DOL Releases FAQs on Families First Coronavirus Response Act

Introduction
Effective April 1, 2020 (ending December 31, 2020), the Families First Coronavirus Response Act (H.R. 6201, “the FFCRA”) requires private employers with fewer than 500 employees (and public agencies with one or more employee) to provide: (1) 80 hours of paid sick leave (reduced for part-time employees) for immediate use for six COVID-19 related purposes, and (2) up to 12 weeks of FMLA leave for school closures or where childcare is not available as a result of the COVID-19 crisis to employees after 30 days of employment (the first 10 days are unpaid). Tax credits will be available to offset the cost of these two new provisions. Our Alert (Alert 2020-05 - Congress Passes Coronavirus Relief Act) has additional details on the Act.

Last week, the Department of Labor (DOL) released a model posting on FFCRA leaves and issued FAQs on this FFCRA posting. (See Alert 2020-07 DOL Releases FFCRA Poster and FAQs on Posting.) More recently, DOL released two rounds of FAQs more generally addressing the new paid sick leave provision and the FMLA expansion. Although the first round of DOL FAQs (questions 1-15) addressed more basic issues the second round (questions 16-36) offers important insights for employers. The complete set of FAQs is largely excerpted into Alliant FAQs below. More nuanced issues addressed below include: calculating the fewer than 500 employee threshold (Q2), a future small business exemption (Q4), recordkeeping requirements (Q15-16), details on telework (Q17-19), intermittent use of leave (Q20-22), unavailability of leave when worksites are closed or during furloughs (Q23-28), and use of preexisting leave or PTO (Q31-33).

DOL FAQs on the FFCRA

1. **What is the effective date of the FFCRA?**
   Both of the FFCRA’s leave provisions apply to leave taken between April 1 and December 31, 2020.

2. **How does an employer know if a business is under the 500-employee threshold?**
   An employer has fewer than 500 employees if, at the time an employee’s leave is to be taken, it employs fewer than 500 full-time and part-time employees within the United States, (including any Territory or possession of the United States). An employer must count employees on leave; temporary employees who are jointly employed with another employer (regardless of whether the joint-employing employees are maintained on another employer’s payroll); and day laborers supplied by a temporary agency. Independent contractors are not considered employees for purposes of the 500-employee threshold.

   If two entities are found to be joint employers all of their common employees must be counted in determining whether paid sick leave must be provided and whether leave must be provided under the [FMLA expansion](#). Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.

   If two entities are found to meet the [integrated employer test](#) under FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of the [FMLA expansion](#).
3. **Does the FFCRA apply to private employers with 500 or more employees?** No.

4. **Is there a small business exemption for businesses with fewer than 50 employees if providing paid sick leave and the FMLA expansion would jeopardize the viability of the business?**

   A small business exemption will be addressed in forthcoming regulations. To prepare to elect this small business exemption, employers should document why compliance with the FFCRA leave provisions would jeopardize the viability of the business.

5. **How do employers count hours worked by a part-time employee for purposes of paid sick leave or the FMLA expansion?**

   A part-time employee is entitled to leave for his or her average number of work hours (hours the employee is normally scheduled to work) in a two-week period. If the normal hours scheduled are unknown, or if the part-time employee’s schedule varies, employers may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that the employer and employee agreed the employee would work upon hiring. If there is no agreement, an employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

   For example, if an employee is normally scheduled to work 25 hours a week, that employee is entitled to 50 hours paid sick leave under this provision.

6. **When calculating pay due to employees should overtime hours be included?**

   The FMLA expansion requires employers to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. Note, however, that the employee will be paid 2/3 of their regular rate of pay, and that calculation will not factor in any overtime rate of pay. Regardless of overtime or hours worked, paid sick leave is paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80. Daily and aggregate caps placed on any pay for paid sick leave and the FMLA expansion are discussed below.

7. **How much will an employee be paid while taking paid sick leave or expanded FMLA under the FFCRA?**

   **Paid Sick Leave.** It depends on the employee’s normal schedule, as well the reason for taking leave. If an employee takes paid sick leave as a result of (1) a Federal, State, or local quarantine or isolation order related to COVID-19; (2) a health care provider’s advice to self-quarantine due to concerns related to COVID-19; or (3) COVID-19 symptoms and is seeking a medical diagnosis, the employee will receive the greater of: the regular rate of pay, the federal minimum wage in effect under the FLSA, or the applicable State or local minimum wage. Note that many localities have minimum wage thresholds that are higher than the state and federal rates. Wages are up to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

   If an employee takes paid sick leave because they are: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition as specified by the Secretary of Health and Human Services, the employee is entitled to compensation at 2/3 of the
greater of the amounts set forth above, up to a maximum of $200 per day, or $2,000 over the entire two week period.

