



## DOL Issues Guidance On Employer Paid Leave Requirements Model Notices Available

The U.S. Department of Labor (DOL) continues to gradually roll out guidance to the Families First Coronavirus Response Act (additional paid sick leave) and the paid expanded FMLA provisions. Stradling will continue to monitor these developments and provide clients with up to date information.

While we discuss some of the key points in the DOL guidance, the publications issued by the DOL have useful information in an easy to reference format. You can access the DOL guidance at:

Questions and Answers

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Employer Paid Leave Requirements

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

Employee Paid Leave Rights

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

Information on related topics can be found at

<https://www.dol.gov/agencies/whd/pandemic>

### The DOL's Response To Frequently Asked Questions About The FFCRA

The DOL's guidance addresses a number of the more common questions about the paid sick leave provided to employees under the FFCRA. Some of the key points include:

- The FFCRA's paid leave provisions are effective April 1, 2020. This is worth noting because the text

of the FFCRA states that the bill goes into effect 15 days after its enactment on March 18, which many calculated to start on April 2.

- The law applies to employers with fewer than 500 employees. To calculate the total number of employees, an employer must include all full-time and part-time employees in the U.S. or any of its territories, including employees on leave, temporary employees who are jointly employed with another employer (think staffing agencies as an example) and any day laborers provided by a temporary employment agency. Employers who are not sure if they meet the 500 employee cut off, or the 50 employee cut off to be considered a small business, should consult with their legal advisors.
- Separate corporate entities are considered separate employers and count their total employees individually, unless they are joint employers under the Fair Labor Standards Act (FLSA) or integrated employers under the Family and Medical Leave Act.
- Companies with fewer than 50 employees that want to take advantage of the small business exception should document the reasons why the business meets criteria to be set forth by the DOL in forthcoming regulations. We hope the DOL will also state what the business is to do with that

documentation to receive the exception.

- During any week, the paid sick leave provisions allow employees to take paid sick leave up to the number of hours they are normally scheduled to work, even if that number includes overtime hours. For example, if a full-time employee is normally scheduled to work 50 hours a week, they may take 50 hours of FFCRA paid sick leave in a single week. FFCRA paid sick leave is capped at 80 hours for a full-time employee, so that employee would only be entitled to 30 additional hours of FFCRA paid sick leave in the subsequent week.
- The employee's regular rate is equal to their average regular rate over the past six months or, if employed less than six months, since they have been employed. This regular rate includes commissions, tips, or piece rates. Employers may also calculate this rate by adding all compensation paid to the employee required to be included in determining the regular rate over the six month period and dividing it by all hours actually worked during the period.
- Employees may not double-dip in FFCRA paid sick leave. Full-time employees are entitled to 80 hours of paid sick leave and part-time employees to a prorated amount based on a typical two week period. Employees who exhaust all of their FFCRA paid sick leave for one purpose (e.g., self isolating based on a doctor's recommendation) do not get additional paid sick leave for other purposes (e.g., caring for someone who is self isolating based on a doctor's recommendation). But remember that FFCRA paid sick leave is separate from paid sick leave or PTO provided under an employer's existing policies.
- Employees only receive a total of 12 weeks of leave under the paid FMLA provisions for staying home to care for a child whose school or child care is closed. The first 10 days (two workweeks) is unpaid but may be covered by the FFCRA's paid sick leave provisions if that time has not been exhausted. The remaining ten weeks are paid consistent with the expanded family and medical leave provisions.
- FFCRA benefits are not retroactive and are

effective as of April 1, 2020.

### Temporary Non-Enforcement of FFCRA

The DOL released Field Assistance Bulletin No. 2020-1 on March 24 stating that the Wage and Hour Division (WHD) of the DOL will observe a temporary period of non-enforcement for 30 days from the enactment of the FFCRA (between March 18 and April 17). During this period, the WHD will not bring enforcement actions against employers who make a reasonable good faith attempt to comply with the law. Employers acting reasonably and in good faith include those who:

- Remedy any violations as soon as practicable;
- Were not "willfully" violating the law (by showing reckless disregard about whether the conduct was prohibited); and
- Provide a written commitment to the DOL to comply in the future.

### FFCRA Model Notices Now Available

The DOL delivered on the FFCRA's requirement to provide a model notice no later than seven days after enactment. Two model notices have been posted, one for federal employees and one for everyone else. The notice for non-federal employees can be found at: [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)

The DOL also provided responses to frequently asked questions about the notices, including what to do in the case of telecommuting employees. Covered employers must post the notice in a conspicuous place on their premises, similar to other required postings. However an employer may satisfy this requirement for telecommuting employees by emailing or directly mailing the notice to employees or posting it on an employee information internal or external website.

## We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

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