

LABOR DEPARTMENT THROWS COVID-19 CURVEBALL IN LATEST GUIDANCE, SUGGESTS SHUT DOWN EMPLOYEES WON'T QUALIFY FOR LEAVE

Insights
Mar 29, 2020

The Department of Labor (DOL) continues to update its guidance document on implementation of the [Families First Coronavirus Response Act](#) (FFCRA), and the latest update caught many employers by surprise. The [updated document](#) released by the agency appears to suggest that employees who cannot work because their businesses are subject to a government shutdown order or they are ordered to shelter at home will not qualify for Emergency Paid Sick Leave or Emergency FMLA. This clarification should now be integrated into employers' plans for developing best practices and compliance tools to deal with the rapidly changing situation.

Earlier this week, the FP COVID-19 Taskforce [summarized the first series of questions and answers](#) issued by the DOL that covered the effective date of the Act (April 1), how to calculate whether your business meets the 500-employee threshold, whether the law will be retroactive in nature, and how the Emergency FMLA and Emergency Paid Sick Leave provisions should be applied in leave situations caused by school closures. In the latest update, DOL covered several additional issues you will want to review to ensure compliance.

EMPLOYEES FORCED HOME BY SHUTDOWN ORDERS ALONE EXCLUDED FROM PAID LEAVE?

The DOL's guidance appears to suggest that if employers send home workers and stop paying them, these workers are not entitled to paid sick leave or expanded family and

Related People



Steven M. Bernstein

Regional Managing Partner
and Labor Relations Group
Co-Chair

[813.769.7513](tel:813.769.7513)



Benjamin M. Ebbink

Partner

medical leave if the “employer closes [the] worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.” This would be true whether the closure occurs before or after April 1, the effective date of the law, and even if workers requested leave prior to the closure.

Similarly, if an employer closes its business while workers are already out on Emergency Paid Sick Leave or Emergency FMLA, it must still pay for any paid sick leave or expanded family and medical leave used before the closure, but it has no further obligation to provide Emergency Paid Sick Leave or Emergency FMLA as of the date of the closure.

Instead, the agency directs workers to determine whether they are eligible for unemployment insurance benefits, pointing them to their state workforce agency or unemployment insurance office for specific eligibility questions. The guidance also reminds workers that they will not be eligible for unemployment insurance if their employer is still paying them pursuant to a paid leave policy or state or local requirements.

FURLOUGH V. LAYOFF: DISTINCTION WITHOUT A DIFFERENCE?

Questions have also been raised over the difference between “furloughs” and “layoffs.” For purposes of paid sick leave or emergency family and medical leave, DOL’s updated comments appear to suggest that the agency equates “furlough” to any layoff where employees are no longer working. And, as explained above, furloughed employees are not entitled to Emergency Paid Sick Leave or Emergency FMLA regardless of whether their employment has officially ended.

CERTIFICATION CONFUSION

As of late Thursday, the questions and answers posted on the DOL’s website instructed all employers to maintain detailed documentation about any Emergency Paid Sick Leave or Emergency FMLA taken by their workers in order to later prove eligibility for tax credit reimbursement. But, by late Friday evening, the answer changed. The DOL now says employers must collect documentation in support of leave “as specified in applicable IRS forms, instructions, and information.” To date, the IRS has not yet released any such certification forms.

916.210.0400



Samantha J. Monsees

Partner

816.842.8770



J. Hagood Tighe

Partner and Co-Chair, Wage and Hour Practice Group

803.740.7655

Service Focus

Counseling and Advice

Employee Leaves and Accommodations

Workplace Safety

The DOL also says that employers can require workers to provide additional documentation in support of Emergency FMLA taken to care for children whose school or place of care is closed, or if a child care provider is unavailable, due to COVID-19-related reasons. This could include a notice of closure or unavailability from a school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider.

THE REALITY OF TELEWORK

The DOL also provided a series of questions and answers addressing the increasing reality of compulsory telework around the nation and its interplay with FFCRA benefits. The agency indicates that employers can adjust typical work schedules to accommodate remote workers, and so long as the employees are able work their regularly scheduled hours, such workers would not be eligible for Emergency FMLA or Emergency Paid Sick Leave.

But, if a worker is unable to work remotely or otherwise perform work the required hours because of one of the qualifying reasons, then the employee would be entitled to take Emergency Paid Sick Leave. Similarly, if because of COVID-19 related reasons an employee is unable to perform teleworking tasks or work the required teleworking hours because of a need to care for a child whose school or place of care is closed, the worker would be entitled to take Emergency FMLA.

INTERMITTENT LEAVE

Finally, the DOL confirmed that employees may be able to take Emergency FMLA or Emergency Paid Sick Leave intermittently while teleworking – if the employer agrees. If an employee is unable to telework their normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act, an employer may agree to allow an employee to take paid sick leave on an intermittent basis while teleworking. Similarly, if someone is prevented from teleworking their normal schedule of hours because they need to care for a child whose school or place of care is closed, or their child care provider is unavailable because of COVID-19 related reasons, an employer may allow the

employee to take Emergency FMLA leave intermittently while teleworking.

Intermittent leave can be taken in any increment, provided that the employer and employee agree. For example, if you agree on a 90-minute increment, an employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking. "The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs," the DOL's updated Q&A says, "and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave."

As for intermittent leave for those workers able to work at a job site, this would depend on the reason the employee is taking the leave and whether the employer agrees. Emergency Paid Sick Leave in non-telework situations must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because an employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Once paid sick leave for one or more of these qualifying reasons begins in a non-teleworking situation, employees must continue to take paid sick leave each day until they either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because FFRCA's intent is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

However, if an employee and employer agree in non-telework situations, Emergency Paid Sick Leave can be taken intermittently to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. Similarly, Emergency FMLA can be available in such a situation with an employer's permission and when an employer can agree upon such a schedule with a worker.

CONCLUSION

While much confusion remains, and further clarity on these and other points will need to be made by DOL, this updated guidance begins to flesh out some of the more complicated issues that have been vexing those employers trying to figure out how to comply with the new law come April 1, 2020. Still, you should expect further revisions and clarifications as the agency – and employers – begin the process of implementing this unprecedented, new law. You should not be surprised if you see the FP COVID-19 Taskforce publish additional explanations on this and other aspects of the CARES Act.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or [any member of our COVID-19 Taskforce](#). If your business has questions about a designation as an essential business under a local shelter-in-place or shutdown order, contact any member of [our Essential Business Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.