

insights

TYPES NOT MAPPED YET March 26, 2020 | TTR not mapped yet | Chuck M. Poplstein

What employers need to know about the Families First Coronavirus Response Act

The U.S. Department of Labor has now released guidance in [Questions and Answer](#) format on the employment provisions of the Families First Coronavirus Response Act (FFCRA) in advance of issuing implementing regulations, expected early next week. **The Q&A is designed to provide employers with compliance assistance before the Act goes into effect on April 1.**

[Click here](#) for our summary of the employment provisions of the FFCRA. This is the most up-to-date summary of the Act and reflects the significant technical corrections and changes incorporated into the bill between its passage in the House and its enactment.

Here are the more notable insights from the DOL:

Effective date

The Emergency Family and Medical Leave Expansion Act (Emergency FMLA) and the Emergency Paid Sick Leave Act (Emergency Paid Sick Leave) are now **effective April 1, 2020**. Earlier reports had suggested an effective date of April 2.

Calculating the 500-employee test for coverage

The new leave provisions apply to employers with fewer than 500 employees. The calculation is made “at the time your employee’s leave is to be taken.” The test includes full-time employees, part-time employees, employees on leave, temporary employees jointly employed by the employer and another employer, and day laborers supplied by a temporary agency. There is no clear guidance on whether the employers must count employees on furlough in determining whether they have fewer than 500 employees.

A company, including separate establishments and divisions, is considered a single employer. However, if a company has an ownership interest in another company (for example, in a subsidiary-parent company relationship), the two companies are considered separate employers **unless they are joint employers under the Fair Labor Standards Act (FLSA)**. In that case, the employees of the two companies are added together for purposes of determining coverage for Emergency FMLA and Emergency Paid Sick Leave.

Similarly, two or more entities will be considered separate employers unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA). If the entities are an integrated employer, the employees of all entities will be counted together to determine coverage for Emergency FMLA.

Corporations with questions regarding how the employee threshold will be calculated under their specific circumstances should contact employment counsel.

Overtime hours included in emergency FMLA pay calculation

The Emergency FMLA Act requires employer to pay an employee for hours the employee would normally have been scheduled to work **even if that number is more than 40 hours in a week**.

There is no premium included for overtime in calculating the amount of pay (as opposed to the amount of hours) for the leave. The same rule applies to Emergency Paid Leave.

Regular rate of pay

The calculation of paid leave is based on a six-month average of the employee's regular rate of pay. This can be derived either by (a) averaging the employee's regular rate over the six months prior to the date when leave begins, or (b) adding together all compensation that is part of the employee's regular rate for the six-month period and dividing it by all hours actually worked in that same period. **Just as under the FLSA, an employee's "regular rate of pay" is not necessarily the same as the employee's hourly wage, and includes other compensation including commissions, tips, and certain bonuses.**

Effect of previously offered paid sick leave

An employer may not subtract paid sick leave granted to an employee **before April 1** from the 80 hours of paid leave required by the EPSLA.

Model notice

The DOL has also released its [notice of FFCRA requirements](#), which all covered employers are required to post. According to the DOL, employers may satisfy the posting requirement by posting the notice in a conspicuous place in the workplace, emailing or direct mailing it to employees, or posting it on an employee information internal or external website.

The forthcoming DOL regulations (expected before April 1) will also define the scope of and process for receiving the small business and health care provider exemptions. We will continue to post updates and guidance as further guidance and the regulations are released.

We are available to answer more specific questions on exactly how these new laws will affect your company. If you have any questions, please feel free to call or e-mail your regular contact at Thompson Coburn.

For more information from Thompson Coburn related to COVID-19, please visit our [resource page](#).

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