



Painters District Council #14
1456 West Adams Street
Chicago, IL 60607-2897
Phone: 312.421.0046
Fax: 312.421.7884

From: Arnold and Kadjan, LLP
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RE: DOL Regulations on Families First Coronavirus Response Act

On March 18, 2020, the Families First Coronavirus Response Act (“FFCRA”) was signed into law. The FFCRA provided two types of paid leave. The first is the Emergency Paid Sick Leave Act, which allows qualifying employees up to two weeks of paid leave. The second leave expands on the Family Medical Leave act and compensates qualifying employees at 2/3 pay (up to \$200 a day) for up to 12 weeks.

On April 1, 2020, the Department of Labor (“DOL”) promulgated regulations to further clarify the FFCRA and its implementation. This memorandum summarizes these regulations.

A. EMERGENCY PAID SICK LEAVE ACT (TWO WEEKS PAID LEAVE)

Employees are entitled to 80 hours paid leave for six reasons relating to COVID-19:

- 1) Employee is subject to a Federal, State, or local quarantine order related to COVID-19;
- 2) Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- 3) Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- 4) Employee is caring for an individual who described in 1) and 2);
- 5) Employee is caring for son or daughter whose childcare provider is unavailable for COVID-19 related reasons; or
- 6) Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

As described more fully below, the Department of Labor regulations clarified when an employee would be entitled to take a leave under each of these sections.

Many states including Illinois and Indiana have issued stay-at-home orders. In Illinois, Governor Pritzker extended the stay-at-home order until April 30, 2020. The DOL regulations clarify that these stay-at-home orders are included in the definition of “quarantine and isolation orders” described in the FFCRA. (29 C.F.R. §826.10(a)).

However, DOL guidance severely limits the entitlement for paid leave under this provision. The DOL states “[a]n employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee.” (p. 14). The question turns on whether the employee would be able to work “but for” being required to comply with a quarantine or isolation order. *Id.*

For an example, a Starbucks closes temporarily or indefinitely due to a downturn in business as a result of COVID-19. The DOL says a cashier for Starbucks would not be eligible for paid leave, because there is no work for the employees. Further, the DOL says that the analysis does not change if the stay-at-home order required the business to close, or if the Starbucks closed because the customers were required to stay-at-home. The business would not have any work for the employee. Therefore, the employee would not qualify under this reason.

The construction industry is still currently classified as an essential business under both the Illinois and Indiana stay-at-home orders. Therefore, employees in the construction industry are still able to work. Similar to the situation described above, if an employee in the construction industry were unable to work because their employer could not obtain work or a jobsite closed as a result of COVID-19 or the stay-at-home order, the employee would not be eligible for the paid leave under this section.

However, the member may be entitled to unemployment. The CARES Act expanded unemployment benefits and would apply to a member in this situation. Some Supplemental Unemployment Benefit plans may provide additional benefits. In addition, some plans have temporarily adjusted either their Welfare or Supplemental Unemployment benefits, on a temporary basis, to include protection in cases, such as inability to access a jobsite due to COVID-19, which can cause a layoff and is not compensated under the Emergency Paid Sick Leave Act as interpreted by the Department of Labor.

2) Employee advised to self-quarantine

An employee may take paid sick leave under this section only if:

- i) A health care provider advises the employee to self-quarantine based on a belief that –
 - a. the employee has COVID-19;
 - b. the employee may have COVID-19; or
 - c. the employee is particularly vulnerable to COVID-19; and

- ii) following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by telework. (29 C.F.R. §826.20(a)(3))

3) Employee has symptoms and is seeking diagnosis

What are the symptoms?

DOL clarifies that the symptoms mentioned in this section are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the Center for Disease Control ("CDC"). (29 C.F.R. §826.20(a)(4)).

What time do I get paid for when seeking a diagnosis?

The employee may only take the sick leave under this section when taking affirmative steps to obtain diagnosis such as: time spent making, waiting for, or attending an appointment for a test for COVID-19" (29 C.F.R. §826.20(a)(4)). An employee cannot self-quarantine **without** seeking a medical diagnosis. (p. 16).

Can I Get Paid Leave While Waiting for COVID-19 Test Results?

Yes, if the employee is unable to telework. The regulations state that an employee who is unable to telework can continue to take the paid leave (regardless of how severe the symptoms are) while awaiting the results of the COVID-19 test. (p. 16).

4) Employee is caring for another subject to stay-at-home order or is self-quarantining

Does this only mean family members?

No, but there must be some relationship to the person. The DOL provides that the person must be an immediate family member, roommate, or a similar person with whom the employee has a relationship. (29 C.F.R. § 826.20(a)(5)). An individual under this section does not include a person with whom the Employee has no personal relationship. *Id.*

5) Employee is caring for son or daughter whose childcare provider is unavailable

Who is considered a child care provider?

A child care provider means a person who is paid for providing child care services on a regular basis. (29 C.F.R. §826.10(a)). This definition includes:

- A center-based child care provider;
- A group home child care provider;
- A family child care provider; or

- Other provider of a child care services that for compensation that is licensed, regulated, or registered under State Law

However, an employee is not entitled to leave when co-parent, co-guardian, or other usual child care provider is available to provide the care the child needs. (29 C.F.R. §826.20(a)(6)).

Who qualifies as a Son or Daughter?

The term “son or daughter” means a biological, adopted, foster child, stepchild, a legal ward, or a child of a person standing in *loco parentis*. (29 C.F.R. §826.10(a)). Additionally, the term means children under 18 and children who are 18 years or older who are incapable of self-care because of a mental or physical disability. (29 C.F.R. §826.10(a)).

B. Emergency Family and Medical Leave Expansion Act

This leave requires employers to provide expanded paid family and medical leave to eligible employees who are unable to work because the employee is caring for a son or daughter whose school or place of care is closed or whose child care provider is unavailable as a result of COVID-19.

The DOL regulations for this provision are the same as requesting paid leave to care for a child under the Emergency Paid Sick Leave Act. The DOL explained “[h]aving different rules would introduce unnecessary complexity and incongruity into the leave provisions...”(p. 19). Therefore, please see the previous section above clarifying leave to care for a son or daughter.

C. General Provisions Regarding Paid Leaves under FFCRA

One-Time Use Only

An individual is only entitled to take 80 hours of Paid Sick Leave. “An Employee who has taken all such leave and then changes Employers is not entitled to take additional paid sick leave from his or her new Employer.” (29 C.F.R. §826.160(f)). For example, in the construction industry employees can frequently change employers depending on the amount of work available. An eligible employee can only take a total of 80 hours total, and **not** 80 hours per employer.

Coordination between the two paid leaves

The two-week paid leave and the expanded paid leave were designed to work together. An employee can start taking the expanded FMLA leave after waiting two weeks. During this two-

week waiting period, the employee can that the two-week paid leave provided for in the FFCRA. (29 C.F.R. §826.60(a)(2). This allows the employee to have a continuous stream of income.

Intermittent Leave (Separate Periods Rather than One Continuous Period)

If the Employer and Employee agree, an Employee may take up the entire portion of the Paid Sick Leave or the Expanded Family and Medical Leave intermittently to care for a child whose school or primary place of care is closed because of reasons related to COVID-19. (29 U.S.C. §826.50(a)). The agreement does not need to be in writing. There only needs to be a clear and mutual understanding between the employer and the employee. *Id.* There also needs to be an agreement as to the increments of time the leave can be taken. (29. C.F.R. §826.40(b)(1).

An Employee taking a leave under the FFCRA for any other reason must use the permitted days of leave consecutively until the Employee exhausts the leave or no longer has a qualifying reason. (29 C.F.R. §826.50(b)(2)

Exemption for Employers with 50 or fewer Employees

A small employer is exempt for the requirement to provide leave when:

- 1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
- 2) The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- 3) The small business cannot find enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting the leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity (29 C.F.R. § 826.40(b)(1).

