

The Families First Coronavirus Response Act (FFCRA) requires all American businesses with fewer than 500 employees to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. In exchange, the Act provides businesses with a tax offset or credit for the cost of providing such benefits. A summary is provided [HERE](#).

On March 26, the Department of Labor (DOL) revised its original guidance to include far greater detail and explanation of employers' obligations under the FFCRA. Highlights can be found provided [HERE](#).

- **Effective date:** April 1, 2020
- **Expansive Joint and Integrated Employer Count:** The Act's 500-employee threshold may be difficult to determine when employees are technically employed by separate but related legal entities. The DOL is using both the "joint employer" test of the Fair Labor Standards Act and the "integrated employer" test of the Family and Medical Leave Act. If an enterprise meets either of these tests, then all employees of the separate but related entities would be counted together. *If you have questions about counting employees in your particular situation, Carr Allison's COVID-19 Response Team is ready to assist you.*
- **Regular Overtime Counts Toward Paid Leave:** If an employee regularly works overtime, that period of time must be credited toward paid leave under the Emergency Paid Sick Leave Act. However, except for childcare leave, the act only provides for a maximum of 80 hours of leave. Thus, if an employee needing two weeks of leave is scheduled to work 45 hours every week, the employee should be paid for 45 hours during the first week, and 35 hours during the second week (bring the total to 80). The rate of pay for all hours, including the "overtime" hours, is the employee's regular rate of pay; in this example, the extra five hours in the first week would not be paid at time-and-a-half.
- **"Regular Rate of Pay" :** Paid leave is based upon an employee's "regular rate of pay," but this may be difficult to quantify if the employee's pay is variable. The DOL clarified that the rate is determined by "looking back" at the employee's average rate of pay over the past six months. If the employee has not worked six months, the employer looks back at the average regular rate of pay for each week the employee has worked.
- **Emergency Paid Sick Leave Capped at 80 Hours:** The Emergency Paid Sick Leave Act provides six reasons for requesting paid leave. DOL clarified that an employee gets 80 hours of total leave, not 80 hours per reason. However, childcare leave under the Emergency FMLA is not capped at 80 hours, but rather at 12 weeks.
- **For Childcare Leave - Emergency FMLA and Emergency Paid Sick Leave Run Concurrently:** The FFCRA has two sections: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Act. Leave related to childcare needs is actually covered by both acts in somewhat conflicting ways:

- o under the Emergency FMLA, the first 10 days of leave (i.e., two work weeks) for childcare are unpaid, and the next 10 weeks are paid.
- o under the Emergency Paid Sick Leave Act, paid leave is for two work weeks and begins immediately.

The DOL clarified this discrepancy, stating that the unpaid portion of Emergency FMLA leave can run concurrently with the paid portion of Emergency Paid Sick Leave. In short, parents with COVID-19 related childcare issues may qualify for 12 total weeks of paid leave and there is no unpaid period before pay begins.

- **No Retroactivity:** The DOL clarified that the FFCRA does not apply retroactively. This means that all qualifying employees are entitled to the full length of leave time under the Act beginning April 1, even if the employee has already taken leave for a qualifying reason prior to April 1. For example, if an employee has been absent from work prior to April 1 for childcare reasons that would qualify for leave under the FFCRA, the employee is still entitled to up to 12 weeks of leave beginning April 1. Similarly, while no official guidance has been issued, it is likely that the tax offset and credit provisions of the Act also do not apply to leaves of absence prior to April 1.
- **Small Business Exemption:** Businesses with fewer than 50 employees may be exempted from the requirements of the FFCRA if compliance would jeopardize the viability of the business. However, the DOL is yet to publish guidance on the requirements of the exemption. For now, the DOL is instructing interested businesses to document why the business meets the criteria. But, do not send any of these documents or materials to the DOL yet.
- **Required Employee Notice:** The DOL-required notice that must be provided to all employees, and can be provided electronically, is found [HERE](#).

If you have questions about how the FFCRA applies to your business, Carr Allison's COVID-19 Response Team stands ready to assist you. Please contact Brett Adair or Daniel Harris or any other member of the team found [HERE](#).