

Blog Post

DOL Issues Regulations on Emergency Paid Sick Leave and Expanded FMLA Leave

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Demonstrating that guidance on the newly mandated Emergency Paid Sick Leave and Expanded Family and Medical Leave is fluid, on April 6, 2020, the United States Department of Labor (DOL) published new regulations as a “[temporary rule](#)” expanding on and tinkering with its prior guidance under the Families First Coronavirus Response Act (FFCRA). The new rule became effective on April 2, 2020. House Democrats have already challenged certain provisions as inconsistent with the FFCRA and asked they be removed. Whether that will happen remains to be seen.

In the meantime, among other things, the new rule provides guidance on the definitions of “quarantine or isolation order,” “health care provider,” “son or daughter,” “child care provider,” and “place of care.” It also lays out documentation and recordkeeping requirements, and clarifies the applicability of the small business exemption from the leave provisions. Each are discussed in more detail below.

Key Terms Defined

The temporary rule defines a number of terms used in the FFCRA.

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For example, the FFCRA permits Emergency Paid Sick Leave where an “employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;” however, it did not define “**quarantine or isolation order.**” Employers were uncertain whether an “isolation order” referred to an order directing an individual to isolate or a community-wide “shelter in place” or “stay at home” order. The new rule makes clear the latter orders count and expressly include: “quarantine, isolation, containment, shelter-in-place or stay-at home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order.”

The rule further specifies that this “includes when a Federal, State, or local government authority has advised categories of citizens (*e.g.*, of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.”

Notably, the temporary rule provides that an employee that is subject to such an order cannot take Emergency Paid Sick Leave when his or her employer *does not have work available as a result of the order* or other circumstances.

The rule also clarifies that the definition of “**son or daughter**” for purposes of both Emergency Paid Sick Leave and Expanded FMLA Leave includes “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.”

The rule also provides a broadened definition of “**health care provider**” for the purpose of determining whether an employee may be excluded from Emergency Paid Sick Leave or Expanded FMLA Leave under the FFCRA. A “health care provider”

under the rule includes “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer or entity.” The definition of a “health care provider” also allows an employer to exclude from Emergency Paid Sick Leave or Expanded FMLA Leave provided for under the FFCRA the following: (1) “any individual employed by an entity that contracts with any of these institutions [previously] described ... to provide services or to maintain the operation of the facility”; and (2) “anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.”

Likewise, the new rule broadens the definition of a “**child care provider.**” The FFCRA defines a child care provider as “a provider who receives compensation for providing child care services on a regular basis... includ[ing] a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed... and those referenced to in section 9858c(c)(2)(E) of Title 42.” The new rule includes not only providers of child care services for compensation that are licensed, regulated, or registered under State law, but also those who are not “compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the child.”

The new rule defines a “**place of care**” as the physical location where an employee’s child is taken for care, including “day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.” The DOL’s

FFCRA FAQ clarifies that a “place of care” is considered closed for purposes of the FFCRA when it moves to online instruction or otherwise expects a child’s school work to be completed at home.

The rule further clarifies that an employee qualifies for Emergency Paid Sick Leave or Expanded FMLA Leave to care for his or her son or a daughter because the child’s school or child care provider has closed or is unavailable “for reasons related to COVID-19 *only if* no other suitable person is available to care” for the son or daughter during the leave period. For example, an employee may not take Emergency Paid Sick Leave if another parent or other suitable family member is available to care for his or her son or daughter.

Despite the clarifications above, other unknowns remain. One such unknown is whether an employer can require an employee to substitute other paid leave when seeking Expanded FMLA Leave. The regulations promulgated by the DOL are inconsistent on the issue. *See* 29 C.F.R. §§ 826.70(f) and 826.160(c). This interplay can affect the length of leave and the rate of pay granted during the leave.

Required Recordkeeping

As a part of this temporary rule, the DOL outlines the records and documents employees and employers should be submitting or requesting for each type of leave.

An employee is required to provide the employer certain information prior to taking Emergency Paid Sick Leave under the FFCRA, including the employee’s name; date(s) for which leave is requested; the qualifying reason for the leave; and oral or written statements that the employee is unable to work because of the qualified reason for leave. An employee is required to submit additional information to the employer depending upon the type of leave requested.

The temporary rule also provides that small employers who decide to deny Emergency Paid Sick Leave or Expanded FMLA Leave to an employee whose son or daughter's school or place of care is closed or child care provider is unavailable, must document the facts and circumstances to justify the denial.

The rule provides that employers should maintain records relating to Emergency Paid Sick Leave or Expanded FMLA Leave for a minimum of 4 years, whether granted or denied.

Poster Revised

In addition to clarifying the recordkeeping requirements of employers, the DOL revised its notice issued on March 25, 2020. This notice is required to be posted by all private employers subject to the FFCRA. Instead of the “[u]p to 10 weeks more of paid sick leave and expanded family and medical leave” provided to eligible employees, the DOL clarified the language on the notice to state “[u]p to 12 weeks of paid sick leave and expanded family and medical leave.” This change clarifies that eligible employees who receive both Emergency Paid Sick Leave and Expanded FMLA Leave are only entitled to receive up to 12 weeks total.

