

New DOL Guidance Puts Employers on Notice: FFCRA Takes Effect on April 1

Barbara E. Hoey, Alison Frimmel

March 26, 2020

The U.S. Department of Labor ("DOL") has issued the first round of guidance regarding the recently enacted Families First Coronavirus Response Act ("FFCRA").

This guidance includes: [Fact Sheet for Employers](#); [Fact Sheet for Employees](#); and [Questions and Answers](#). Although much of the DOL's guidance echoes what we already knew (or guessed) about the [FFCRA](#), the DOL did address some issues that employers have been grappling with since its enactment last week.

Below is a summary of the pertinent highlights:

- The effective date of the FFCRA is April 1, and **benefits are not retroactive.**
- **The DOL will observe a temporary period of non-enforcement for the first 30 days**, as long as the employer **can show it has acted reasonably and in good faith to comply with the Act**. "Good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the Act in the future.
- The new FFCRA leave entitlements do not permit an employer to reduce or eliminate leave it was providing to employees before the FFCRA became effective. Therefore, if an employer maintained a paid leave policy prior to the enactment of the FFCRA, it does not reduce an employee's entitlement to paid leave under the FFCRA.
 - If an employee was already on paid leave prior to April 1, that paid leave should continue, as per the employer's 'pre-FFRCA' policy.
- For purposes of determining whether employers meet the 500-employee threshold:
 - Employers should calculate the number of employees (in the United States) at the time leave is taken. You must count full-time and part-time workers, employees on leave, temporary employees jointly employed with another company (regardless of which company's payroll the employee is on), and day laborers supplied by a temp agency.
 - Independent contractors are exempt from the 500-employee threshold.
- Related businesses will be considered a single employer consistent with the "integrated employer" test under the Family and Medical Leave Act.
- To calculate a "rate of pay" employers should average an employee's regular rate over a period

of up to 6 months prior to the date on which the employee takes leave; commissions, tips, or piece rates, are included in this calculation. If an employee has worked for *less* than 6 months, the regular rate used to calculate paid leave is the average of the employee's regular rate of pay for each week worked.

- Paid sick leave is capped at 80 hours for full time employees and may only be taken once. Employees cannot, for example, take 80 hours of paid sick leave for their own self-quarantine and then request another 80 hours for another qualifying reason. 80 hours is the maximum.
- Businesses with less than 50 employees are entitled to an exemption if they can show that complying with the FFCRA's leave entitlements would "jeopardize the viability of the business as a going concern." The DOL does not explain how to apply for the exemption, but advises to document if you believe exemption applies to your business. Additional regulations are expected in April 2020.

Kelley Drye's [Labor and Employment](#) group continues to closely monitor developments surrounding the FFCRA, as well as the wide breadth of issues employers are facing as a result of the COVID-19 pandemic. We are all living and working in unique times and dealing with complex situations. As questions arise, we encourage employers to reference Kelley Drye's [COVID-19 Response Resources Center](#), and contact [Barbara Hoey](#) at 212-808-7628 or bhoey@kelleydrye.com or [Mark Konkel](#) at 212-808-7959 or mkonkel@kelleydrye.com, before making any employment decisions.