



In advance of the effective date of the Families First Coronavirus Response Act (FFCRA), the Department of Labor (DOL) has issued guidance clarifying several issues that have been vexing employers since the law was passed two weeks ago, including whether furloughed employees receive FFCRA leave benefits, the availability of intermittent leave, and the criteria for small business exemptions. Here is what employers need to know:

- **Emergency FMLA (EFMLA) and Paid Sick Leave Not Available for Furloughed Employees** - Furloughed employees are not entitled to either EFMLA benefits or paid sick leave. According to the DOL, “[i]f your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave.”
- **EFMLA and Paid Sick Leave Not Available for Employees of Closed Worksites** - Employees forced to stay home because their worksite was subject to a shutdown order are also not entitled to either EFMLA or paid sick leave. This is true regardless of whether the closure occurs before or after April 1, 2020, or whether the employee had requested, but not yet taken, qualifying leave. For employees that are already out on leave when the worksite is closed, the employer's only obligation is to pay employees for the amount of leave taken before the closure.
- **Intermittent Leave Available with Employer Agreement** - Employees can take EFMLA leave or paid sick leave intermittently while working remotely, if their employer agrees. Intermittent leave for employees working remotely can be taken in any increment the employer agrees to. With the agreement of their employer, employees can also take EFMLA or paid sick leave intermittently when not working remotely. However, intermittent paid sick leave when working on-site may only be taken to care for the employee's child whose school or place of care is closed, or whose paid child care provider is unavailable, because of COVID-19-related reasons.
- **Small Business Exemption Criteria** - The DOL has clarified that a business with fewer than 50 employees is exempt from providing EFMLA and paid sick leave (but only if the sick leave is due to school or place of care closures or paid child care provider unavailability for COVID-19-related reasons) if an authorized officer of the business has determined that:
 - The provision of EFMLA or paid sick leave would result in the business's expenses and financial obligations exceeding available revenues and would cause the business to cease operating at a minimal capacity;
 - The absence of the employee(s) requesting EFMLA or paid sick leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting EFMLA or paid sick leave, and these labor or services are needed for the business to operate at a minimal capacity.
- **Expansive Definition of “Health Care Provider”** - The FFCRA allows employers of employees who are “health care providers” to elect to exempt such employees from EFMLA or paid sick leave. The DOL has clarified that the definition of “health care provider” is very broad, including “anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy,

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EFFECTIVE APRIL 1, 2020: THE EMERGENCY FMLA AND PAID SICK LEAVE PROVISIONS OF THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

by Gray Reed's Labor & Employment Department
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or any similar institution, employer, or entity." The DOL's guidance goes on to provide that "[t]his definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility."

KEY TAKEAWAYS FOR EMPLOYERS

Given the national emergency, the FFCRA was passed very quickly, leaving employers with a lot of questions about its implementation and the application of its provisions. Although the DOL's guidance is non-binding and subject to revision, it provides employer's with much-needed direction in their attempts to comply with this unprecedented new law and its far-reaching effects.

Employers should expect additional guidance, as well as more formal agency regulations, to be adopted by the DOL in the coming days, and Gray Reed will continue to monitor such developments and provide further updates as warranted. For our prior review and analysis of the FFCRA, please see our alert [here](#).

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