Small Business Exemption Clarified

The rule also gives further details on which small businesses are eligible for an exemption under the FFCRA. Generally, an employer with fewer than 50 employees is exempt from providing Emergency Paid Sick Leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and Expanded FMLA Leave due to school or place of child care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer has determined that:

- doing so would raise expenses above revenue such that the employer would cease operating at minimal capacity;
- the requesting worker's absence would pose a substantial risk to the employer's financial health or operations; or
- the employer cannot find enough workers to perform the work of the employee requesting an absence.

Families First Coronavirus Response Act: Updated Questions and Answers

The DOL's Q&A Guidance continues to be updated. The most recent guidance expounds on ongoing questions in order to interpret and implement the FFCRA. Throughout its answers, the DOL encourages collaboration between employers and employees to achieve flexibility and meet mutual needs.

1. **The Emergency Paid Sick Leave and Expanded FMLA Leave requirements are not retroactive** (and were not effective prior to April 1, 2020).
2. **An employee may take Emergency Paid Sick Leave or Expanded FMLA Leave *intermittently* while teleworking if their employer allows it and they are unable to telework normal hours due to one of the qualifying reasons.** An employee may take intermittent leave in any increment so long as the employer agrees.
3. **If an employee is working at the worksite (not teleworking), Emergency Paid Sick Leave may be taken *intermittently* if an employer agrees and the employee is taking the Emergency Paid Sick Leave to care for a son or daughter when school or care providers are unavailable or closed.** On the other hand, leave cannot be taken intermittently if the employee is subject to a quarantine or isolation order, has been advised by a health care provider to self-quarantine, is

experiencing symptoms and seeking a medical diagnosis, is caring for an individual who is subject to a quarantine or isolation order or who has been advised to self-quarantine by a health care provider, or is experiencing a substantially similar condition specified by the Secretary of Health and Human Services. Once an employee who is not teleworking begins taking Emergency Paid Sick Leave for one of the qualifying reasons, the employee must continue taking it until the employee uses the full amount of leave offered or no longer has a qualifying reason to continue taking it.

4. **Employees who were furloughed – whether before or after April 1, 2020 – cannot get Emergency Paid Sick Leave or Expanded FMLA Leave under the FFCRA.** Employees who were sent home and who stop receiving paychecks *because the employer does not have work*, cannot get Emergency Paid Sick Leave or Expanded FMLA Leave, but may be eligible for unemployment insurance benefits.
5. **If an employer reduces an employee’s scheduled work hours, Emergency Paid Sick Leave or Expanded FMLA Leave cannot be used for the hours the employee is no longer scheduled to work.** The reasoning is that the employee has not stopped working due to a COVID-19 qualifying reason, even if the reduction in hours was tenuously related to COVID-19.
6. **If an employee elects to take leave under the FFCRA, the employer may be required to continue to provide health insurance coverage.** An employee is entitled to continued group health coverage during Expanded FMLA Leave if an employer provides such coverage. This does not remove the employee’s obligation to make normal contributions towards the cost of their health coverage. Likewise, an employer must continue health insurance coverage if an employee elects to take Emergency Paid Sick Leave.

- 7. The rule provides that an employer will not receive a tax credit for any amounts paid to employees in excess of the FFCRA requirements.**
- 8. An emergency responder may be excluded from Emergency Paid Sick Leave or Expanded FMLA Leave by their employer under the FFCRA.** An emergency responder includes employees who are necessary for transportation, caregiving, health care, as well as providing comfort and nutrition to COVID-19 patients, or whose services are otherwise needed to limit the spread of COVID-19.
- 9. An employee cannot use Emergency Paid Sick Leave and Expanded FMLA Leave together for any COVID-19 related reasons.** Expanded FMLA Leave applies only when an employee takes leave to care for the employee's son or daughter whose school or childcare place is closed or unavailable due to COVID-19 related reasons. However, an employee can take paid sick leave for numerous other qualifying reasons. If an employee is eligible for both Emergency Paid Sick Leave and Expanded FMLA Leave, the combined leave shall not exceed a total of twelve weeks of paid leave.
- 10. Emergency Paid Sick Leave can be used in addition to leave provided by federal, state, or local law, a relevant collective bargaining agreement, or the employer's existing leave policy.**
- 11. An employee may be entitled to Emergency Paid Sick Leave to care for an immediate family member or someone who lives in his or her home.** But, an employee is not entitled to Emergency Paid Sick Leave to care for someone with whom he or she has no relationship or who does not expect or depend on that employee's care during COVID-19 quarantine or isolation.
- 12. The DOL will not bring enforcement actions under the FFCRA prior to April 17, 2020 if the employer has made a "reasonable, good faith effort" to comply with the FFCRA.** However, if an

employer fails to remedy any violations of the FFCRA that occurred prior to April 17, 2020, the DOL may bring an enforcement action.

Further regulations and guidance from the DOL are expected on an ongoing basis. The DOL guidance and rule described above are subject to change as the FFCRA and similar laws continue to develop. 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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