

ALTSHULER BERZON LLP

FFCRA (“Families First Coronavirus Response Act”), HR 6201: Updated Guidance and FAQs

March 27, 2020

What is the FFCRA’s effective date?

The Department of Labor now states that the FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. Therefore, keep in mind that the answers to these FAQs apply only during that time period.

What if an employer sends an employee home because the employee had contact with a co-worker or other person who has symptoms of coronavirus, and tells the employee to stay home until the other person with symptoms obtains a negative test result for the virus?

In this situation, the best course of action would be for the employee to consult a health care provider. If the health care provider recommends that the employee self-quarantine, the employee should document this if at all possible, and should advise their employer that a health care provider has advised them to self-quarantine, in order to ensure that the employee can claim sick leave under the FFCRA.

The answer would be the same if a worker wants to stay home to avoid exposure to a sick co-worker or to protect co-workers due to exposure to a sick person outside of work.

Are part-time employees eligible for benefits under the FFCRA?

Yes. A part-time employee is entitled to leave for the employee’s average number of work hours in a two-week period. For example, if an employee normally works 32 hours per week, the employee will be entitled to 64 hours of paid sick leave over the two weeks. If the normal hours scheduled are unknown, or if the part-time employee’s schedule varies, a six-month average can be used to calculate the average daily hours. A part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave to care for a child whose school or childcare place is closed for the same number of hours per day, for up to ten weeks after that.

How does an employer determine whether it has 500 or more employees under the FFCRA?

An employer has fewer than 500 employees if, at the time the employee's leave is to be taken, it employs fewer than 500 full-time and part-time employees anywhere in the United States. In making this determination, employers will include employees on leave, temporary employees who are jointly employed with another employer (even if the jointly-employed employees are on the other employer's payroll), and day laborers supplied by a temporary agency (so long as there is a continuing employment relationship between the employer and the day laborer). Workers who are independent contractors under the Fair Labor Standards Act, rather than employees, are not considered employees for purposes of the 500-employee threshold.

What happens to employees who have already taken their FMLA leave in the past 12 months?

The Department of Labor has interpreted the FFCRA to mean that any FMLA leave that an employee has already taken during the applicable 12-month period must be subtracted from an employee's entitlement to emergency family or medical leave under the FFCRA.

However, an employee who has already used 12 weeks of FMLA would still be eligible for the two weeks of emergency paid sick leave under the FFCRA, which is independent of FMLA's 12-week cap.

What about employees who were not previously eligible for FMLA leave?

Employees not previously eligible for mandatory FMLA leave because their employer has fewer than 50 employees have not used any of the 12 weeks of FMLA leave (because they were not previously eligible). Accordingly, they should be eligible for the entire 12-week leave period provided under the FFCRA to care for a child whose school or childcare provider has closed. This is true even if the employer already provided them with some other form of paid or unpaid family leave (e.g. maternity leave / baby bonding leave) in the last 12 months pursuant to a CBA or other policy.

If employees take either emergency sick leave or paid family leave, are those payments subject to regular payroll taxes?

Yes. However, payroll tax credits for qualified sick leave wages and family leave paid by an employer will include these amounts.

Are health insurance costs tax-deductible?

Yes, eligible employers are entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Do employers have to post the notice informing employees about their rights?

Yes. The Secretary of Labor has provided a model notice to employees that must be posted by employers. That notice is available [here](#). Each covered employer must post this notice in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. Employers must convey this notice to newly hired employees, either by email, direct mail, or by posting this notice on the premises or on an employee information internal or external website.

Unions as employers are required to post the notice. They should do so by mailing it or emailing it to the union's employees if they are working remotely.

When will enforcement of the FFCRA begin?

Although the FFCRA goes into effect on April 1, 2020, the Department of Labor has stated that it will prioritize education over immediate enforcement actions if an employer attempts to comply with the law. Therefore, the Department will not bring enforcement actions against any public or private employer for violations of the FFCRA before April 17, 2020, so long as the employer has made reasonable, good-faith efforts to comply with the FFCRA. For purposes of non-enforcement, reasonable, good-faith efforts mean (1) employer remedies any violations, including by making all affected employees whole as soon as practicable; (2) the employer's violations of the FFCRA were not willful; and (3) the employer submits a written commitment to the Department of Labor that the employer will comply with the FFCRA in the future.

Even if the Department holds off on enforcement, however, employers are still required by the law to comply immediately on the effective date of the FFCRA, which is April 1, 2020. The Department's policy does not preclude individual employees or unions from enforcing these obligations.

What if I have other questions?

The Department of Labor has a helpful FAQ page [here](#) that covers the basics of the law. We are also available to discuss any questions you have about the FFCRA. You may reach out to your regular contact at Altshuler Berzon LLP with questions, or if you are uncertain whom to contact, please email Stacey Leyton at sleyton@altber.com.

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Altshuler Berzon LLP