

Blog Post

Department of Labor Issues FFCRA Guidance, Poster

March 26, 2020

A flurry of publications from the United States Department of Labor (DOL) provide employers with additional details regarding the recently-passed Families First Coronavirus Response Act (FFCRA). Q&A guidance issued March 24 establishes an April 1, 2020 effective date and explains how to calculate the 500-employee threshold and hours used to determine employees' leave entitlement. A March 24 Wage and Hour Division enforcement memorandum indicates that the Act will be subject to a 30-day limited non-enforcement period. Finally, the DOL published a required poster and guidelines for posting notices in an era of remote working. Employers subject to the FFCRA should familiarize themselves with each of these publications before the law takes effect.

The FFCRA, signed into law on March 18, 2020, provides assistance to employees and reimbursable tax credits to employees. The FFCRA requires employers with fewer than 500 employees to provide eligible employees with paid sick leave under two provisions: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. A detailed summary of the FFCRA is available [here](#).

**Families First Coronavirus Response Act:
Questions and Answers**

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The DOL's March 24, 2020 Q&A Guidance resolves several outstanding questions, including:

1. **The Act takes effect on April 1, 2020.**
2. **The Act applies to leave taken between April 1, 2020 and December 31, 2020.**
3. **Employees on leave, temporary employees (including those jointly employed by another employer), and day laborers are counted in determining whether the employer has fewer than 500 employees. Independent contractors are not.**
4. **A corporation with an ownership interest in another corporation is a separate employer unless they are considered joint employers under the Fair Labor Standards Act.** Factors considered in making this determination include whether the potential joint employer hires or fires the employee, supervises and controls the employee's work schedule or conditions of employment to a substantial degree, determines the employee's rate and method of payment, and maintains the employee's employment records.
5. **Regulations concerning the small business exemption are forthcoming.** Employers with fewer than 50 employees that believe that providing child care-related benefits under the FFCRA would jeopardize the viability of the business should document why their business meets the criteria set forth by the DOL in forthcoming regulations.
6. **Part-time employees are entitled FFCRA benefits based on their average number of work hours in a two-week period.** If the part-time employee's schedule varies, employers may use a six-month average to calculate average daily hours.
7. **Overtime hours are not included in the Emergency Paid Sick Leave Act.** The Emergency Paid Sick Leave Act entitles eligible employees to up to 80 hours of paid sick leave over a two-week period.

8. **Overtime hours must be included when calculating hours under the Emergency Family and Medical Leave Expansion Act.** These provisions require employers to pay an employee for hours they would have normally been scheduled to work, even if that number exceeds 40 hours per week. However, benefits under the Emergency Family and Medical Leave Expansion Act are capped at \$200 per day and \$12,000 in the aggregate (including paid sick leave).
9. **FMLA leave for other conditions remains unpaid.** Only leave taken under the FFCRA's Emergency Family and Medical Leave Expansion Act—when such leave exceeds ten days—is paid. FMLA leave taken for any other reason is unpaid. Expanded FMLA leave under that act is available only where an employee is unable to work or telework due to a need for leave to care for the employee's son or daughter under 18 years of age, if the child's school or place of care has been closed or if the child care provider is unavailable due to a COVID-19 emergency declared by a Federal, State, or local authority. Keep in mind that the Act defines a "child care provider" as: "a provider who receives compensation for providing child care services on a regular basis, including an 'eligible child care provider' (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n))."
10. **The paid sick and expanded family and medical leave requirements are not retroactive.**

Memorandum Regarding Temporary Non-Enforcement Period

In a March 24, 2020 memorandum, the Wage and Hour Division indicated that it will observe a temporary period of non-enforcement for 30 days after enactment to enable covered employers to come into compliance with the FFCRA. Specifically, the Division will not initiate enforcement actions against employers for any violations occurring on or

before April 17, 2020 provided the employer has made reasonable, good faith efforts to comply with the FFCRA. An employer in violation of the FFCRA acts “reasonably” and “in good faith” only when each of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole, as soon as practicable;
2. The violations were not “willful” (adopting a standard that conduct is “willful” if the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited”); and
3. The DOL receives a written commitment from the employer to comply with the FFCRA in the future.

The Division expressly reserved the right to enforce violations where the employer willfully violates the FFCRA, fails to remedy a violation, and/or fails to provide written commitment to future compliance.

Poster and Notice FAQs

On March 25, 2020, the DOL published the Families First Coronavirus Response Act Notice and a list of Frequently Asked Questions. All private employers subject to the FFCRA must post this notice. A separate notice applies to federal employers.

The FAQs clarify that covered employees can satisfy the posting requirement by emailing or direct mailing the notice to employees or by posting the notice on an internal or external employee information website. Employers are required to share the notice with new hires, but not recently laid-off employees or new job applicants. While employers are not required to post the notice in multiple languages, the DOL will be translating the poster into additional languages.

Regulations and further guidance from the DOL are expected on an ongoing basis. Akerman continues to follow COVID-19 developments as they impact the workplace and will provide frequent updates on those developments. For assistance addressing issues in your workplace, contact your Akerman attorney.

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