**FMLA Expansion.** If an employee takes expanded FMLA leave, they can take paid sick leave for the first ten days of that leave period (or potentially other PTO). For the following ten weeks, the employee will be paid at 2/3 of the regular rate of pay for the hours normally scheduled to work. The regular rate of pay must be at or above the federal minimum wage, or applicable state or local minimum wage. Employees will not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded FMLA when on leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

8. **What is the regular rate of pay for purposes of the FFCRA?**
   For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of the regular rate over a period of up to six months prior to the date on which leave is taken. If the employee has not worked for the employer for six months, the regular rate used to calculate paid leave is the average of the regular rate of pay for each week worked for the current employer. Commissions, tips, or piece rates are generally included in this calculation under the FLSA.

9. **Can an employee take 80 hours of paid sick leave for self-quarantine and then more paid sick leave for another paid sick leave qualifying reason?**
   No. The total number of hours for which you receive paid sick leave is capped at 80 hours, regardless of whether the employee experiences multiple qualifying reasons for leave.

10. **How do paid sick leave and the FMLA expansion interact when an employee is home with a child because a school or place of care is closed or child care provider is unavailable?**
    An employee may take both paid sick leave and expanded FMLA to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. Emergency paid sick leave provides for an initial two weeks of paid leave at 2/3 of wages that covers the first ten workdays of expanded FMLA, which are unpaid. After the first ten workdays, employees will receive 2/3 of your regular rate of pay under the FMLA expansion.

11. **Can an employer deny paid sick leave under the FFCRA if it already gave employees paid leave for a reason identified in the Act prior to April 1?**
    No. Note, however, that a strict reading of the law, in conjunction with existing FMLA provisions, indicates that employees who have already exhausted FMLA are not entitled to additional leave under this expanded FMLA provision. Likewise, employees who have used some, but not all of their FMLA leave, are only entitled to the balance of the 12 weeks for leave under this provision.

12. **Is all leave under the FMLA now paid leave?**
    No. FMLA leave is only paid for this specific and limited reason (to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, and only for a finite period of time, e.g., April 1 through December 31, 2020.

13. **Are paid sick leave and the FMLA expansion retroactive?**
    No. Eligible employees can only take leave under these provisions beginning on April 1, 2020.
14. **For purposes of expanded FMLA how is the 30 calendar days of employment measured?**
   An employee is considered to have been employed for at least 30 calendar days if they were on the employer’s payroll for the 30 calendar days immediately prior to the day leave would begin. For example, an employee that wanted to take leave on April 1, 2020, would need to have been on the employer’s payroll as of March 2, 2020.

   **Compliance Commentary:** Note the CARES Act added a break in service rule where the 30 day eligibility provision is waived if: (1) an employee was laid off on or after March 1, (2) prior to the layoff the employee worked for the employer for at least 60 days, and (3) the employee is later rehired.

15. **What records should employers keep when an employee takes paid sick leave or expanded FMLA?**
   Employers must require employees to provide 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. For expanded paid sick leave this could include the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For expanded FMLA, 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. 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.

16. **What documents do employees need to provide to get paid sick leave or expanded FMLA?**
   See above. Also note that all existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee takes leave beyond the two weeks of emergency paid sick leave because of a medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA.

17. **When is an employee able to telework under the FFCRA?**
   An employee may telework when the employer permits or allows you to perform work while at home or at a location other than the normal workplace.

18. **What does it mean to be unable to work, including telework for COVID-19 related reasons?**
   An employee is unable to work if the employer has work for the employee but one of the COVID-19 qualifying reasons set forth in the FFCRA prevents that employee from being able to perform the work, either under normal circumstances or by telework. If the employee and employer agree that the employee will work the normal number of hours, but outside of the normal schedule (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

19. **Is an employee unable to telework entitled to paid sick leave or expanded FMLA?**
   If an employer permits teleworking and an employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave. Similarly, if the employee is unable to perform those teleworking tasks or work the required hours because of the need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then the employee is entitled to
take expanded family and medical leave. Of course, to the extent the employee is able to telework while caring for a child, paid sick leave and expanded FMLA is not available.

20. **Can employees take paid sick leave or expanded FMLA intermittently while teleworking?**
Yes. Where an employee is unable to telework normal hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act, an employer can permit the employee to take intermittent leave. Similarly, where an employee cannot telework a normal hours because of the need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, an employer can permit the employee to take expanded FMLA intermittently while teleworking. An employee may take intermittent leave in any increment, provided that the employee and employer agree. For example, if they agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

21. **Can employees take paid sick leave intermittently while working at a usual worksite (as opposed to teleworking)?**
It depends on why the employee is taking paid sick leave and whether the employer agrees. Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is related to a quarantine order or connected to COVID-19 symptoms (or any other substantially similar condition specified by HHS). This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others. In contrast, where the employee and employer agree an employee may take paid sick leave intermittently to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.

22. **Can employees use expanded FMLA intermittently while a child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons if not teleworking?**
Yes. An employer may allow this.

23. **If an employee’s worksite closed before April 1, 2020 is paid sick leave or expanded FMLA available?**
No. If an employer closes (e.g. lack of business or pursuant to a Federal, State, or local directive), employees will not get paid sick leave or expanded FMLA but may be eligible for State unemployment insurance.

