



Bradley Cave

Partner
307.778.4210
Cheyenne
bcave@hollandhart.com

DOL Finalizes FFCRA Regulations

Insight — April 8, 2020

After days of uncertainty and looming deadlines created by the Families First Coronavirus Response Act (FFCRA), the DOL has finally issued some definitive regulatory guidance, as well as twenty new Q&As to its list of non-regulatory guidance. You can read the Q&As and access the final regulations at the DOL's website. But, if you have had enough of the daily changes, we offer the following summary of the new Q&As and the regulations:

Stay-at-Home Orders. A "Federal, state or local quarantine or isolation order" as used in the definitions of qualifying reasons for leave under the Paid Sick Leave Act, includes shelter-in-place or stay-at-home orders that cause an employee to be unable to work, and employees can take paid sick leave for this reason if the employer has work for the employee to do. The supplementary information DOL published with the final rules explains that quarantine and isolation orders include "a broad range of governmental orders." The regulations also state a bright line rule that paid sick leave can be used only if the employee would have been able to perform work at the worksite or by teleworking but for the quarantine or isolation order. If the employer does not have work for the employee to do regardless of the shelter-in-place or stay-at-home order, the employee is not eligible for paid sick leave.

Self-Quarantine Because of Vulnerability. The FFCRA clearly stated that paid sick leave is available if an employee's health care provider directs or advises the employee to stay home, and the employee is therefore unable to work or telework, because the provider believes the employee may have COVID-19. The Act did not address situations when the employee was advised to self-quarantine due to the employee's vulnerability to COVID-19 because of another condition. The regulations make it clear that an employee is entitled to paid sick leave if advised by a health care provider to self-quarantine because the employee is "particularly vulnerable" to COVID-19. Unfortunately, the new regulations do not define "particularly vulnerable," but we doubt employers will have much to gain by arguing over this term.

Self-Quarantine with Symptoms. The regulations confirmed an employee with COVID-19 symptoms is entitled to paid sick leave while self-quarantining but the leave is limited to time the employee is unable to work because he is "taking affirmative steps to obtain a medical diagnosis, including making, waiting for, or attending an appointment" for a test. On the other hand, an employee who has COVID-19 symptoms and decides to self-quarantine but does not seek diagnosis or advice from a health care provider is not eligible for paid sick leave. The employee may become

eligible for paid sick leave if he later tests positive for COVID-19 or is advised by a provider to self-quarantine.

Care for an Individual. The FFCRA states that paid sick leave is available for an employee to care for "an individual" who is subject to a quarantine or isolation order or who is self-quarantining under a health care provider's advice. Employers reasonably questioned the breadth of this provision. Fortunately, the regulations have limited the scope of individuals under the Act to an employee's immediate family member, someone who regularly resides in the employee's home, or someone whose relationship with the employee creates an expectation that the employee would care for the person. And, according to DOL's discussion with the regulations, the person must "genuinely need" the employee's care. Employees cannot take paid sick leave to care for someone with whom they have no relationship or who does not expect or depend on the employee's care. If the employer does not have work for the employee to do, the employee is not eligible for paid sick leave.

Children. The Q&As and regulations provide several clarifications regarding when paid sick leave or family and medical leave is available under the FFCRA to take care of children.

Children over age 18. An employee may take paid sick leave and expanded family and medical leave to care for a child over the age of 18 if the child has a disability and cannot care for him or herself, and the child's school or place of care is closed or the child's care provider is unavailable due to COVID-19 related reasons.

Childcare definitions. The FFCRA states that child care leave is available when the school or "place of care" of the child is closed. The regulations define a "place of care" as a physical location where care is provided for the employee's child, and can include day care facilities, preschools, before and after school programs, summer camps or enrichment programs, respite care programs, schools or homes. And, the regulations clarify that school is closed for the purposes of leave under the Act even if the school has instituted on-line instruction and homework for children.

