

UPDATE ON FAMILIES FIRST CORONAVIRUS RESPONSE ACT

I. INTRODUCTION

One of the Compliance Updates issued during the past week featured the Public Health Emergency Leave and Emergency Paid Sick Leave established by the Families First Coronavirus Response Act (FFCRA). While final regulations to implement the FFCRA will be issued by the Department of Labor (DOL), the DOL has issued several guidance documents related to employer and employee responsibilities under the FFCRA. The guidance documents provide employers with initial assistance, pending the issuance of final regulations, in interpreting the provisions of the FFCRA.

II. FAMILIES FIRST CORONAVIRUS RESPONSE ACT: “QUESTIONS AND ANSWERS” GUIDANCE

The DOL has issued a “Question-and-Answer” guidance, which can be viewed: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. Among the more significant issues addressed in the Q&A, are the following:

A. Effective Date

The Effective Date of the FFCRA will be April 1, 2020. (NOTE: The FFCRA is scheduled to expire on December 31, 2020.) The Q&A clarify that any leave taken prior to April 1 does not count towards the leave required by the FFCRA.

B. 500- Employee Threshold

You have fewer than 500 employees if, at the time your employee’s leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer’s payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered

employees for purposes of the 500-employee threshold.

C. Corporations/Affiliates/Divisions

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.

Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and Expanded Family and Medical Leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

D Small Business Exemption

The DOL Q&A states that businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern. The DOL indicates that it will issue exemption criteria in forthcoming regulations and employers wishing to seek the exemption should document why their business meets such criteria, but will not be required to send any such documentation to the DOL. It is also anticipated that the DOL will issue small business exemption criteria pertaining to paid leave provided for other qualifying reasons under the Emergency Paid Sick Leave Act.

E. Counting Hours Worked For Part-Time Employees

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the

employee was scheduled to work over the entire term of his or her employment.

F. Does Pay Include Scheduled Overtime

The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

Pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

H. 30-Calendar Day Employment Requirement

An employee is considered to have been employed by your employer for at least 30 calendar days if your employer had you on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if you want to take leave on April 1, 2020, you would need to have been on your employer's payroll as of March 2, 2020.

In addition, if an employee has been working for the employer as a temporary employee, and the company subsequently hires him/her on a full-time basis, the days previously worked as a temporary employee toward the 30-day eligibility period.

H. FFCRA "Workplace" Poster

The required FFCRA Paid Sick Leave and Expanded Family and Medical Leave poster is available at

https://www.dol.gov/sites/dolgov/files/WH/posters/FFCRA_Poster_WH1422_Non-Federal.pdf. The required workplace poster notifying employees of their rights under the FFCRA must be posted in a conspicuous place on the employer's premises. For employers with employees who are telecommuting, the posting requirement may be satisfied by emailing or direct mailing the notice to employees or posting it on an internal or external information employee website. The notice does not have to be provided to recently laid-off individuals, or new job applicants; however, for new hires the notice must be conveyed to them, either by email, direct mail, or by posting the notice on the premises or on an employee information internal or external website. The DOL FAQs regarding the poster/notice requirements can be viewed at <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

I. Field Assistance Bulletin – Safe Harbor

The DOL has issued a Field Assistance Bulletin in which it directs Wage and Hour

Division field staff to refrain from bringing enforcement actions against FFCRA–covered employers for violations occurring within 30 days of the FFCRA's enactment (March 18, 2020 – April 17, 2020). The 30–day non–enforcement directive is only applicable if the employer has made reasonable, good-faith efforts to comply with the act. For purposes of the non–enforcement provision, an employer was found to have violated the FFCRA acts “reasonably” in “good faith” when all of the following factors are present:

1. The employer remedies any violations, including by making all affected employees whole “as soon as practicable.” As explained in a Joint Statement by the DOL, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, the program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages. For purposes of the non–enforcement policy, employers who are eligible for tax credits but who having insufficient cash flow should make payment of sick leave or family leave wages as soon as possible, but not later than 7 (seven) calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer's federal payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.
2. The violations of the act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (The employer “either knew or showed reckless disregard for the matter of whether it's conduct was prohibited...”).
3. The department received a written commitment from the employer to comply with the act in the future.

If the employer fails to meet any of these conditions and fails to remedy any violation upon notification by the DOL, the DOL shall have the right to exercise its enforcement authority.

J. Additional Resources

Additional resources regarding implementation of the FFCRA can be viewed at the following:

[Families First Coronavirus Response Act: Employee Paid Leave Rights \(PDF\)](#)

[Families First Coronavirus Response Act: Questions and Answers](#)

[COVID-19 and the Fair Labor Standards Act: Questions and Answers](#)

[COVID-19 and the Family and Medical Leave Act: Questions and Answers](#)

The foregoing Compliance Update is for informational purposes only and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.