

Department of Labor Issues Guidance on Families First Coronavirus Response Act (FFCRA) and Public Employers

Late in the evening on March 28, 2020, the Department of Labor (DOL) issued additional guidance in the form of Questions & Answers on the application of the Families First Coronavirus Response Act (FFCRA). Included in that guidance is some explanation of the terms used in the FFCRA, as well as the suggested documentation which employers may require to document the qualifying need for leave. In addition, as some public employers contemplate reductions in force in response to COVID-19 conditions, the DOL also provided guidance on the impact of such action on leave under the FFCRA. Below are some frequently asked questions and answers:

1. ***Who is an Emergency Responder under FFCRA?*** As addressed by the DOL, individuals classified as emergency personnel include the following:

An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Thus, for purposes of public sector employers, the most common exemptions will include police, firefighters, as well as public works employees. For County employers, this would also include corrections personnel and 911 operators.

In its guidance, the DOL encourages employers to be judicious in their use of the exemption in an effort to slow the spread of COVID-19.

2. ***When do the FFCRA benefits begin?*** The DOL guidance indicates that the FFCRA benefits become effective **Wednesday**, April 1, 2020.
3. ***What documents can a public employer require from employees in order to utilize emergency sick leave or expanded FMLA leave?*** Employers are permitted to request (and those seeking tax credits/reimbursements must maintain) information that sufficiently documents the need for the leave. This could include, but not be limited to, general information confirming that the employee is receiving medical treatment for COVID-19, that an employee is under a government or physician-mandated quarantine, is caring for another family member in the above categories or must provide childcare to a child as the result of the closure of a daycare or school. This could include a newspaper or website confirmation of the closure of the applicable facility.

4. ***If a public employer enacts layoffs before or after April 1, 2020, what is the impact of such action on expanded FMLA or emergency sick leave entitlement?*** Employees who are laid off or furloughed prior to the commencement of the above provisions are not entitled to any of the benefits. If the employee is laid off or furloughed after April 1, 2020, the employee can receive FFCRA benefits for the period from April 1, 2020, until the date of layoff/furlough. However, as of the date of the layoff/furlough, the benefits would end unless the employee is subsequently recalled during a period in which the FFCRA remains applicable. The same analysis applies if the employer is ordered to close by the federal or state government.

As an extension of this issue, the fact that an employer has one or more employees receiving FFCRA benefits does not preclude the employer from implementing a layoff/furlough, so long as such action would have been taken regardless of the FFCRA usage.

5. ***If an employee is receiving benefits under the FFCRA, can they also claim unemployment?*** No, employees receiving FFCRA benefits are considered to be employed and, therefore, are ineligible for unemployment compensation benefits.
6. ***Can an employee use both FFCRA benefits and paid leave concurrently?*** To the extent that doing so would allow the employee to receive more than his/her full normal compensation, no. However, an employer **may** allow employees to use part of their leave time to supplement FFCRA benefits to obtain full salary, but no more.
7. ***Can FMLA expanded leave and emergency sick leave be used intermittently?*** It depends. If the employer and employee agree, then possibly, but the DOL has limited the instances in which such agreement can occur. For instance, in the following circumstances, such an agreement **is not** permissible by the DOL:
- the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
 - the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The DOL further indicated that other instances, such as where the employee has access to childcare for two days out of the week, but not for the other three, are instances where the employer and employee may agree on intermittent leave.