The DOL states: “[f]or reasons (1), (2), and (3), the employer may deny paid sick leave and expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at a minimum capacity. (p. 40).

Does an Employer with fewer than 50 employees need to apply for exemption?

No. An Employer does not have to send the documentation to the Department of Labor. (29 C.F.R. §826.40(b)(2). An Employer must make a determination that it meets the criteria set forth in the previous section, and then retain the records in the files. *Id.* However, an Employer who improperly denies a leave is subject to liability under the Fair Labor Standards Act. (29 C.F.R. §826.150(b)(1)). This demonstrates that the exemption for employers with fewer than 50 employees is not broad, and employers who deny leave will need to be able to support their decision. Otherwise, they will be subject to liability.

Employee notice of need for leave

It is reasonable for the employer to require that the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. (29 C.F.C. §826.90(a)(1)). If employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the leave. *Id.*

Documentation needed for leave

An employee must provide his or her employer documentation in support of paid sick leave or expanded family medical leave. (29 C.F.R. §826.100). Arnold and Kadjan, LLP has drafted a form that provides the requested information and is attached to this memorandum.

D. Prohibited Acts and Enforcement

Employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding. (p. 56). However, an employee is not protected from employment actions, such as layoffs, that would have affected the Employee regardless of whether he or she took the leave. (29 C.F.R. §826.130(b)(1)). An employer must be able to show that the employee would not have otherwise have been employed at the time reinstatement is requested. *Id.*

An employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage as required by Section 6 of the Fair Labor Standards Act ("FLSA"). (29 C.F.R. §826.150(b)(1)); (29 U.S.C. §206). An employer who violates the prohibition on discharge, discipline, or discrimination is considered to have violated Section 15(a) of the FLSA. (29 C.F.R. §826.150(b)(2); 29 U.S.C. §215(a)(3)). These violations can be enforced through Sections 16 and 17 of the FLSA. (29 C.F.R. § 826.150(b)); (29 U.S.C. §216, 217).

Additionally, for the Expanded FMLA leave, employers are subject to the same prohibitions that apply to a regular FMLA leave. (29 C.F.R. §826.151); (29 U.S.C. §2615). Employers are prohibited from interfering with, restraining, or denying an employee's exercise or attempt to exercise any right under the FMLA. *Id.*

REQUEST FOR PAID LEAVE UNDER FAMILIES FIRST CORONAVIRUS RESPONSE ACT

My name is _____. I am requesting paid leave for a qualifying COVID-19 related reason.

Dates of Requested Leave: _____.

EMERGENCY PAID SICK LEAVE ACT

I am requesting paid leave under the Emergency Paid Sick Leave Act for the following reason(s):

Check the applicable reason:

☐ **Employee is subject to a Federal, State, or local quarantine order related to COVID-19;**

- Name of government entity issuing quarantine or isolation order: _____.

☐ **Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;**

- Name of provider advising to self-quarantine: _____.
- Please note this is **not** a release under HIPAA to obtain protected health information from a medical provider.

☐ **Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;**

☐ **Employee is caring for an individual who is subject to quarantine order; or has been advised to self-quarantine by a medical professional;**

- Name of government entity issuing quarantine order (if applicable) _____.
- Name of health care provider who advised the individual to self-quarantine: _____.
- Please note this is **not** a release under HIPAA to obtain protected health information from a medical provider.

☐ **Employee is caring for son or daughter whose school or place of care is closed or whose childcare provider is unavailable for COIVD-19 related reasons; or**

- Name of child(ren)being cared for:_____.
- Name of school, place of care or child care provider that closed:_____.
- By signing below, I affirm no other suitable person is available

☐ **Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor**

EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

I am requesting paid leave under the Emergency Family Medical Leave Expansion Act
Check the applicable reason:

☐ **Employee is caring for son or daughter whose school or place of care is closed or whose childcare provider is unavailable for COIVD-19 related reasons; or**

- Name of child(ren):_____.
- Name of school, place of care or child care provider that closed:_____.
- By signing below, I affirm no other suitable person is available

I am unable to work or telework because of the above reason.

Signature

Date