AFL-CIO Lawyers Coordinating Committee
COVID-19 and the Workplace
Frequently Asked Legal Questions
(Version 2; Last updated March 31, 2020)

Families First Coronavirus Response Act (FFCRA)

A. Background:

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020, and requires certain employers to provide employees with paid sick leave and expanded family leave for specified reasons related to COVID-19.

The FFCRA directs the Secretary of Labor to promulgate guidance regarding these provisions by April 2. The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) has already published some informal guidance on its website. We anticipate continued informal guidance to be released through the WHD website and formal regulations to follow soon.

This is an updated document. We will continue to update this document as additional guidance and regulations become available. For the most current DOL guidance, check regularly at this site: https://www.dol.gov/agencies/whd/pandemic

B. Frequently Asked Questions:

1) What is the effective date of the paid sick leave and expanded family leave provisions?

The FFCRA states that its provisions shall take effect no later than 15 days after the date of enactment, which is April 2. However, the DOL has stated (including in posters employers are required to post in the workplace) that the paid sick leave and expanded family leave requirements take effect April 1.

DOL has issued a Field Assistance Bulletin stating that it will not bring enforcement actions against employers under the FFCRA for 30 days (through April 17) provided that the employer has made reasonable, good faith efforts to comply with the Act. FAB No. 2020-1 (March 24, 2020). The Field Assistance Bulletin describes what constitutes reasonable, good faith efforts. *See* https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1.

2) How do I determine whether an employer is subject to the paid sick leave and expanded family leave requirements?

(a) 500 employee threshold: FFCRA §§ 3102(b) and 5110(2)(B) state that only employers employing "fewer than 500 employees" are covered by the paid sick leave and expanded family leave requirements.

The WHD has published questions and answers on its website in which it provides detailed guidance on how the 500 employee threshold is calculated. Of particular relevance, the WHD states that it will calculate a business's employees on a nationwide basis, rather than a facility-by-facility, or geographically-defined basis. As a result, a significant number of businesses likely will be exempt from the paid sick leave and expanded family leave provisions even if they employ fewer than 500 employees at a particular location.

(b) 50 employee threshold: FFCRA §§ 3102(b) and 5111(2) provide the Secretary of Labor with authority to issue regulations to exempt businesses with "fewer than 50 employees" from the specific paid sick leave requirement connected to missing work to care for a child whose school is closed or childcare is unavailable (*i.e.*, not from the paid sick leave requirement connected to an employee being infected with COVID-19 and subject to isolation, self-quarantining, seeking a medical diagnosis, or caring for someone who is sick or in self-quarantine) and from the expanded family leave requirement "when the imposition of such requirements would jeopardize the viability of the business as a going concern."

The WHD has now further clarified that a business may claim this exemption if an authorized officer of the business determines that: (i) provision of the leave would result in the business's expenses and financial obligations exceeding available business revenues and result in the business ceasing to operate at a minimal capacity; (ii) the absence of the employee or employees on leave would entail a substantial risk to the financial health or operational capabilities of the business because of the employees' specialized skills, knowledge of the business, or responsibilities; or (iii) there are not sufficient employees able, willing, and qualified, and available at the necessary time and place, to perform the labor or services ordinarily performed by the employees' requesting leave, and these labor or services are needed for the business to operate at a minimal capacity.

WHD continues to state that it will issue a regulation addressing this exemption in more detail.

3) For employees who are ineligible for some or all forms of paid sick leave or expanded family leave based on the size of their employer (see previous question), what other income support may be available?

On March 27, 2020, the CARES Act was signed into law. Among other things, the CARES Act creates the Pandemic Unemployment Assistance program (PUA), modeled after existing disaster unemployment assistance programs. PUA provides up to 39 weeks of financial assistance to a wide range of individuals who are experiencing a loss of income as a result of COVID-19, including individuals who have been diagnosed with COVID-19, who are seeking a medical diagnosis, who are self-quarantining, or who are caring for a child whose school or childcare is closed as a result of COVID-19. Employees who are receiving paid sick leave or expanded family leave are not eligible for PUA benefits. However, employees who are not eligible for paid sick leave or expanded family leave under the FFCRA because of the size of their employer should generally be eligible for PUA benefits under the CARES Act. Minimum benefits are equal to one-half the state's average weekly unemployment insurance benefit. Retroactive benefits are available back to January 27, 2020.

