



# COMPLIANCE ALERT

## IMPORTANT UPDATES TO DOL GUIDANCE ON FFCRA

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The U.S. Department of Labor has updated its Q&A Guidance on the Families First Coronavirus Response Act (FFCRA). Because the law and best practices relating to COVID-19 continue to rapidly evolve, please continue to consult with your Benefit Advisor regarding updates.

### LAYOFFS, FURLOUGHS, CLOSURES, REDUCTIONS IN HOURS & STAY-AT-HOME ORDERS

The DOL has clarified that employees on layoff or furlough are not entitled to benefits under FFCRA until they return to work.

- Generally, if an employer sent an employee home and stopped paying the employee because it does not have work for the employee to do, the employee will not get paid sick leave or expanded FMLA, but the employee may be eligible for unemployment benefits.
- This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a federal, state, or local order such as a "stay-at-home" order before or after April 1, 2020.
- If an employer closes after April 1, 2020, while an employee is on paid sick leave or expanded FMLA, the employer must pay for any paid sick leave or expanded FMLA the employee used before the employer closed. As of the closure date, the employee is no longer entitled to paid leave but may be eligible for unemployment benefits.
- If an employee is furloughed or the employee's hours are reduced because of lack of work or business, the employee is not entitled to then take paid sick leave or expanded FMLA for the hours they are no longer scheduled to work but may be eligible for unemployment benefits.

### PROMPT PAYMENT FOR THE COST OF PROVIDING LEAVE

The DOL has released the required notification poster for FFCRA. Employers should post the required workplace poster in their

offices by April 1 and, to the extent an employer has workers working remotely, should also send them the poster via email and/or post it on an external website.

DOL has updated the poster since originally making it available. To ensure the most up-to-date version, employers may wish to wait to print or download the poster until March 31st.

The poster is available here:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

### INABILITY TO WORK OR TELEWORK

According to DOL, an employee is unable to work if their employer has work for them and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents them from being able to perform that work, either at their normal worksite or by means of telework.

If an employer permits teleworking and an employee is unable to perform those teleworking tasks or work the required teleworking hours because of one of the qualifying reasons for paid sick leave, the employee is entitled to take paid sick leave.

If an employee is unable to perform those teleworking tasks or to work the required teleworking hours because he or she needs to care for their child whose school or place of care is closed because of COVID-19 reasons, the employee is entitled to take expanded family and medical leave.

To the extent an employee is able to telework while caring for a child, paid sick leave and expanded family and medical leave is not available.

### INTERMITTENT LEAVE

An employee's right to intermittent leave depends on why the employee is taking leave, whether they are teleworking, and whether the employer agrees to it.



An employee may take emergency paid sick time and expanded FMLA leave intermittently while teleworking only if the employer allows it.

If an employee is working at the normal worksite (i.e., not teleworking), an employee may not take intermittent sick leave and is required to use leave in full-day increments if the employee is subject to a quarantine or isolation order by the government or recommendation by a health care provider, experiencing symptoms of COVID-19 and seeking medical treatment, or is caring for someone subject to a quarantine or isolation order or recommendation.

In contrast, if the employer allows it, an employee may take paid sick leave intermittently while working at the normal worksite if the employee is taking sick leave to care for their child whose school or place of care is closed because of reasons related to COVID-19.

The employee may use intermittent expanded FMLA leave due to a school or daycare closing, including while teleworking, only if the employer allows it.

### HEALTH INSURANCE CONTINUATION

An employer is required to allow an employee to continue the group health coverage elected by the employee on the same terms as if the employee continued to work. The employee must generally continue to make any normal contributions to the cost of the health coverage.

To the extent an employee is able to telework while caring for a child, paid sick leave and expanded family and medical leave is not available.

### HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under 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;
  - 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;
  - 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; and
  - any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.
- 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.



## **SMALL BUSINESS EXEMPTION**

DOL has clarified that the small business exemption is available only for leave that is requested because a child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

An employer with fewer than 50 employees is exempt from providing paid sick leave and expanded FMLA leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the employer as an ongoing concern.

A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Given the fluidity of the rapidly developing laws, regulations, and guidance surrounding COVID-19, we strongly advise employers to watch for forthcoming Compliance Alerts and contact their Hilb Group Benefit Advisor with questions.

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