

# Updated DOL Guidance - What Employers Need To Know On The First Day Of The FFCRA

Mark A. Konkel

April 1, 2020

The Families First Coronavirus Response Act (“FFCRA”) is effective today, April 1. In honor of this undoubtedly daunting occasion for employers with less than 500 employees, we analyze the most significant provisions from the Department of Labor’s [updated FAQs](#), which fill in gaping holes in the legislation that left employers (and counsel) puzzled. For employers with fewer than 50 employees, we also examine recent DOL guidance on the “small business exemption” and identify the ways in which employers can qualify for this exemption.

## **Intermittent Leave**

The FFCRA failed to address whether employees were entitled to take intermittent leave either under the emergency paid sick leave provision or the expanded FMLA provision. The FAQs clarify that employees are not entitled to intermittent leave in either case. However, employers have the discretion to approve requests for intermittent leave, but only under certain circumstances, which depend upon whether an employee works remotely or onsite.

For employees who work remotely, as long as an employer approves and the employee and employer agree on a schedule, an employee can take intermittent emergency paid sick or expanded FMLA leave in any increment.

For employees who work onsite, intermittent leave is only available if an employer approves, the employee and employer agree on a schedule, and the intermittent leave is being taken to care for a child whose school has closed. Intermittent leave is not available for employees who are sick or caring for sick family members, as that would defeat the purpose of providing employees with paid sick leave in the first place-to keep employees from spreading the virus to others.

## **Furloughs and Worksite Closures**

The FAQs provide welcome reassurance to employers who furlough workers or close worksites on or after April 1. In both cases, employees are not entitled to FFCRA benefits. Further, if an employee is on leave and an employer closes the employee’s designated worksite, the employee is only entitled to FFCRA benefits up to the date of the site closure.

## **Amount of FMLA Leave**

The FAQs confirm that employees are not entitled to more than 12 weeks of FMLA leave in a 12-month period regardless of whether an employee takes paid leave under the expanded FFCRA FMLA provision or “regular” unpaid FMLA leave for reasons unrelated to COVID-19.

## Small Business Exemption

DOL guidance also sheds new light on the requirements of the FFCRA's "small business exemption." Under the new guidance, small businesses (defined as employers with fewer than 50 employees) do not need to provide employees with FFCRA leave if an employee is requesting leave due to a COVID-19 related school closure or child care provider unavailability, and an authorized officer of the business has determined that providing leave would "jeopardize the viability of the small business." There are three ways in which an employer can establish that providing leave would jeopardize the viability of a business:

1. Business expenses and financial obligations would exceed available business revenues and cause the small business to cease operating at a minimal capacity if leave was provided;
2. An employee's (or multiple employees) absence would present a substantial risk to the financial health or operational capabilities of the small business because of the employee's specialized skills, knowledge of the business, or responsibilities; **or**
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

While employers can evidently interpret the factors above, the factors are seemingly subjective and if an outsider is making an objective assessment, there is a substantial risk that the employer's "proof" will not be enough. However, the most significant aspect of the DOL guidance is that an authorized officer may use his or her judgment to determine whether the business will be in jeopardy. **Therefore, the "judgment call" rests with the employer**, which is good news for small businesses.

Importantly, however, the small business exemption only applies to paid leave for school closures and **does not** exclude small businesses from having to provide FFCRA emergency paid sick leave due to other COVID-19 related reasons.