

DOL Issues New Guidance: Notice Requirements and a Non-Enforcement Period for FFCRA

Following the enactment of the Families First Coronavirus Response Act (FFCRA), on March 25, 2020, the Department of Labor (DOL) disseminated additional guidance to address issues facing the implementation of the FFCRA. The guidance provides information to employers about the employer's obligation to provide notice to employees, the period of non-enforcement of the FFCRA, and the impact of COVID-19 on the Family and Medical Leave Act (FMLA).

The information in this article is current through March 26, 2020. However, given the fast changing nature of the nation's response to the COVID-19 pandemic, we acknowledge that facts will change and invite you to visit our pandemic [site](#) where we maintain up-to-date information.

Federal Notice Requirements under FFCRA

Employers are required to notify employees of their rights, benefits, and obligations related to Emergency Paid Sick Leave and Public Health Emergency Leave under the FFCRA and post the notices in conspicuous places on their premises. Satisfying notice and posting requirements can be a challenge for employers facing the COVID-19 outbreak due to large numbers of the workforce teleworking or performing job duties with less contact with the regular job site or office. For employers who have employees who are teleworking during this time, [DOL FAQs](#) allow employers to communicate the requirements of the FFCRA via email, direct mail, or by posting the notice on the organization's internal or external website where other employee information is posted. If an employer's operations include, in whole or in part, employees who report for work at an office or jobsite, the employer will need to post the notice in a conspicuous place that is visible to all employees at the office or jobsite.

Employers should download a copy of the [FFCRA poster](#) and post or provide notice to employees as soon as practicable and prior to the April 1, 2020 effective date of the FFCRA. If the employer did not or could not physically post the notice at a jobsite prior to April 1st (due to teleworking), the notice should be posted as soon as operations resume. The DOL has not yet translated the poster into any other languages, but is working to do so.

Note that the Emergency Paid Sick Leave and Public Health Emergency Leave provisions of the FFCRA will apply from April 1, 2020 until December 31, 2020.

DOL FFCRA FAQs

The DOL also published updated [FAQs](#) on the FFCRA on topics ranging from how to count employees for purposes of determining whether the employee threshold is met to record keeping requirements. Employers should note the recording keeping information in particular.

What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

If one of your employees takes paid sick leave under the Emergency Paid Sick Leave Act, you must require your employee to provide you with appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, under the Emergency Family and Medical Leave Expansion Act, you must require your employee to provide you with appropriate documentation in support of such leave, just as you would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason. If you intend to claim a tax credit under the FFCRA for the expanded family and medical leave, you should retain this documentation in your records. You should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

Another FAQ addresses documents employees should provide to their employers. Employers should return from time to time to the DOL's FFCRA webpage to see updated information.

Temporary Non-Enforcement Period for FFCRA

Although the FFCRA takes effect on April 1, 2020, the DOL issued [enforcement guidance](#) stating that it will observe a temporary non-enforcement period of the provisions of the FFCRA from March 18 through April 17, 2020. During the non-enforcement period, DOL will not bring enforcement action against any public or private employer for violations of the FFCRA if the employer has made a reasonable, good faith effort to comply its provisions. The DOL has indicated that a reasonable, good faith effort exists if the employer remedies the violation, including making all

employees whole as soon as practicable, the employer did not act in a “willful” manner, and the employer provides the DOL with a written commitment that the employer will comply with the provisions of the FFCRA going forward.

DOL FAQs: COVID-19 and the Family and Medical Leave Act

On March 11, 2020, the DOL issued [FAQs](#), addressing how and when FMLA applies to employees who miss work as the result of COVID-19. The DOL’s FAQs, related to pandemic influenza, indicate that FMLA leave may apply to employees sick with influenza under certain circumstances. Specifically, an employee who is sick or who is caring for a sick family member may be entitled to FMLA leave where complications from the flu arise that create “a serious health condition” as defined by FMLA. The DOL guidance related to an influenza pandemic would apply to COVID-19, as well. Furthermore, the DOL urges workers who are ill with COVID-19 or have a family member who is ill to stay home to minimize the spread of the pandemic. DOL encourages employers to consider flexible leave policies to support these employees and other strategies to mitigate spread of COVID-19 in the community.

It is important to remember that FMLA leave does not extend to situations that do not involve a “serious health condition” as that term is defined by FMLA. In this regard, employers are not required to provide leave to those employees who stay home from work in an attempt to avoid contracting COVID-19. The DOL FAQs recommend, however, that employers review their leave policies and consider providing flexibility to their employees and in a manner that does not discriminate based on race, color, sex, national origin, religion, age, disability, or veteran status.

Please note, the FFCRA will temporarily impact FMLA administration when an employee cannot work or telework because of a need to take leave due to care for a child for specific reasons is the result of COVID-19. Employers will be reimbursed for some of the expenses associated with the paid leave for Public Health Emergency Leave and Emergency Paid Sick Leave through tax credits. Links to additional resources on the FFCRA are included below.

Additional Resources

COVID-19: Employer Frequently Asked Questions: <https://ajg.adobeconnect.com/covid19benefitsfaqs/>

Compliance Alert: Families First Coronavirus Response Act Becomes Law: <https://ajg.adobeconnect.com/ffra/>

WHO, Q&A on Corona Viruses: <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

WHO, Coronavirus Disease (COVID-19) Advice for the Public: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>

CDC, Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19:

https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html

EEOC, What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Department of Labor, COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act

Questions and Answers: <https://www.dol.gov/agencies/whd/fmla/pandemic>

For further information on organizational responses to COVID-19, please see Gallagher News & Insights:

<https://www.aig.com/us/news-and-insights/2020/mar/gallagher-report--responding-to-the-coronavirus/>

The intent of this article is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans.