

MEMORANDUM

DATE: March 27, 2020

RE: Important Legal Update regarding Coronavirus (COVID-19)

Late yesterday, the Department of Labor issued detailed FAQs (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>) that respond to many of the questions we have been getting on the Families First Coronavirus Response Act (FFCRA) and its requirement that employers provide paid family and sick leave for COVID-19-related purposes. We encourage you to read all of the questions and answers carefully, but here is a quick summary of some of the highlights:

- The employee head count to determine whether you fit under the 499-employee cap includes temporary employees (FAQ #2).
- Employers with less than 50 employees who want to seek a hardship exemption have to wait for more guidance on that issue (FAQ #4).
- The “regular rate of pay” used to determine the amount of paid leave includes commissions, tips and bonuses (FAQs #7-8).
- Employees must provide documentation in support of the reasons for paid sick leave and expanded family and medical leave (e.g., a copy of the Federal, State or local quarantine or isolation order related to COVID-19, written documentation by a health care provider advising the employee to self-quarantine, or a notice of a school or place of care closure. Such documentation will be important for claiming tax credits under the FFCRA. (FAQ #16). Unfortunately, the FAQ does not indicate whether pay during the leave (or the leave itself) can be denied or delayed if the documentation is not provided.
- An employee is “unable to work” if their employer has work for them and one of the COVID-19 qualifying reasons in FFCRA prevents the employee from being able to perform that work, either under normal circumstances at the normal worksite or by telework (FAQs #18-19).
- In general, sick leave and expanded family and medical leave must be taken in full-day increments, unless the employer permits leave to be taken intermittently or on a reduced work schedule. That rule applies even if the employee is teleworking. If the employer permits intermittent leave, the employer may also designate the minimum increment of leave. (FAQs #20-22).

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- Employees are not eligible for sick leave or expanded family and medical leave during furloughs or temporary layoffs, whether they happen before or after the effective date of FFCRA (i.e., April 1) (FAQs #23-27).
- Business closure orders, like Governor Brown's, likely do not support the need for leave (FAQs #23-27).
- Employees are not eligible for sick leave or expanded family and medical leave if their hours were reduced for business reasons. But if the employee cannot work his or her full schedule because of a qualifying reason under the FFCRA, leave is available. (FAQ #28).
- Employers must continue providing group health coverage during sick leave or expanded family and medical leave (FAQ # 30).
- Preexisting paid leave benefits (e.g., PTO, vacation or sick leave) cannot be used to get to full pay unless the employer and employee mutually agree. (FAQs #31-33).

If the Department of Labor issues additional guidance, we will let you know.

For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.