24. **If an employee’s worksite closed on or after April 1, 2020, but before I go out on leave, can I still get paid sick leave or expanded FMLA?**
No. If an employer closes after the FFCRA’s effective date (even if leave was requested prior to the closure), you will not get paid sick leave or expanded FMLA but you may be eligible for unemployment insurance or other wage replacement benefits.

25. **What happens if an employee’s worksite closes while an employee is on paid sick leave or expanded FMLA?**
If an employer closes while an employee is on paid sick leave or expanded FMLA, the employer must pay for any paid sick leave or expanded FMLA used before the employer closed. As of the date the employer
closes the worksite, an employee is no longer entitled to paid sick leave or expanded FMLA, but may be eligible for unemployment insurance or other wage replacement benefits.

26. **If an employer is open, but furloughs employees on or after April 1, 2020 can employees receive paid sick leave or expanded FMLA?**

   No. An employer that furloughs employees for lack of work is not required to provide paid sick leave or expanded family and medical leave. However, employees may be eligible for unemployment insurance or other wage replacement benefits.

27. **If an employer closes a worksite on or after April 1, 2020 but indicates it will reopen at some time in the future, can employees receive paid sick leave or expanded FMLA?**

   No. If an employer closes the worksite, even for a short period of time, employees are not entitled to take paid sick leave or expanded family and medical leave. However, employees may be eligible for unemployment insurance or other wage replacement benefits.

28. **If an employer reduces scheduled work hours, can employees use paid sick leave or expanded FMLA for the hours they are no longer scheduled to work?**

   No. If an employer reduces and employee’s work hours because it does not have work, the employee may not use paid sick leave or expanded FMLA for the hours they are no longer scheduled to work. This is because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19.

29. **Can employees collect unemployment insurance benefits and receive pay for paid sick leave and/or expanded FMLA at the same time?**

   No. If an employer provides an employee paid sick leave or expanded family and medical leave, that employee is not eligible for unemployment insurance. However, DOL recently clarified additional flexibility to the States (UIPL 20-10) to extend partial unemployment benefits where hours or pay have been reduced.

30. **Are employers required to continue health benefits for employees who elect to take paid sick leave or expanded FMLA? If employees remain on leave beyond the maximum period of expanded FMLA do they have a right to stay on the group health plan coverage?**

   Where an employer provides group health coverage, enrolled employees are entitled to continue that coverage during their expanded FMLA on the same terms as if they continued to work. Employees generally must continue to make normal contributions to the cost of health coverage. If an employee does not return to work at the end of expanded FMLA, the employer should review its eligibility provisions and internal policies to determine whether the employee can remain on the plan. If the employee is no longer eligible, COBRA coverage should be offered (generally applies to employers with 20 or more employees). If you elect to take paid sick leave, your employer must continue your health coverage.

31. **Can employees use preexisting leave entitlements and FFCRA paid sick leave and expanded FMLA concurrently for the same hours?**

   Generally, employees may not simultaneously take paid leave under both the new provisions and preexisting employer provided leave, unless the employer agrees to allow the employee to supplement the amounts received from paid sick leave or expanded FMLA, up to normal earnings. For example, if an employee receiving 2/3 of normal earnings from paid sick leave or expanded FMLA can, where an
employer permits, use preexisting employer-provided paid leave to receive the additional 1/3 of your normal earnings.

32. **Can employers supplement the pay mandated under the FFCRA with other paid policy leave?**
   Yes. An employer can choose to do that, but isn’t required to supplement these paid leaves.

33. **Can employers require an employee to supplement the FFCRA paid leave provisions with other paid leaves?**
   No. An employer can permit an employee to use that leave, in which case the employee decides whether to existing paid leave to supplement paid leave under the FFCRA.

34. **Can employers pay employees more than they are entitled to receive for new FFCRA leaves and claim a tax credit for the entire amount paid?**
   No. Employers cannot receive a tax credit for amounts paid in excess of the FFCRA requirements.

35. **Can an employer that is part of a multiemployer collective bargaining agreement satisfy expanded FMLA and paid sick leave obligations through contributions to a multiemployer fund, plan, or program?**
   An employer may satisfy expanded FMLA and paid sick leave obligations by making contributions to a multiemployer fund, plan, or other program in accordance with existing collective bargaining agreements (CBAs). These contributions must be based on the amount of paid FMLA and paid sick leave to which each employees is entitled under the Act based on each employee’s work under the applicable CBA. The fund, plan, or program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, employers may choose to satisfy their obligations under the Act by other means, provided they are consistent with their bargaining obligations and CBAs.

36. **Are contributions to a multiemployer fund, plan, or other program the only way an employer that is part of a multiemployer collective bargaining agreement can comply with the paid leave requirements of the FFCRA?**
   No. Both the paid sick leave and FMLA expansion provide such an employer may satisfy its obligations by making appropriate contributions to a fund, plan, or other program based on the paid leave owed to each employee. However, the employer may satisfy its obligations under both Acts by other means, provided they are consistent with its bargaining obligations and collective bargaining agreement.

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