an integrated employer, then the employees of all entities are counted together in determining employer coverage for purpose of E-FMLA.

***Is there still a small business exemption to these Acts?*** Yes, an exemption may exist for businesses with fewer than 50 employees if it can show that compliance would jeopardize the viability of the business. However, the criteria the DOL will consider are still unknown and,

according to the DOL's recent publication will be addressed in "forthcoming regulations." An employer should not send any materials to the DOL when seeking a small business exemption under these Acts.

***How does a company count the hours of a part-time employee?*** A part-time employee is entitled to leave for the average number of work hours in a two-week period. An employer calculates hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours are unknown or the schedule varies, an employer may use a six-month average to calculate the average daily hours. A part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day for up to 10 weeks. If an employee has not worked for the employer for six-months, the employer can use the number of hours agreed to or average the hours the employee has worked over the term of their employment.

***Are overtime hours calculated?*** It depends on whether leave is taken under the E-FMLA or Sick Leave Act.

- E-FMLA – Yes, this Act requires an employer to pay an employee for hours the employee normally works, even if that is more than 40 hours a week (subject to the Act's maximum).
- Sick Leave – This Act only allows 80 hours of sick leave. Therefore, if an employee is scheduled to work 50 hours a week, he or she can take 50 hours of leave the first week, but the employee can only take 30 hours of paid sick leave the second week.
- Under both Acts, the pay does not have to include a premium pay for overtime hours.

***How is an employee's regular rate calculated?*** Paid leave is calculated as the average of an employee's regular rate over a period of up to six months prior to when leave is taken. If an employee has not worked for the employer for six-months, the regular rate used is the average of the regular rate of pay for each week an employee worked for the employer. **Commissions, tips or pieces rates are included into this calculation.**

The DOL also provides an alternate computation method: All compensation that is part of the regular rate over the period of time divided by all hours actually worked in the same period.

***Can an employee get leave under both Acts?*** An employee can take both Sick Leave and E-FMLA to care for a child whose school, place of care or childcare provider is unavailable due to coronavirus reasons. Sick Leave provides for an initial 80 hours of paid leave, which covers the first ten workdays of E-FMLA (which is unpaid, unless an employee chooses to use existing vacation, personal, medical or sick leave under the employer's policies). After the first ten workdays, an employee will receive 2/3 of their regular rate of pay for 10-weeks under the E-FMLA. The DOL emphasized the additional 10 weeks under the E-FMLA is only available for an employee to care for a child whose school is closed, or childcare provider is unavailable due to COVID-19 related reasons.

***Is all FMLA leave now paid?*** No, the only paid leave is pursuant to the new E-FMLA which is only available for an employee to care for a child whose school, place of care or childcare provider is unavailable due to COVID-19 related reasons.

***How is the 30 calendar days of employment calculated under E-FMLA?*** The 30 calendar days is satisfied if the employee is on the employer's payroll for 30 calendar days prior to the day the leave would begin. To illustrate, if an employee requests to take leave on April 1, 2020, the employee will need to have been on the payroll as of March 2, 2020. If employee worked as a temporary employee and then hired on a full-time basis, the days worked as a temporary employee count toward the 30-day period.

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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