

Families First Coronavirus Response Act (FFCRA) – Agency Guidance Released

Issue Date: March 2020

The Department of Labor (DOL) and Internal Revenue Service (IRS) have released initial guidance clarifying several provisions set forth in the Families First Coronavirus Response Act (FFCRA). A high-level summary of these items, as well as links to the guidance, are provided below.

DOL Guidance

The DOL guidance indicates the new paid leave requirements go into effect April 1, 2020 (without a retroactive effect) and continue through the end of 2020. Among other things, the guidance clarifies the following items:

- Private employers with fewer than 500 employees are required to comply with the new paid leave requirements. To determine the employee count, count all employees (full-time and part-time) in the U.S. at the time leave is requested.
 - If two entities are found to be “joint employers” as defined under the Fair Labor Standards Act (FLSA), all their common employees must be counted.
 - If two or more entities are considered an “integrated employer” as defined under the Family and Medical Leave Act (FMLA), then employees of all entities making up the integrated employer will be counted.
 - Employers with 500+ employees do NOT have to comply with the paid leave requirements under the FFCRA.
 - Employers with <50 employees may qualify for an exemption if the paid leave requirements would jeopardize the viability of the business as a going concern.
- Paid leave as required under the FFCRA applies to full-time and part-time employees who request leave for a qualifying reason. To calculate hours and corresponding pay for part-time or variable hour employees, the employer may use a 6-month average. For employees who have been employed less than 6 months, use:
 - (i) the number of hours agreed upon at hire; or
 - (ii) the average hours per day the employee was scheduled to work over the entire term of employment.
- Paid leave as required under the FFCRA should be based on the employee’s regular rate of pay (as defined by FLSA) or federal, state or local minimum wage, whichever is highest. However, there are daily and aggregate maximums on the amount an employer is required to pay any employee; the maximum thresholds differ depending upon the type of leave and the qualifying reason for leave.
- The Paid Sick Leave required under the FFCRA for 2 weeks (up to 80 hours) is available only once. An employee who may experience more than one qualifying reason is eligible for only up to 2 weeks of paid leave total under this provision.
- An employee who requests leave to stay home with a child due to coronavirus-related school or daycare closures may qualify for Paid Sick Leave AND Expanded FMLA for a total of up to 12 weeks of protected paid leave.

The DOL has promised additional details and guidance will be available in early April. DOL Guidance on COVID-19 and the Workplace can be found at <https://www.dol.gov/agencies/whd/pandemic>.

IRS Guidance

Employers required to provide Paid Sick Leave and Expanded FMLA under the FFCRA are eligible for refundable tax credits applied against the employer's quarterly payroll tax return (i.e. Form 941) to offset such costs. The IRS indicates employers will be able to retain an amount of the payroll taxes equal to the amount of paid leave, plus related group health plans costs (rather than depositing them with the IRS). Payroll taxes available for retention include withheld federal income taxes, as well as employee and employer share of Social Security and Medicare taxes. If there are insufficient amounts available via payroll taxes to cover the employer's expenses related to the paid leave requirements, employers may file a request for an accelerated payment from the IRS and IRS expects to process such requests in 2 weeks or less. The guidance provided to date is high level. The IRS has promised additional details in the next week.

IRS Guidance on Refundable Tax Credits can be found at <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>.