

On March 24, 2020, the U.S. Department of Labor’s Wage & Hour Division (WHD) issued a series of informal guidance documents, designed to answer employers’ most pressing questions regarding enforcement of the Families First Coronavirus Response Act (FFCRA). Key information is outlined below. Links to the guidance documents are available at the following site: <https://www.dol.gov/agencies/whd/pandemic>. This summary provides an overview of novel information provided by the new guidance, and does not provide a complete summary of all FFCRA programs. Please note that this guidance may change when the US Department of Labor issues official regulations governing the FFCRA, which are expected in April.

Effective Date

The effective date the FFCRA will be April 1, 2020.

Limited Suspension of Enforcement Actions

The WHD will not bring any enforcement actions prior to April 17, 2020, where employers have made a reasonable, good faith effort to comply with the Act. Reasonable, good faith effort is defined to exist where (1) The employer remedies any violations, including by making all affected employees whole as soon as practicable; (2) The violations of the Act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited...”); and (3) The Department receives a written commitment from the employer to comply with the Act in the future. After April 17, normal enforcement actions will be pursued without limitation.

Calculating Number of Employees

The WHD confirmed that the number of employees will be calculated in line with the principles of the FMLA, not the ACA. That means counting all full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. You should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer’s payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Small-Business Exception

The guidance indicates that a small-business exception will be created. The WHD has advised as follows: To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed

in more detail in forthcoming regulations. You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

Calculation of Sick Leave

The guidance indicates that employees may take paid sick leave for multiple permitted reasons, but that the total leave available for all reasons is 80 hours. In other words, an employee is ***not*** entitled to 80 hours for each qualifying reason, but a combined 80 hours total.

Credit for Past Leave Allowed

Contrary to prior indications, the WHD is now indicating that paid leave extended to employees ***prior to*** April 1, 2020, will ***not*** be counted towards the 12 weeks of total paid leave permitted under the FFCRA.

Traditional FMLA Remains Unpaid

The WHD has confirmed that the new paid leave allowance applies only to the expansion of the FMLA. The prior categories of leave permitted by the FMLA remain unpaid.

Application of Expanded FMLA Benefits to Federal Employees

While most state and municipal employers are subject to the FFCRA, the WHD guidance indicates that because most employees of the federal government are covered by Title II of the FMLA, which was not amended by this Act, they are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Tax Credits

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. The WHD's guidance clarifies that qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the appropriate *per diem* and aggregate payment caps. Importantly, applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

Notice Requirements

One provision of the FFCRA that's getting very little attention is the notice requirement. All employers are required by law to post a notice summarizing an employee's rights and obligations under the FFCRA, similar to the notice requirement under the FMLA. Employers should ensure they have the notice posted by April 1, 2020.



OSHA and Work-from-Home Arrangements

The WHD's most recent guidance indicates that it will not apply the provisions of the Occupational Safety and Health Act (OSHA) to home offices. However, employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

Leave for Employees Worried about Disease

The WHD's general guidance on influenza notes that leave taken by an employee for the purpose of avoiding exposure to the flu or another infectious disease agent would not be protected under the FMLA. But keep in mind that employees who have preexisting conditions may be eligible for reasonable accommodations under the ADA or the Delaware Persons with Disabilities Employment Protection Act.

WHD Operations

In response to the ongoing coronavirus pandemic, the WHD has temporarily moved to telephone contact only. To contact WHD, call 1-866-487-9243.