The FFCRA also provides leave when the "child care provider . . . is unavailable" because of COVID-19. The regulations define child care provider as a "provider who receives compensation for providing child care services on a regular basis" including child care centers, group homes, a family child care provider or other provider licensed, regulated or registered under state law. A child care provider need not be licensed or compensated if the provider is a family member, friend or neighbor who regularly cares for the employee's child. The Q&A explains that this definition includes nannies and au pairs who are paid for their service, as well as relatives who provide care for the child without charge.

Multiple Caregivers. Paid sick leave and expanded family and medical leave to care for a child is available only when the employee needs to and actually is caring for the employee's child and is unable to work or

telework as a result. The regulations direct that leave is available to care for a child "only if no other suitable person is available" to care for the child during the period of leave. Leave is not needed if a co-parent, co-guardian or usual child care provider is available to care for the child.

Other People's Kids. Employees can take leave under the FFCRA to care for their son or daughter, including biological, adopted, legal wards or foster children, and any child for whom the employee stands *in loco parentis*, meaning the employee has day-to-day responsibilities to care for or financially support a child. Expanded family and medical leave and paid sick leave is available only to care for children who meet this definition. An employee may be entitled to paid sick leave to care for other people's children only if the situation meets the requirements for caring for another individual who is subject to a quarantine or isolation order as discussed above.

Substantially Similar Conditions. Paid sick leave is available when an employee is experiencing a substantially similar condition to COVID-19 specified by the Secretary of Health and Human Services, but the regulations confirmed that no such conditions have been identified at this time.

Calculating the Amount of Leave and Pay. The regulations included detailed instructions for calculating how much leave employees are entitled to receive and the rate of pay during the leave.

Paid Sick Leave Entitlement. Fulltime employees are entitled to 80 hours of paid sick leave. Fulltime employees are those who are regularly scheduled to work an average of 40 hours per week or more, or, if the employee's schedule varies, the employee's scheduled hours including any periods of leave, averaged more than 40 hours per week over the last six months, or the employee's entire period of employment if less than six months. Employees who do not meet this definition are considered part-time. Part-time employees are entitled to paid sick leave equal to the number of hours the employees are regularly scheduled to work over a two-week period. For employees who do not have a regular schedule, the amount of paid sick leave is calculated as fourteen times the average number of hours the employee was scheduled to work or took any leave for each calendar day for the six-month period prior to paid sick leave. If the part-time employee has not been employed for six months, the number of hours is based on the average number of hours per day agreed to at the time of hire, or, if there was no such agreement, the average daily hours over the employee's employment.

Pay for Sick Leave. Pay for paid sick leave must be calculated based on an average of the employee's regular rate as defined by the Fair Labor Standards Act. The regulations require the employer to calculate the regular rate for each workweek the employee has been employed for the lesser of the six months prior to paid sick leave or the employee's entire period of employment. Then, the employer should calculate the average of the weekly regular rates weighted by

the number of hours worked for each workweek. An employee using paid sick leave is entitled to pay at this average weekly regular rate but not less than the minimum wage required by federal, state or local law, and depending on the qualifying reason for leave, capped at \$511 per day and \$5,110 in total, or at the rate of two-thirds of this average weekly regular rate, capped at \$200 per day or \$2,000 in total.

Expanded Family and Medical Leave Entitlement and Pay. Eligible employees are entitled to up to twelve weeks of expanded family and medical leave. After the initial two weeks of this leave, the employer should calculate the employee's pay for leave as two-thirds of the employee's average regular rate as calculated above times the employee's scheduled number of hours for each day of leave taken, capped at \$200 per day and \$10,000 in total pay for expanded family and medical leave. The employee's scheduled number of hours is based on the employee's regular schedule, or, if the schedule varies such that the number of hours an employee would have worked on a given day is unknown, the employer should use the average number of hours the employee was scheduled to work each workday over last six months including any hours of leave. If not employed for six months, the scheduled number of hours should be based on the agreement at the time of hiring, or the daily average the employee has worked or taken leave during the entire period of employment.

