

Insights: Alerts

Department of Labor Releases Guidance Regarding the "Families First Coronavirus Response Act"

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Yesterday, Tuesday, March 24, the U.S. Department of Labor ("DOL") issued guidance regarding the Emergency Family and Medical Leave Expansion Act ("FMLA Expansion Act") and Emergency Paid Sick Leave Act ("EPSL Act") provisions of the new Families First Coronavirus Response Act ("FFCRA" or "the Act"). The DOL released its first round of published guidance in three parts: a [Fact Sheet for Employees](#), a [Fact Sheet for Employers](#), and a [Frequently Asked Questions](#) document. The guidance was drafted and released by the DOL's Wage and Hour Division, which is charged with both administering and enforcing the Act's requirements.

The DOL's guidance was largely consistent with Kilpatrick Townsend's prior interpretation available [here](#). However, there were some notable differences:

- **Effective Date.** The FFCRA will become effective on April 1, 2020. This effective date is one day before the deadline established in the text of the Act.
- **Notice.** The DOL indicates that "covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements." This guidance is noteworthy because only the EPSL contains a specific notice posting requirement. The DOL met the March 25 deadline for issuing the model notice which can be found [here](#). However, the DOL's guidance is silent on how employers should post the notice if their workforce has transitioned to remote work arrangements.
- **Counting Employees.** In the FAQ document, the DOL unequivocally limits the countable employees to those employed as "full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States." Employers are also directed to include "employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship)." However, independent contractors are explicitly carved out.

This is particularly noteworthy because it changes the definition of “employee” provided in the Act, which applies the definition of employee from Section 3(e) of the FLSA. Section 3(e) does not limit employees to those only in the United States, but rather uses the broad definition of all those who are employed by the employer. While the DOL has been granted significant discretion to interpret the Act, the DOL is not permitted to change the law or rewrite the law under the longstanding rules established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, which was decided in 1984. We will continue to monitor this conflict and provide updates as applicable.

- **Exemptions.** Despite explicit affirmative language in both the EPSL and FMLA Expansion sections of the Act regarding the possibility of exemptions for small businesses with fewer than 50 employees “where the requirements would jeopardize the viability of the business as a going concern,” the guidance only confirms the authority provide such an exemption under the FMLA Extension Act. It is notably silent as to the Secretary of Labor’s authority to provide the same exemption under the EPSL Act.

Similarly, while the guidance mentions the possible exemption from the paid portions of the FMLA Extension Act provisions for employers with fewer than 50 employees, it does not provide any instructions about how to apply for such an exemption. Rather, it says employers should “document why [their] business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.” Employers are told not to send any materials to the DOL at this time.

- **Overtime Applicability.** The guidance acknowledges a split here between the FMLA Expansion Act and the EPSL Act. While the guidance affirms that the aggregate caps placed on the paid leave will still apply, and explicitly states that “pay does not need to include a premium for overtime hours” under either provision, it also explicitly states that the FMLA Expansion Act requires employers to pay an employee.
- **Prohibitions.** Employers may not discharge, discipline, or otherwise discriminate against any employee who takes leave under the FMLA Expansion Act and files a complaint/institutes a proceeding under the FFCRA.
- **Penalties.** The guidance conflates the EPSL and FMLA Extension Act provisions with regards to the first two (2) weeks of leave and provides that employers found to be in violation of the EPSL Act OR the unlawful termination provisions of the FFCRA, will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. While the EPSL as drafted does invoke the penalties of the Fair Labor Standards Act; the FMLA Extension Act does not and instead relies upon the normal remedies available under the FMLA. Despite what appears to be an error regarding the first two (2) weeks of FMLA Extension Act leave, the guidance notes that employers found to be in violation of the additional ten (10) weeks of leave under the FMLA Expansion Act are subject to the enforcement provisions of the FMLA.
- **Enforcement and “Good Faith” Grace Period.** The DOL “will observe a temporary period of non-enforcement for the first thirty (30) days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.” The guidance continues, explaining that “‘good faith’ exists when violations are remedied and the employee is made whole as soon as practicable by the

employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.”

- **Application to Federal Employees.** Most employees of the Federal Government are covered by Title II of the FMLA, which was not amended by the Act. Accordingly, while the EPSL Act provisions will apply to Federal employees, the FMLA Expansion Act provisions will not.

While the guidance answers certain questions from the FFCRA, it also creates some questions of its own. For example, in the [Fact Sheet for Employers](#), the DOL refers to provisions created under the FMLA Expansion Act, however those provisions were expressly and solely created under the EPSL Act. Similarly, the guidance regularly refers to the first two (2) weeks of FMLA Expansion Act leave and the EPSL Act child-care leave interchangeably, and strongly suggests that they run concurrently. However, there is nothing in the language of the FFCRA to require that they run concurrently. In addition, the language in the Act regarding the child care situation triggering each leave is not identical. Under the FMLA Expansion Act, a “public health emergency” is an emergency related to COVID-19 as declared by the federal, state or local government and a child care provider is someone who receives compensation for providing child care services on a regular basis. There is no definition of child care provider in the EPSL Act and that leave is available when child care is unavailable “due to COVID-19 precautions.” While these discrepancies may be simply an oversight, they will require clarification from the DOL and create potential additional compliance issues for employers. While given deference, DOL guidance does not have the weight of regulations and cannot overcome the plain language of the Act.

Under the Act, the Secretary of Labor must issue regulations related to calculating leave due under EPSL Act. Hopefully, the regulations will resolve some of the discrepancies raised in the DOL's facts sheets and FAQs. Today, March 25, the DOL invited “stakeholders” to participate in a “national online dialogue on paid family and medical leave and paid sick leave under the [FFCRA].” The DOL [press release](#) described the event as “a national online dialogue, *Providing Expanded Family and Medical Leave to Employees Affected by COVID-19*, to help employers and workers understand their responsibilities and rights, respectively, under the [FFCRA].” This appears to be an invitation for employers and employees to be involved in influencing the DOL's planned regulations. The DOL's press release said that the “public, including employers, workers and their advocacy groups can participate in this national online dialogue through Sunday, March 29, 2020. This dialogue will also include a one-hour Twitter chat scheduled for Wednesday, March 25, 2020.” We will continue to monitor the situation and provide additional information as relevant.

As with all things COVID-19 related, the situation is rapidly evolving with near constant changes and updates. Accordingly, will continue to monitor the situation and report through our [Task Force](#), [insights](#), [webinars](#), and other client communication.

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