

# DOL Revises and Supplements Guidance on FFCRA Compliance and Administration

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On March 24, 2020, the Department of Labor (“DOL”) issued a document entitled Families First Coronavirus Response Act: Questions and Answers (the “Q&A”) intended to provide guidance on the two new paid leave benefits under the Families First Coronavirus Response Act (“FFCRA”) signed into law on March 18. The original guidance consisted of 14 Q&As. The DOL has supplemented and revised the original Q&As several times since then. We explained changes made to the 37 prior and new Q&As issued on Friday, March 27, 2020 in [“DOL Provides Additional Guidance on New Paid Leave Laws.”](#) Over the weekend, the DOL revised some answers to questions it previously had addressed and added 22 new questions and answers in [“Families First Coronavirus Response Act: Questions and Answers.”](#) Although changes are being made with unpredictable frequency and the Q&As are not law, they provide the only official guidance on how to interpret and apply the new emergency paid sick leave (“EPSL”) and expanded paid Family and Medical Leave benefits (“Expanded FMLA”). Updates to the Q&A since our March 27, 2020 bulletin on the guidance include the following

- **The integrated employer test now applies to both EPSL and expanded FMLA.**  
The Q&A previously suggested that the FMLA’s “integrated employer” test applied only for purposes of determining employer coverage (fewer than 500 employees) under the Expanded FMLA. But revisions to Q&A Number 2 state that the “integrated employer” test will be used in deciding employer coverage under both EPSL and Expanded FMLA.
- **The IRS apparently will provide guidance regarding documentation an employer needs from an employee for paid leave purposes.**  
The prior Q&As described certain documentation an employer must obtain from an employee who requests leave under the EPSL and Expanded FMLA. However, in an about face, the Q&A now states only that an employer should retain “appropriate documentation,” and directs employers to “consult [IRS] applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.” (Q&A Numbers 15 and 16.) As of the time of publication of this bulletin, it appears that such IRS forms and instructions have yet to be released.
- **An employee is generally entitled to the same level of job protection and reinstatement while taking EPSL and Expanded FMLA as now provided by the FMLA.**  
The Expanded FMLA, as an amendment to the FMLA, generally provides for reinstatement to the same or equivalent job after an employee returns from leave. In new Q&A Number 43, the DOL has imported that concept into the EPSL, giving many employees who take that form of leave the same reinstatement rights. However, as is now the law under the FMLA, neither EPSL nor Expanded FMLA prohibit an employer from taking adverse action against an employee on either form of leave if the employer would have taken that action whether or not the employee was on leave. For example, a business that is implementing across the board pay cuts or layoffs due to the COVID-19 crisis may cut the pay of or lay off employees on EPSL and/or Expanded FMLA if those employees would have been subject to those job actions if they were not on leave. Further, an employer with fewer than 25 employees may refuse to return an employee to work in the same or an equivalent position if (a) leave was taken for EPSL/Expanded FMLA child care reasons and (b) specific hardship conditions exist, including (i) the employee’s position no longer exists due to economic conditions related to COVID-19 reasons, (ii) the employer made reasonable efforts to reinstate the employee to the same or equivalent position and (iii) the employer makes reasonable efforts over a 12-month period to contact the employee if an equivalent position becomes available.

- **The Expanded FMLA leave benefit is counted as part of the employee’s current 12-week entitlement to FMLA leave in a 12-month period.**

Answering one of the most critical issues not addressed in the FFCRA, the DOL has taken the position that the 12 weeks of Expanded FMLA must be counted as part of the 12 weeks of total FMLA leave an employee can take in the 12-month period currently used by the employer for keeping track of FMLA usage. (Q&A Numbers 44 and 45.) If an employee has already used his/her 12 weeks of FMLA as of April 1 for the 12-month FMLA period, the employee is not eligible for Expanded FMLA. Similarly, an employee who has taken six weeks of FMLA through April 1, 2020 may take only six more weeks of FMLA including Expanded FMLA leave. However, an employee’s entitlement to the two weeks of EPSL is not affected by the employee’s use of FMLA.

- **The definition of “health care provider” depends on whether it relates to someone who can advise an individual to self-quarantine or to someone who may be excluded from the benefits of the new leave laws.**

Reflecting the different public policy objectives of the FFCRA, the term “health care provider” is being given different meanings within the same statute. For purposes of defining health care providers who can advise an employee (or an individual who an employee cares for) to self-quarantine in order to qualify for EPSL, the definition refers to the same persons who can issue medical certifications under the FMLA. However, when defining a health care professional who can be excluded from leave benefits under the FFCRA, the definition is far broader and effectively includes any person employed at any organization that provides any type of health care service, and of organizations that provide services and products for such health care organizations.

- **The small business exemption applies only when an employee needs leave to provide child care because of a school closure or lack of a child care provider and the employer can demonstrate financial hardship or other exigency.**

A business with fewer than 50 employees can try to avoid coverage under the EPSL and Expanded FMLA if an “authorized officer of the business” determines that (a) providing the leave would result in the business’s “expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;” (b) the relevant employee’s absence would “entail a substantial risk to the financial health or operational capabilities of the small business because of the employee’s specialized skills, knowledge or the business or responsibilities;” or (c) there is an insufficient number of workers “able, willing, and qualified” to perform work needed for the small business to operate at a “minimal capacity.” The Q&As are silent as to how and if this self-determination by a small business can be proven except if challenged in court.

- **The DOL has issued an updated version of the mandatory FFCRA poster and has directed employers to post or distribute it to employees.**

The DOL issued a separate guidance on the posting requirement in the [“Families First Coronavirus Response Act Notice - Frequently Asked Questions.”](#) As noted therein, covered employers must post the required notice by April 1, 2020.

Given the rapidly changing legal landscape, employers are encouraged to frequently check the DOL website regarding FFCRA leave, and to consult with legal counsel with respect to FFCRA compliance and administration.

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