Intermittent Leave. Employees may take paid sick leave or expanded family and medical leave intermittently to the extent the employer and employee agree. A written agreement is not required, but advisable to limit disagreement later. For employees who are unable to telework and need to report to the worksite to work, intermittent leave is available only when the employee is taking leave to care for a child whose school is closed or childcare is unavailable. If the employer and employee agree the employee can telework, the employee can take intermittent paid sick leave or expanded family and medical leave on an agreed schedule. Only the amount of leave actually taken counts against the employee's leave entitlement.

Concurrent Use of Paid Sick Leave, Expanded FML and Employer Leave. When an employee takes leave to care for a child whose school is closed or childcare is unavailable, the employee has the option to use FFCRA paid sick leave concurrently with the first two weeks of expanded family and medical leave. If the employee has used his FFCRA paid sick leave for another qualifying reason, the employee may elect to substitute accrued leave provided under his employer's policies, which will run concurrently with expanded family and medical leave. However, when taking expanded family and medical leave, the employee may elect to use, and the employer may require the employee to use, only leave that would be available under employer policy for time off to take care of an employee's child who is not ill. Also, the employee is limited to twelve weeks of FMLA leave in the twelve-month period defined by employer policy, whether taken as FFCRA expanded family and medical leave or traditional FMLA. An employee's prior use of FMLA leave does not limit the

employee's use of FFCRA paid sick leave.

Documentation. For all types of FFCRA leave, the regulations require employees to provide documentation of the employee's name, dates of requested leave, qualifying reason for leave and a statement that the employee is unable to work because of the qualified reason. Additional requirements vary by the reason for the leave:

- For leave due to a quarantine or isolation order, the employee must provide the name of the governmental entity that issued the order.
- For leave based on the advice of a health care provider to self-quarantine, the employee must provide the name of the provider.
- For leave to care for an individual who is subject to a quarantine or isolation order, or who is self-quarantined on the advice of a provider, the employee must provide the name of the governmental entity that issued the order or the provider that advised self-quarantine. The regulations do not directly require the employee to provide the name or relationship of the individual the employee will care for, but that information should be required as part of the explanation of the qualifying reason.
- For leave to care for a child whose school is closed or child care provider is unavailable, the name of the child, the name of the school, place of care or childcare provider; and a statement that no other suitable person will be caring for the child during the leave period. Notably, the Internal Revenue Service's Q&A about the documentation employers need to support a request for tax credits adds a requirement that the employer obtain a statement that "special circumstances exist" requiring the employee to provide care when an employee requests leave to care for a child over 14 years of age during daylight hours.

The regulation also permits employers to require additional material as necessary to support the employer's request for tax credits under the FFCRA and permits the employer to deny leave if the employee has not provided materials needed to support the tax credit request.

Other Reasons for Leave. The regulations and the Q&A repeatedly reinforce the general rule that employees are entitled to paid sick leave or extended family and medical leave only if they would have been performing work or teleworking but for the COVID-19 related qualifying reason:

Workers Comp/Temporary Disability. An employee cannot take paid sick leave or expanded family and medical leave while receiving workers compensation benefits or temporary disability benefits under an employer or state plan, unless the employee had been released to work light duty and a qualifying reason then prevented the employee from working and the employer had work for the employee to do.

On a Leave of Absence. An employee on a mandatory leave of absence imposed by the employer cannot take FFCRA leave because the mandatory leave of absence, not any qualifying reason for leave,

is the cause of the employee being unable to work. If the leave of absence is voluntary, the employee can end the leave of absence and begin taking paid sick leave or expanded family and medical leave if a qualifying reason prevents the employee from working or teleworking.

DOL Enforcement. DOL will not bring enforcement actions for violations of the Act occurring through April 17, 2020 if the employer made reasonable, good faith efforts to comply with the FFCRA. But if the violation is willful, the employer fails to commit in writing to comply in the future or fails to remedy a past violation as directed by DOL, the DOL retains the right to fully enforce the law. Once it starts enforcement DOL's enforcement actions will be retroactive in that DOL will require employers to remedy violations occurring on or after April 1, 2020.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.