



This Legal Alert contains general advice and you should seek legal counsel regarding your specific circumstances. Also, the guidance provided below is the law as of April 7, 2020. In these uncertain times, the laws and regulations are constantly changing.

DOL Issues Temporary Regulations Implementing the FFCRA

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The U.S. Department of Labor (DOL) recently issued [temporary regulations](#) implementing the Families First Coronavirus Response Act (FFCRA). The regulations largely conform to the DOL's prior "Questions and Answers" guidance, but they offer some new details of which non-profit organizations should take notice. Some highlights include:

- **Work must be available:** Paid leave under the FFCRA is not available if, for whatever reason, the employer does not have work for the employee (e.g., the employee has been laid off or operations have been shut down entirely).
- **No leave when employee is "able to telework:"** Leave under the FFCRA is only available when an employee is unable to work, or "telework," for a qualifying reason. Under the regulations, an employee is able to telework if (a) the employer has work for the employee, (b) the employer permits the employee to work remotely and (c) there are no "extenuating circumstances (such as serious COVID-19 symptoms)" that prevent the employee from performing the work.
- **Leave for employees seeking diagnosis limited:** Employees seeking leave because they are seeking medical diagnosis for COVID-19 symptoms only qualify for leave during those periods of time that the employee is unable to work because the employee is taking affirmative steps to obtain the diagnosis.
- **Leave to care for son or daughter limited:** Employees seeking leave because they need to care for a child whose school or daycare has closed only qualify for leave "if no other suitable person is available" to care for the child.
- **Son and daughter defined:** The terms "son" and "daughter" are defined consistently with the FMLA's definition, which includes "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18, or 18 or older and incapable of self-care because of a mental or physical disability."



- **Health care provider advice to self-quarantine explained:** Employees seeking leave because they have been advised by a health care provider to self-quarantine only qualify for paid leave if the advice to self-quarantine was based on the health care provider’s belief that the employee (a) has COVID-19, (b) may have COVID-19 or (c) is particularly vulnerable to COVID-19.
- **Expansive definition of health care provider and emergency responder:** The regulations maintain the broad definition contained in prior DOL guidance of the “health care providers” and “emergency responders” that employers may choose to exempt from the FFCRA.
- **Exemption for small businesses:** Non-profit organizations with fewer than 50 employees are exempt from the FFCRA only if and when (a) leave is requested because the employee needs to care for a child whose school or care provider is unavailable and (b) an authorized officer of the organization has determined (and documents) one of the following:
 - (i) the leave would result in expenses and financial obligations exceeding available revenues and cause the organization to cease operating at a minimal capacity
 - (ii) the employee’s absence would entail a substantial risk to the financial health or operational capabilities of the organization because of the employee’s specialized skills, business knowledge or responsibilities
 - (iii) there are not sufficient workers who are able, willing and qualified to perform the work provided by the employee(s) seeking leave and these services are needed for the organization to operate at minimal capacity
- **Employer approval needed for intermittent leave:** Whether teleworking or working onsite, employees may only take leave intermittently if the employer agrees. And, for employees reporting to a worksite, intermittent leave is only available when needed by the employee to care for a child whose school or care provider is unavailable.
- **Documentation:** As a condition of leave, employees must provide documentation containing (a) their name, (b) dates for which leave is requested, (c) a qualifying reason for the leave, (d) a statement that the employee is unable to work because of the qualifying reason (this can be oral), (e) as applicable, the name of the government entity that issued the isolation order, the name of the health care provider who advised the employee to self-quarantine, the name of the child being cared for, the



name of the school or care provider that is unavailable, and/or a representation that no other suitable person will be caring for the child and (f) any additional material that may be needed to support a request for tax credits.

- **Employee notice requirements:** When leave is due to an employee's need to care for a child whose school or care provider is unavailable, employees must provide notice as soon as practicable. For all other leaves under the FFCRA, employers may require employees to follow "reasonable notice procedures." Reasonableness "will be determined under the facts and circumstances of each particular case."
- In all cases, notice may not be required prior to the first workday for which an employee takes leave. Employees who fail to provide notice must be given notice of that failure and an opportunity to provide the required documentation prior to denying the request for leave.

The DOL has extended its national online dialogue to April 10, 2020, providing employers and employees opportunities to comment on these regulations.

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