

# *In Brief*

April 9, 2020

## **DEPARTMENT OF LABOR ISSUES RULES FOR NEW FEDERAL LEAVE LAWS**

As we previously reported, the *Families First Coronavirus Response Act* (FFCRA), requires private employers with less than 500 employees and all public sector employers to provide eligible employees with new paid leave benefits for reasons related to COVID-19. These temporary, new leave provisions raised many questions from employers. Preliminary informal guidance was published by the Department of Labor (DOL) shortly thereafter. Then on April 1, 2020, the DOL published a rule regarding paid leave under the FFCRA. The rule clarifies the prior informal guidance from DOL, and also answers many common questions from employers, including whether an employee may take paid sick leave because of the Governor's Stay at Home Executive Order. This publication summarizes some of the key provisions of the rule.

### **Background**

Under the FFCRA, full- and part-time employees are entitled to **emergency paid sick leave** if they are unable to work or telework because he/she:

1. Is subject to a Federal, State or local quarantine/isolation order related to COVID-19;
2. Has been advised by a health care provider to quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an "individual" who is subject to a quarantine order or advisement by a health care provider, as described above;
5. Is caring for a son or daughter if the child's school or place of care has been closed or the child's care provider is unavailable due to a COVID-19 related reason; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Full-time employees are entitled to 2 weeks of paid sick leave and part-time employees are entitled to the number of hours they normally work, on average, over a 2-week period.

Also, under the FFCRA, individuals employed with an employer for at least 30 calendar days have the right to take up to 12-weeks of job protected leave if the employee is unable to work or telework for reason #5 above (**emergency expansion of FMLA**). The first 2 weeks are unpaid, but the employee may substitute available paid leave. The remainder of the qualifying leave is paid by the employer at 2/3 of the employee's FFCRA pay rate.

These new leave provisions are effective April 1, 2020 to December 31, 2020. Employers may elect to exempt health care providers and emergency responders from these new leave provisions. Also, private employers with less than 50 employees may claim a small business exemption from providing leave for reason #5 above, if they meet certain conditions.

### Key Provisions of DOL's Rule

- ❖ No leave entitlement unless the employee would have been scheduled to work or the employer has work available for the employee.
- ❖ For **Reason #1** above, the DOL rule indicates that a shelter in place order is not enough, by itself, for an employee to take paid sick leave. An employee may take paid sick leave only if the employer has work for the employee and being subject to a quarantine or isolation order actually prevents the employee from working or teleworking. With regard to this issue, the following key concepts apply:
  - If the employer does not have work for the employee, they are not entitled to leave.
  - Essential businesses and operations are exceptions under the Governor's Stay at Home Order. In general, employees of those business and institutions are permitted to work (this includes educational institutions and most governmental entities) and, thus, are not eligible for leave for Reason #1.
  - There is no prohibition on teleworking under the Governor's Stay at Home Order. Thus, generally, employees required or allowed to telework will not be eligible for leave for Reason #1.
    - For example, a teacher performing duties in accordance with a school district's Remote Learning Days Plan would not be prevented from working by Governor Pritzker's Stay at Home Order and, thus, may not take paid sick leave as a result of being subject to that order.
  - If the business is closed because it is not an "essential business or operation" under the Governor's Stay at Home Order, the employee is not entitled to paid leave for Reason #1 because there is no work available for that employee.
  - *In most instances, employees will not qualify for paid sick leave solely as a result of the Governor's Stay at Home Order. However, we recommend consulting with legal counsel if an employee seeks paid leave for this reason.*
- ❖ For **Reason #3**, paid leave is limited to the time the employee is unable to work or telework because the employee is taking "affirmative steps" to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.
- ❖ For **Reason #4**, the employee must have some personal relationship to the "individual" that creates an expectation that the employee would care for them if subject to a quarantine (e.g., immediate family member or a person that regularly resides with the employee).
- ❖ For **Reason #5**, son/daughter means "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or 18 years of age or older who is incapable of self-care because of a mental or physical disability."

- ❖ An employee is required to provide their employer with the following information when taking leave under the FFCRA:
  - **For all reasons**: employee name, proposed leave date(s), qualifying reason for leave, and oral/written statement that the employee is unable to work or telework because of the qualifying reasons for leave.
  - **Additional information, depending on the reasons for leave**:
    - For **Reasons #1 and #4**, the name of the government entity that issued the quarantine or isolation order.
    - For **Reasons #2 and #4**, the name of the health care provider.
    - For **Reason #4**, the name of the individual and the employee's relationship to the individual.
    - For **Reason #5**, the name of the son/daughter being cared for, the name of the school, place of care (day care, summer camp, etc.) or child care provider that has closed or become unavailable due to a COVID-19 related reason, and a representation that no other suitable person will be caring for the son/daughter during the period for which the employee seeks to take leave.
      - *Note for private employers eligible for refundable tax credits*: for employees taking leave to care for a child age 15 to 17, employers should ask them to explain the "special circumstances" as to why that child needs care during daytime hours and the employer should document same.
- ❖ Employers must **retain all records** related to an employee's request for, grant, or denial of FFCRA leave for **at least 4 years**. Any information provided orally by employees should be reduced to writing by the employer and retained accordingly.
- ❖ Employees may use leave **intermittently** if the employer and employee agree for **Reason #5**. Use of emergency sick leave for other COVID-19 reasons can only be used intermittently if there is an agreement and if the employee is teleworking, as the purpose is to slow and contain the virus.
- ❖ **Expanded FMLA leave is limited to Reason #5 above and for a total of up to 12 workweeks during the period from April 1 to December 31, 2020**. This is true even if there is more than one FMLA year during this period.
  - By way of example, if an employer's FMLA year is September 1 to August 31, and an eligible employee uses 12 workweeks of leave for Reason #5 for the period between May 1 – August 15, they would not be entitled to another (up to) 12 workweeks of leave between September 1 and December 31, 2020, for Reason #5.

- ❖ **Remember the Pay Caps:** Pay for leave taken for Reasons 1-3 is capped at \$511 per day per employee (\$5,110 in aggregate). For Reasons 4-6, paid leave is 2/3 of employee's pay rate, and is capped at \$200 per day per employee (\$2,000 in aggregate).

Please do not hesitate to contact any Robbins Schwartz attorney for further guidance on application of the new leaves under the FFCRA.