

Employment Law Update-April 6, 2020

What Now? Applying the Families First Coronavirus Response Act

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With the recent implementation of the Families First Coronavirus Response Act (FFCRA), small business owners have more questions than answers applying the law in real time as shelter-in-place orders go into effect in response to the COVID-19 pandemic. The Department of Labor (DOL) has answered several questions in its Q&A sheets to assist employers on their responsibilities under the Act. The following is a recap of the DOL's answers to some of the more pertinent questions:

What's the FFCRA?

Effective April 1, 2020 through December 31, 2020, the FFCRA provides employers with a workforce below 500 employees refundable payroll tax credits designed to reimburse them, dollar-for-dollar, "as quickly as possible" for the cost of providing COVID-19-related leave to their employees.

What if I violate the FFCRA while I'm trying to understand the law?

The Department of Labor will not bring actions against employers for violations of the FFCRA within 30 days of enactment of the Act - March 18th and April 17th. *The non-enforcement period does not mean employers do not need to comply with the FFCRA.* Employers must make reasonable, good faith efforts to comply with the law.

How do I know if I need to provide my employees paid sick leave under the Emergency Paid Sick Leave (EPSL) Act or expanded family and medical leave under the Emergency Family and Medical Leave Expansion (FML+) Act?

If your business has fewer than 500 full-time and part-time employees working in the United States, *at the time your employee's leave is to be taken*, then the FFCRA requires you to provide EPSL or FML+. Employers with more than 500 employees are not required to comply with the FFCRA.

Who do I count towards the 500-employee threshold?

You should count employees currently on leave; temporary employees; and, day laborers supplied by a temporary agency. You should also count all employees working in the United States, including any state in the U.S., the District of Columbia, or any U.S. territory or possession. You *do not* count independent contractors as defined by the Fair Labor Standards Act (FLSA).

I have 20 employees. Do I have to offer my employees leave under the FFCRA even though it would hurt my business?

You can elect the small business exemption under the FFCRA.

May I require my employees to work while under a shelter-in-place order and, if not, do I have to offer my employees leave under the FFCRA?

You cannot require employees to come to the workplace during a shelter-in-place order if your business is not "essential" as defined by the order [[click here](#)]. You do have to offer employees EPSL if a shelter-in-place order causes employees not to be able to work *or telework* even though you have work employees could perform but for the order. You do not have to offer employees EPSL if you do not have work for employees as a result of a shelter-in-place order.

Do I have to pay an employee EPSL who became ill; decided to self-quarantine; and, returned to work without seeking a medical diagnosis or the advice of a healthcare provider?

An employee is not eligible for paid sick leave under the FFCRA if the employee unilaterally decides to self-quarantine for an illness without medical advice, even if the employee had COVID-19 symptoms.

I have employees who have been on leave under the FMLA before the implementation of the FMLA+, do I now have to pay all employees under the FMLA and the FMLA+?

The only paid family and medical leave is under the FMLA+

I have employees who have already used some or all of their leave under the FMLA prior to April 1st, are they entitled to EPSL and FMLA+?

An eligible employee is entitled to EPSL regardless of how much leave taken under the FMLA. If an employee was on leave under the FMLA prior to April 1st, the employee's eligibility for FMLA+ depends on how much leave the employee has already taken during the current 12-month period. For example, if an employee has taken four workweeks of leave under the FMLA during the current 12-month period, the employee, if eligible, can take up to eight workweeks of FMLA+. If an employee has taken 12 workweeks of leave under the FMLA during the current 12-month period, the employee is not entitled to FMLA+.

What documents can I require my employees to provide to support paid leave under the FFCRA?

For FMLA+ to care for a child, you may ask an employee to provide written notice including a posting on a website, newspaper, or email, of physical closure of child's school, place or care, or childcare provider. For EPSL, you may ask an employee to provide copy of the quarantine order related to COVID-19, or written documentation by a health care provider (doctor, nurse practitioner or other healthcare provider permitted to issue FMLA certification) advising the employee to self-quarantine due to concerns related to COVID-19.

Do I have to offer EPSL or FMLA+ to employees I furlough because of a lack of work?

If you furlough an employee because of a lack of work, the employee is not eligible to take EPSL and FMLA+.

May I discipline employees because they took leave under the FFCRA?

You cannot discipline *or discriminate* against employees because they took EPSL or FMLA+.

May I still discipline an employee for violating a policy or procedure?

You may discipline employees, up to and including termination, for any legitimate, non-discriminatory reason pursuant to your business's policies and procedures for violations of same.

Will I receive a tax credit for the amount I pay in excess, if I want to pay my employees more than they are entitled to receive under the FFCRA?

While you may pay employees in excess of the FFCRA requirements, you will not receive credit for any amount in excess of the FFCRA's statutory limits.

Are my employees who are receiving workers' compensation eligible for paid leave under the FFCRA?

If an employee is receiving workers' compensation because the employee is unable to work, the employee is not eligible for paid leave under the FFCRA.

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