



## CLIENT ALERT

April 2, 2020

### CORONAVIRUS (COVID-19)

#### U.S. Department of Labor Issues FFCRA Regulations

On April 1, 2020, the U.S. Department of Labor issued temporary regulations pursuant to the Families First Coronavirus Response Act (FFCRA), providing additional guidance regarding the implementation of the Act's provisions for emergency paid sick leave and public health-related emergency leave under the Family and Medical Leave Act (FMLA).

On the same date, the IRS also provided guidance on the documentation necessary to support employers' eligibility for tax credit to offset the costs of providing leave to qualifying employees.

The regulations include, but are not limited to, details of the criteria and documentation requirements employees must satisfy in order to establish a qualifying reason for leave related to COVID-19 as well as important definitions for terms such as "telework" and "child care provider."

The following summary highlights some of the more notable matters clarified by the FFCRA regulations and is followed by links to DOL and IRS notices we have referenced.

#### **Notice and Documentation Requirements for Employee Requests**

- 1. Employees must provide reasonable notice and sufficient information supporting the Coronavirus-qualifying reason for paid sick leave and/or Expanded FMLA Leave.** Employees must provide a signed-statement containing, at minimum, the following:
  - a. Employee's name;
  - b. Date(s) for which leave is requested;
  - c. The Coronavirus-qualifying reason for leave; and
  - d. A statement that the employee cannot work or telework because of this reason.
  
- 2. Employees who are seeking leave because he or she is quarantined/self-quarantined, must provide the name of the government entity that issued the quarantine/isolation order, or the name of the health care provider who advised the individual to self-quarantine.**
  - This does not necessarily require submission of an actual written government order or written doctor's note but does require verification of the employee having been advised by a specified entity to self-quarantine, as opposed to otherwise reaching that conclusion.
  - For these purposes, a healthcare provider is "a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of the FMLA."

- 3. An individual requesting expanded FMLA leave due to the closing of the school or childcare provided for the employee's son or daughter, must verify the name of the school or provider and confirm that no other suitable person is available to care for the child.**

The DOL regulations explained that an employee seeking expanded FMLA leave for a childcare-related purpose must provide, at minimum, the following:

- a. Name of Child being cared for;
- b. Name of school, place of care, or childcare provider that closed or became unavailable due to Coronavirus-related reasons;
- c. Statement representing that no other suitable person is available to care for the child during the period of requested leave.

- 4. For purposes of reasonable notice, an employee should be advising an employer of the Coronavirus-related reason for leave as soon as possible which may, if necessary, apply after the first work day or portion of a work day for which an employee receives paid sick leave.**

If an employee fails to do so, the employer should give the employee notice of the problem and an opportunity to provide the required documentation prior to denying the request for leave.

Important Information for Employers seeking Tax Credits:

The IRS has also published additional guidance with FAQs confirming that employers who wish to claim tax credits for qualified leave wages must retain records and documentation related to and supporting each employee's leave in order to substantiate any claim for the credit in addition to certain specified tax forms. This guidance mirrors the requirements under the FFCRA regulations for purposes of substantiating eligibility as outlined above. However, there are certain additional requirements in the following cases:

1. In the case of an employee seeking leave on the basis of a quarantine order or self-quarantine advice, but the person subject to the quarantine is not the employee, the documentation must include the name and relation to the employee of the person who is subject to quarantine and requires the employee's care, must be provided.
2. In the case of any leave taken due to the closing of a school or childcare provider, the IRS guidance indicates that the employer must provide the same information supporting this reason for leave as outlined above, as well as:
  - a. a representation that no other person will be providing care for the child during the period for which the employee is receiving the leave, and
  - b. with respect to care of a child older than age 14 during daylight hours, a statement that special circumstances exist which require the employee to provide care.
3. Additionally, the IRS guidance provides that in order to receive tax credit, the employer's documentation must also reflect the manner in which the employee determined the amount of qualified sick and family leave wages paid to employees rendering them eligible for the credit, to include records of work, telework, qualified sick leave, and qualified family leave, as well as documentation showing how the employer determined the amount of qualified health plan expenses that were allocated to wages for purposes of seeking the credits.

