



# MANCHEL BRENNAN

COUNSELLORS AT LAW

## EMPLOYMENT LAW ALERT (APRIL 1, 2020)

### DOL PUBLISHES FFCRA REGULATIONS

The Department of Labor has published regulations implementing the two new federal coronavirus-related leaves (paid sick leave and expanded FMLA leave) that smaller employers (under 500 employees) must offer to employees effective today, April 1, 2020, under the Families First Coronavirus Response Act (the “FFCRA”). The regulations are generally consistent with the Q&As published by the DOL on its website during the past two weeks. The FFCRA regulations are located at: <https://www.dol.gov/sites/dolgov/files/WHDPandemic/FFCRA.pdf> (the actual regulations start at page 83 of the pdf document).

Points which are clarified by the regulations include the following:

- Employees who have been furloughed or laid off are not eligible for leave under the FFCRA. Leaves are available only if the employee otherwise would be provided work or would be able to telework. In other words, the leaves are not available if the business is shuttered.
- The FFCRA leaves are available only through December 31, 2020.
- An eligible employee may use the 10 days of FFCRA sick leave before being required to use leave available under any other employer policy, collective bargaining agreement, or federal, state or local law.
- With respect to the 10 days of FFCRA sick leave for an employee who may be “subject to a federal, state or local quarantine or isolation order,” the leave is only available if the employee would otherwise be allowed to work by the employer. In other words, if the employer is closed and the employee is unable to work remotely, the employee is not eligible for this sick leave.
- An employee is eligible for FFCRA sick leave to care for another individual if the individual is “an immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined,” and “does not include persons with whom the employee has no personal relationship.”
- Only employees who normally work or are scheduled to work 40 hours each week are treated as full-time and eligible for the full 80 hours of paid sick leave; all other employees are treated as part-time and are eligible for an amount of sick leave equal to the hours they are normally scheduled to work over two weeks or two weeks at their average weekly hours.
- The expanded paid FMLA leave which is available to employees to care for a son or daughter whose school or place of care has been closed: is available “only if no suitable person is available

to care for his son or daughter during the period of the leave”; counts towards the employee’s annual allotment of FMLA leave for any qualifying purpose; and can be subject to a requirement that the employee use any accrued paid time off after the first two weeks of the expanded FMLA leave.

- An employer may exclude from FFCRA coverage any employee who is a “health care provider” or an “emergency first responder.” The regulations broadly define a “health care provider” to include “anyone employed at any doctor’s office, hospital, health care center, clinic, . . . nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity.” Any employer in any of these industries should carefully consider whether to avail themselves of this exception.
- For purposes of counting employees to determine if an employer has fewer than 500 employees (and is therefore covered by the FFCRA), the employer should count all full-time and part-time employees in the United States as well as all employees for whom the employer is an integrated employer or joint employer; i.e., affiliated corporations may be considered joint employers.
- Employers with fewer than 50 employees may exempt themselves from coverage under the FFCRA if an authorized officer of the business has determined that: the leave would result in the business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; the absence of the employee on leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge or responsibilities; or there are not sufficient workers who are able, willing and qualified, or who will be available at the time and place needed, to perform the labor or services provided by the employees and these labor or services are needed for the small business to operate at a minimal capacity. The employer must document the determination made above, but does not need to seek an exemption or file any documentation with the DOL.
- The FFCRA leaves are available intermittently only if the employer agrees.
- The FFCRA regulations set forth the documentation that can be required of the employee for each type of FFCRA leave (the documentation varies by scenario).
- Employees who take FFCRA leave have a right to reinstatement to the same or an equivalent position, except that the employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether they took the leave.
- Employers are prohibited from discharging, disciplining or discriminating against any employee because an employee took FFCRA leave or participated in a proceeding alleging denial of FFCRA rights.

Please feel free to contact us if you have any questions. Stay safe.

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