

## Updates to DOL FAQs on FFCRA

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Since Congress's quick passage of the Families First Coronavirus Response Act (FFCRA) in late March, the Department of Labor has continued to issue guidance interpreting this new law. While the Department published its Temporary Rule on the FFCRA on April 2, it has continued to update the Frequently Asked Questions on its website throughout the month, providing additional clarification on this complex new law. Below is a summary of the major updates since the Temporary Rule was issued.

### Definition of Quarantine or Isolation Order

The Department has repeatedly stated that a stay-at-home or shelter-in-place order qualifies as a "quarantine" or "isolation order" that could justify an employee's request for emergency sick leave. But the Department has also emphasized that if an employer does not have work for an employee to perform, regardless of whether that lack of work is due to a shelter-in-place order or some other reason, then that employee is not entitled to leave. The updated FAQs provide some additional insight as to how these seemingly contradictory decrees fit together. The Department provides an example of a "containment zone" where an employer is outside of the containment zone and remains open. The employer has work for the employee to do, but if the employee is within the containment zone and unable to leave, then the employee would be unable to work due to the government containment zone order and thus would be eligible for sick leave. Employees whose employers close because of a stay-at-home order, by contrast, are not eligible for leave and should instead apply for unemployment.

### Calculating Benefits

#### *Employees with Irregular Schedules*

The Department has offered guidance for how to calculate the total leave allowance for employees who do not work typical work schedules. The Department has set forth two different methods of calculation for the paid sick leave and emergency family and medical leave, which can lead to slightly different leave entitlements under each FFCRA leave provision.

#### Sick Leave Calculation

The FFCRA requires employers to provide paid sick leave equal to the number of hours an employee is scheduled to work, on average, over a two week period up to a maximum of 80 hours. To calculate the "number of hours" an employee will be scheduled to work over a two week period, the employer must take the number of hours that the employee was scheduled to work (which includes any time taken off when the employee was scheduled, such as vacation or sick time), divide that amount by the number of calendar days in the six month period, and multiply the estimate of hours per calendar day by 14. So, for instance, if an employee worked 860 hours in a six month period spanning 183 days and also took 55 hours of vacation, the average hours per calendar day would be 915 divided by 183, or 5 hours per calendar day. Then, to get the total sick leave entitlement, the employer would multiply 5 hours by 14 days, or 70 hours of total leave.

#### Family and Medical Leave Calculation

Unlike with sick leave, employers must calculate family and medical leave based on an employee's average hours of work per workday,

including hours spent on leave such as vacation. To calculate the number of hours for which the employer must pay the employee while on family and medical leave, the employer must first take the total of all hours the employee worked or took leave, and then divide it by the number of work days. For instance, if the employee above, who had 915 total work hours (including leave), worked on 122 days, their total work time would average out to 7.5 hours per work day. Thus, the employee would be entitled to 7.5 hours of pay per day of leave.

### Calculating the Six-Month Period

The guidance also makes clear that an employer does not need to calculate an employee's leave entitlement more than once. So, for instance, if an employee takes three weeks of family and medical leave in May, works for the summer, and then takes more leave once school starts in September, the employer does not recalculate the leave allotment based on the six months prior to September. Instead, they use the six-month period leading up to the initial leave in May. Likewise, although the method for calculating leave for sick leave and for family and medical leave differs, employers should use the same six-month period to calculate leave for both.

### *Regular Rate for Employees Not Paid through Salary or Wages*

The amount of pay that an employee will receive for each hour of leave will be their regular rate of pay. Ordinarily, the regular rate of pay will be easy to determine: either it is the hourly rate the employee receives, or it is their regular weekly salary divided by the hours they are generally expected to work. When employees are paid through less common pay arrangements, such as commission or piece-rate pay, employers must calculate an employee's regular hourly rate of pay based on the total of all of the employee's "non-excludable" remuneration for the six month period. "Non-excludable remuneration" includes piece-rate pay, commissions, and tips (only to the extent a tip credit is taken against minimum wage), but does not include any additional amount of tips above the minimum wage rate or any overtime compensation. Employers will divide this total amount of remuneration by the total amount of hours the employee worked in the previous six months to obtain that employee's "regular rate."

### *Seasonal Employees*

The new FAQs clarify that the six month "lookback" period for calculating benefits excludes any "off-season" time when seasonal employees do not ordinarily work. Accordingly, if the previous six months include only three months where the employee actually worked, the employee's regular rate would be calculated only across those three months.

## Interaction of Existing Leave Benefits with FFCRA Leave

Paid sick leave under the FFCRA must be in addition to any form of existing leave. Employers cannot require employees to take any existing sick leave or paid time off benefits before or while taking FFCRA sick leave.

This is not the case with family and medical leave under the new law. For that leave, an employer can require an employee to take any existing paid leave concurrently to paid family and medical leave, which will allow the employee to receive full pay during that period of time. Employers cannot, however, require employees to take paid leave during the initial two weeks of unpaid family and medical leave. Employers also cannot force employees to take emergency paid sick leave under the FFCRA during those two weeks.

## Damages and Enforcement

Although prior guidance indicated that the amount of damages an employee could claim for denied sick, family, and/or medical leave was limited to the federal minimum hourly wage for every hour of leave denied, the FAQs now make clear that employees will recover their regular hourly rate of pay. The one exception is if the employee's regular rate is less than the applicable minimum wage. In that case, the employee would be entitled to recover the minimum wage for each hour of leave they were denied.

Hopefully, this updated information will provide employers some much needed clarity as they move forward with implementing this new law. Stay tuned for further updates on the FFCRA and other employment law developments in response to the Covid-19 pandemic.

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