As a result of the additional documentation required for purposes of seeking tax credits, employers intending to do so should require all of the information listed above, relevant to the specific reason for which leave is sought, but should bear in mind that an employee's right to receive the leave is dependent solely upon the information outlined with respect to the FFCRA regulations above, while the additional requirements outlined by the IRS are relevant solely to the employer's compensation for tax credits.

### Telework

"Telework" – means work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace.

### **An Employee is able to telework (and may not take paid sick leave) if:**

- a. The employer has work for the employee to perform;
- b. The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated, seeking or waiting to receive a medical diagnosis, or providing care for an individual or child due to qualifying reasons;
- c. There are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work;

**Self-Quarantine:** With respect to a request for leave based on a health care provider's advice to self-quarantine, the regulations state that the advice must be based on the health care provider's advisement that the employee has COVID-19, may have COVID-19, or is vulnerable to COVID-19. The advice to self-quarantine must prevent the employee from working or teleworking in order the employee to receive paid leave.

**Identifying Hours of Telework:** The regulations confirm that in order to encourage the implementation of highlight flexible telework arrangements, an employer allowing such flexibility during the COVID-19 pandemic shall not be required to count as hours worked all of the time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons, which is a distinction from the continuous workday guidance generally applied by the Fair Labor Standards Act ("FLSA").

- a. As an example, the regulations note that an employer may agree that the employee will perform telework from 7:00 a.m. to 9:00 a.m., 12:30 p.m. to 3:00 p.m., and 7:00 p.m. to 9:00 p.m., on weekdays, in order to allow for the employee to assist with children whose schools are closed, or to assist the employee's parents, and will not be required to compensate the employee for all 14 hours between the employee's first principal activity at 7:00 a.m. and the last principal activity at 9:00 a.m., but rather would compensate them for the total 7.5 hours worked in clusters or batches throughout the day. This applies only to workers who are teleworking for COVID-19 reasons.

Keep in mind that the relevant inquiry as to whether the employee is entitled to paid sick leave and/or Expanded FMLA leave is dependent upon whether or not a quarantine/stay-at-home/shelter in place order, an order of a health care provider, or a school/childcare provider closing renders the employee unable to work or telework as described within the regulations, including flexible work arrangements such as those described above.

### **Clarifications on Caring for Others.**

**Caring for Another Individual:** With respect to an employer unable to work due to the need to care for an individual who is quarantined due to COVID-19-related reasons, the regulations clarify that the employee must have a genuine need to care for an individual and a personal relationship with the individual, who must be an immediate family member, roommate, or similar person with whom the employee has a relationship that would create an expectation that the employee would be caring for the person, if the person is quarantined.

**Caring for a Child due to School/Child Care Provider Closure:** With respect to paid sick leave in circumstances when the employee is unable to work because the employee needs to care for his or her son or daughter if the child's school or place of care has closed or the childcare provider is only available to COVID-19-related reasons, regulations clarify the following:

- An employee may take such leave to care for his or her child only when the employee needs to and actually is caring for his or her child, and not in circumstances where another suitable individual such as a co-parent, co-guardian or the usual childcare provider is available to provide the care the employee's child needs.
2. The regulations also define the term "**childcare provider**" as including the following:
- a. A provider who receives compensation for providing childcare services on a regular basis, including a center-based childcare provider, a group home childcare provider, a family childcare provider, or other provider of childcare services for compensation that is licensed, regulated, or registered under state law;
  - b. An eligible childcare provider who is not compensated or licensed, if the provider is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

Record Retention

Both the DOL regulations and the IRS require Employers to maintain the documentation discussed above for a period of four years, and the FFCRA makes clear that records should be maintained for this length of time regardless of the outcome of the employee's request for leave, i.e. even if it is denied.

Additional information regarding the publications discussed above can be found at the following link:

US Department of Labor Press Release:

<https://www.dol.gov/newsroom/releases/whd/whd20200401>

IRS Guidance/FAQ on Tax Credits:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

It is anticipated that the Department of Labor will continue to release additional guidance on the FFCRA and the implementation of requirements relevant to emergency paid sick leave and expanded FMLA leave. Beard Legal Group monitors these legislative developments on a daily basis. Please do not hesitate to contact us with any specific concerns arising for your organization.

*While the Beard Legal Group Client Alert is designed to provide information on topics of concern, it is not legal advice and Employers should contact their Legal Counsel for advice related to their specific circumstances.*