



## Department of Labor Guidance Families First Coronavirus Response Act (From NTMA Labor Attorney)

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Tonight, the Department of Labor ("DOL") issued Questions and Answers, a Fact Sheet for Employers and a Fact Sheet for Employees related to the Families First Coronavirus Response Act ("FFCRA"). Importantly, the DOL stated that the law goes into effect April 1, 2020, that it will be providing the mandatory workplace poster later this week (not later than March 25, 2020), and will be publishing implementing regulations sometime in April 2020 (meaning that the implementing regulations are expected after the date the law goes into effect). The fact that the regulations will not come until sometime in April explains the period of non-enforcement that will last for thirty (30) days after the law goes into effect, during which time an employer will not be subject to sanctions or penalties (by the DOL, Treasury and the IRS) provided that the employer has acted reasonably and made good faith efforts to comply with the FFCRA.

### FFCRA - Questions and Answers

The DOL issued Q&A related to the FFCRA, answering numerous questions related to both paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. As a brief reminder, the FFCRA provides for 80 hours of paid sick leave in six different circumstances, and has expanded the Family Medical Leave Act ("FMLA") to provide for up to 12 weeks (2 weeks unpaid, and 10 weeks paid at 2/3 a person's average weekly wages) for persons whose children are home due to closure of schools or daycare, or due to a childcare provider being unable to care for children due to COVID-19.

The Q&A address a variety of questions related to the FFCRA, including how one determines if they are covered by the new emergency sick leave requirements or the amendments to the FMLA, what happens if an employer believes they should be exempt from the FFCRA due to employing less than 50 employees, and other important questions. You can view the Q&A [here](#). Of the several more interesting parts of the Q&A, the DOL has specifically said that businesses seeking to elect the small business exemption (under 50 employees) should NOT send any materials to the DOL, but rather simply document the reasons why your business meets the criteria that the DOL will set forth in regulations to come! According to the press release from the IRS, Treasury and the DOL, the DOL will provide emergency guidance and rulemaking to clearly articulate the standards under which an employer with less than 50 employees can state they are exempt from the FFCRA.

### Fact Sheet - Employer Expanded FMLA Requirements

The Fact Sheet regarding an employer's obligations under the FFCRA basically mimics the statute itself, which our firm has already documented. However, there are a few key points. First, look for the DOL poster to be issued tomorrow, which you must post conspicuously by April 1, 2020. Furthermore, not only do the tax credits covering the paid leave pay for the paid leave, but they also cover any amounts paid or incurred to maintain health insurance. You can view both the DOL's Fact Sheet and the IRS' press release [here](#) and [here](#).

Importantly, if your social security and Medicare taxes do not cover the cost of paid leave and health insurance premiums, you can also keep federal income tax withholdings. The IRS' website states as follows: "The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees." And, self-employed individuals can receive an equivalent credit. If there still are insufficient funds to cover the paid leave,

the IRS promises refunds "as quickly as possible." Further guidance is expected from the IRS, Treasury and DOL next week.

## Fact Sheet- Employee Paid Leave Rights

The DOL also issued today a Fact Sheet outlining Employee Paid Leave Rights, available [here](#). In typical fashion, the DOL's fact sheets and Q&A are easy to understand and written in plain language. Notably, the FMLA's notice requirements for the paid leave still apply, meaning that an employee should provide notice of his or her need for leave as is practicable. Further, employers can require employees to follow reasonable notice procedures in order to continue receiving the paid sick time. This means you should follow your typical FMLA notice requirements. For those employers with less than 50 employees who do not plan on seeking the exemption, FMLA will be new to you. Please reach out to McMahon Berger and we can assist you in dealing with the obligations you have under the FMLA.

## FFCRA Workplace Poster

The U.S. Department of Labor's Wage and Hour Division ("WHD") has issued a poster related to the Paid Sick Leave and Expanded Family and Medical Leave under the Families First Coronavirus Response Act ("FFCRA"). The poster may be found at:

[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)

Please note that WHD has also released a similar poster for distribution to the federal workforce. The correct poster for non-federal employers (which includes federal contractors and subcontractors) simply reads "Employee Rights" on the top line while the corresponding poster reads "Federal Employee Rights."

The posters are accompanied by a FAQ section:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

Employers are required to post the poster in "conspicuous places" in the workplace that employees frequent. This may be accomplished by posting them where other required postings are placed such as bulletin boards and breakrooms. Employers are not required to place them at all worksites as long as they are posted in locations that all employees report to at some point, such as a common lunchroom. Employers may not, however, place posters in binders if wall space is unavailable. Stated otherwise, the poster must be on a wall in the facility where it will be seen by all employees.

For companies with employees working remotely, the posting requirement may be satisfied by sending it directly to employees via e-mail or a direct mailing, or by publishing it on an employee information internal or external website.

Unlike other WHD postings, employers are only required to post the notification in English. There is currently no version of the posters in other languages, but those may be issued later.

To ensure that you are meeting all of your posting requirements, employers should download the poster and post copies of it where similar posters are placed (note: these do not replace traditional FMLA postings). Additionally, copies of the posters should be emailed to any employees who are authorized to work remotely, even if they are not actually doing so. A best practice would be to both post the poster in your physical locations and email it to all employees regardless of telework status. Posters should be distributed no later than the April 1, 2020, effective date.

DISCLAIMER: The St. Louis employment attorneys at McMahon Berger have been representing employers across the country in labor and employment matters for over sixty years. As always, the foregoing is for informational purposes only and do not constitute legal advice regarding any particular situation as every situation must be evaluated on its own facts. The choice of a lawyer is an important decision and should not be based solely on advertisements.