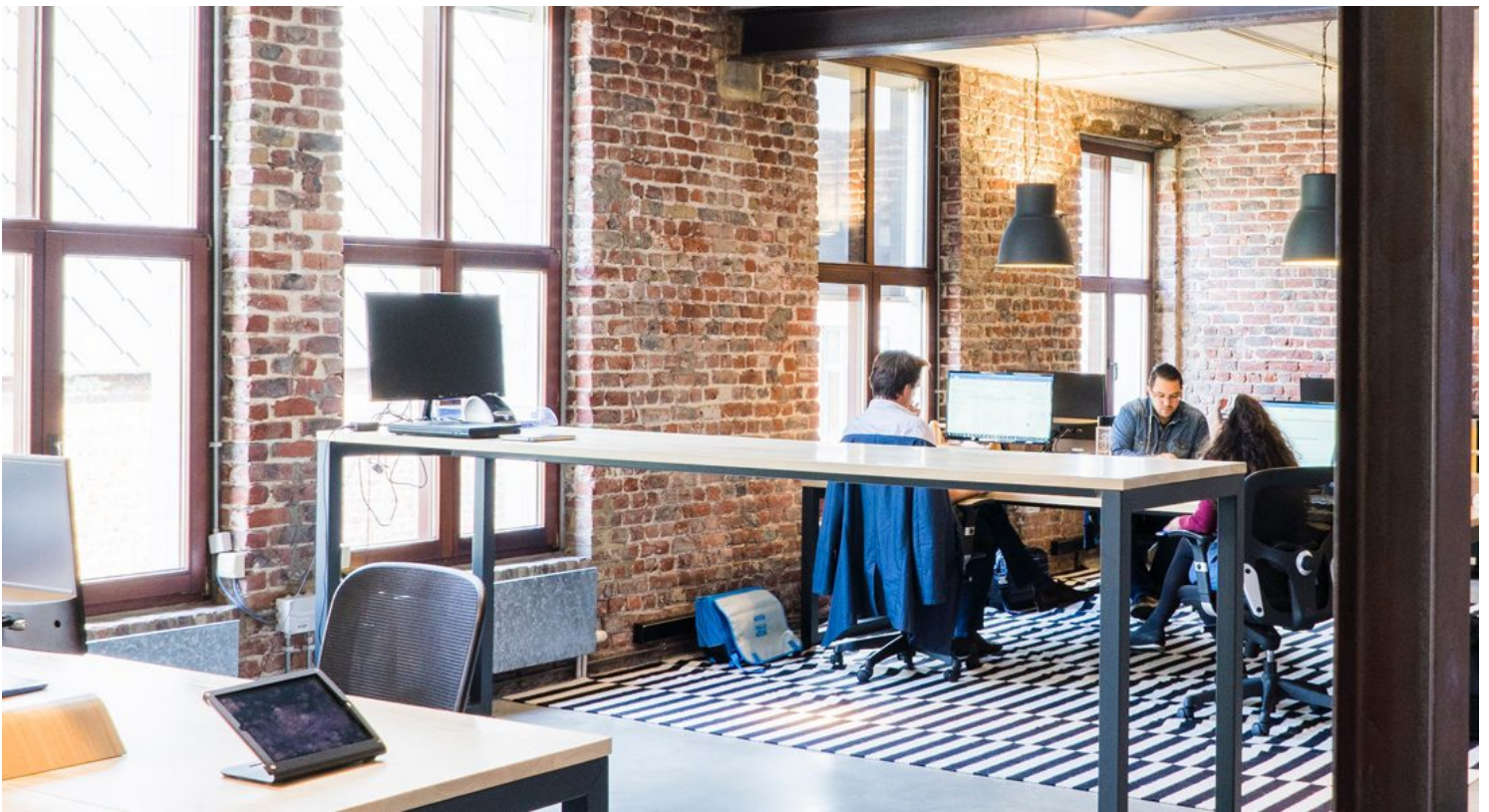


NEWS & INSIGHTS

Department of Labor continues to refine FFCRA guidance

INSIGHTSLEGAL UPDATE

APRIL 28, 2020



The below information is current as of the publication date listed. Because COVID-19 response measures on all fronts are continually evolving, clients should stay alert to new developments and consult with counsel on any critical questions.

The Department of Labor [continues to refine its guidance](#) on the [Families First Coronavirus Response Act \(FFCRA\)](#), which mandates paid leave to employees at private companies of fewer than 500 and at most public sector employers when those employees cannot work or telework for specified reasons related to COVID-19. The Act mandates leave in two parts: Emergency Paid Sick Leave (EPSL) and expanded FMLA (or Public Health Emergency

Leave). The mandate is subject to exceptions for healthcare providers and emergency responders.

New guidance clarifies that:

- “Joint employers” must include jointly-employed employees in their analysis of whether they are under the 500-employee threshold for purposes of FFCRA coverage. Joint employer status is determined, under the Department’s current interpretation, by evaluating direct or indirect control over the employee in matters of hiring and firing, supervision, pay and maintenance of records.
- Leave is available under EPSL where the employee is unable to work because of a shelter-in-place or stay-at-home order issued by federal, state or local authority; therefore, where a governor mandates that specific categories of vulnerable individuals stay at home due to risk of exposure, those individuals would be generally be eligible for EPSL. However, if the employer’s location is closed, or the employer has no work for the employee due to a similar order, EPSL is not available. Accordingly, where closures or business conditions result in no work for the employee, the leave is not available.
- The regular rate of pay used for calculating benefits for non-exempt employees under FFCRA is a weighted average derived from the six-month period running backward from the first day of leave. If there are tips, bonuses, supplements, piece rate payments or commissions, these need to be included in the weighted average. The DOL also provided guidance for calculating the number of hours of leave employees working irregular schedules are entitled to by reference to hours worked in the six-month lookback period, although the calculations for EPSL and expanded FMLA are different.
- Healthcare employees and emergency responders may be excluded from coverage under the FFCRA at the employer’s option—and the employer may decide to cover those employees for some purposes and not others.
- While the Department announced a limited stay of enforcement of the FFCRA until April 17, 2020, the Act went into effect on April 1, and violations that are not remedied will result in enforcement actions retroactive to April 1.

Employers are reminded to collect and maintain documentation of benefits provided under the FFCRA. For all requests, the employer should document:

- The name of the employee
- The dates for which leave is requested
- The reason for the request (including name of any government entity or healthcare provider who issued an order or advice to isolate or quarantine)
- A statement from the employee that the employee is unable to work because of that reason

Additionally, for purposes of the expanded FMLA (Public Health Emergency Leave), documentation should include

the name of the child being cared for; the name of the school, place of care or child care provider that has closed or become unavailable; and a statement from the employee that no other suitable person is available to care for the child.

Saxton & Stump attorney [Rick Hackman](#) is available to further discuss the new DOL guidance and how our [Labor and Employment](#) group can provide guidance for businesses when handling paid leave requests under the FFCRA.

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