4) What is an "emergency responder" for purposes of FFCRA?

FFCRA §§ 3102(b) and 5111(1) provide the Secretary of Labor with authority to issue regulations "to exclude certain . . . emergency responders from the definition of eligible employee" for purposes of the paid sick leave and expanded family leave requirements.

The WHD has now provided guidance on the meaning of the term "emergency responder" for purposes of the FFCRA. An "emergency responder" is

> "an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility."

In addition, the WHD states that the highest official of a state, territory, or the District of Columbia may designate other employees as emergency responders "necessary for . . . [the] response to COVID-19." Finally, the WHD states that, "[t]o minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA."

5) What is an "health care provider" for purposes of FFCRA?

FFCRA §§ 3102(b) and 5111(1) provide the Secretary of Labor with authority to issue regulations "to exclude certain health care providers . . . from the definition of eligible employee" for purposes of the paid sick leave and expanded family leave requirements.

The WHD has now provided guidance on the meaning of the term "health care provider" for purposes of the FFCRA. A "health care provider" is

> "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

> This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

In addition, the WHD states that the highest official of a state, territory, or the District of Columbia may designate other employees as health care providers "necessary for . . . [the] response to COVID-19." Finally, the WHD states that, "[t]o minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA."

6) What constitutes "advised by a health care provider to self-quarantine due to concerns related to COVID-19" for purposes of accessing the FFCRA paid sick day benefit? In particular, is a health care provider's advice that an employee self-quarantine because of the employee's preexisting medical condition sufficient even if the employee has not been exposed to COVID-19? What about self-quarantine advice premised on the preexisting medical condition of a family member of the employee?

The scope of this provision is unclear from the statutory language. Congress's choice to use the phrase "due to concerns related to COVID-19," rather than "due to exposure to COVID-19" might indicate an intent to cover self-quarantines beyond just those that result from exposure to a person confirmed to be infected with the virus. On the other hand, the federal Department of Health and Human Services defines the phrase "self-quarantine" as "separat[ing] and restrict[ing] the movement of people *who were exposed to a contagious disease* to see if they become sick," a definition that would seem to limit the term "self-quarantine" to situations in which an employee was exposed to COVID-19. *See* https://www.hhs.gov/answers/public-health-and-safety/what-is-the-difference-between-isolation-and-quarantine/index.html *See also* 42 C.F.R. 70.1 (similar definition for "quarantine").

7) How does FFCRA expanded family leave relate to ordinary FMLA leave? In particular, if an employee has already exhausted his or her ordinary FMLA leave for the current twelve-month period, can the employee still take FFCRA expanded family medical leave?

The WHD has clarified that FFCRA expanded family leave is treated as a form of FMLA leave. Therefore, an employee who has already exhausted his or her FMLA leave for the current twelve-month period is not eligible to take expanded family leave under the FFCRA. Conversely, an employee who uses expanded family leave now will have that leave count against their overall FMLA leave allowance for the current twelve-month period. In particular, if an employee takes his or her first two weeks of (unpaid) expanded family leave concurrently with his or her two weeks of paid sick leave, those two weeks of unpaid expanded family leave will count against the employee's overall FMLA leave allowance.

Note that, per WHD guidance, FFCRA paid sick leave is not a form of FMLA leave. Therefore, an employer must allow use of paid sick leave even if the employee has already exhausted all of his or her ordinary FMLA leave.

8) Are immigrant workers eligible for FFCRA paid sick leave and expanded family medical leave?

As with ordinary FMLA leave, immigrant employees should be eligible for FFCRA paid sick leave and expanded family medical leave like any other employees.

Note, however, that because federal reimbursement to employers of the costs of paid sick leave and expanded family medical leave operates through the payroll tax system, in circumstances where an employer unlawfully pays an employee "under the table" – *i.e.*, does not withhold payroll taxes – we can anticipate that at least some employers may not pay out FFCRA paid sick leave and expanded family medical leave. Note also that the failure to do so likely constitutes a violation of the paid sick leave and/or expanded family leave provisions of the FFCRA, since a worker paid under the table is still an "employee" for purposes of the law's paid leave requirements.

Because application for PUA benefits under the CARES Act (discussed in Question #3 above) requires proof of work authorization, undocumented employees are not eligible for these benefits.