

HEADS,
EMPLOYMENT
LITIGATION
PREVENTION &
DEFENSE

David Kurtz
Boston, MA
New York, NY

Sarah Robertson
San Francisco, CA

EDITORS IN CHIEF

Robin Shea
Winston-Salem, NC

Susan Bassford Wilson
St. Louis, MO

Your Families First Coronavirus Response Act questions answered! (Some of them, anyway)

By Robin Shea
Winston-Salem Office

Yesterday the U.S. Department of Labor published three pieces of guidance on the Families First Coronavirus Response Act provisions relating to expanded leave under the Emergency Family and Medical Leave Expansion Act and paid sick leave under the Emergency Paid Sick Leave Act.

The guidance doesn't clarify as much as we had hoped, but it does provide some helpful information about calculating number of employees for coverage purposes, calculation of paid leave, and other issues. And considering that the DOL had only a week to issue guidance, we probably should not complain.

This bulletin will focus on the most helpful and interesting information in the guidance. For more details, you can read the **FFCRA Q and A**, the **guidance on employer obligations**, and the **guidance on employee rights**.

Please note that this bulletin assumes you already have some familiarity with the expanded FMLA and paid sick leave provisions of the Families First Act. If this is all new to you, please read **our earlier bulletin** summarizing the legislation, and then come back. We'll wait.

Q. When does this thing take effect?

Most of us thought it would be April 2. President Trump signed the legislation on the night of March 18. The legislation was to take effect 15 days after enactment. Using March 19 as Day One, that would make the effective date April 2. But apparently the DOL used the date of signing as Day One, making the effective date April 1.

Q. How do I know whether I have 500 employees or more?

By looking only at employees in the 50 states, the District of Columbia, and "any Territory or possession of the United States." Part-time, as well as full-time employees count. You should also count employees on leave, employees whom you employ jointly with another employer, and day laborers supplied to you by a temp agency whether you are the agency or the client of the agency. Independent contractors do not count.

Separate establishments of a single entity should be counted together. If two entities are "integrated employers" within the meaning of the FMLA, then the employees of the two entities should be counted together.



March 25, 2020

Legal Bulletin #746

Q. If I have fewer than 50 employees, and I want to be exempted from complying with these laws, how do I do it?

You would have to show that complying with the laws “would jeopardize the viability of [your] business as a going concern.” The DOL has two things to say about that: (1) you need to document how you meet that requirement, and (2) please don’t send any stuff to the DOL. (Their hands are full as it is.) Regulations will be coming that will address the exemption issue in more detail.

Q. I have an employee who regularly works 48 hours a week. How would I compute her paid leave?

Paid leave is generally computed by taking the employee’s regular rate and multiplying it by the number of hours worked. If the employee works 48 hours a week, then all 48 hours should count, so in this case it would be [Regular Rate] x 48 = [This Employee’s Paid Leave Amount for One Week].

But under the FFCRA, you’d have to use the employee’s *average* regular rate over a period of six months, ending with the date on which leave is taken. If the employee hasn’t worked for you for six months, you can calculate the paid leave amount by taking the average regular rate for each week that the employee has been working for you.

Although overtime *hours* are included in calculating the amount of paid leave due, you do not have to pay an overtime *premium*.

Q. What is a “regular rate”?

Very generally, this is an employee’s weekly pay expressed as an hourly rate. You add up all of the pay the employee receives in a given workweek (including wages, salaries, commissions, piece rates, etc.) and divide it by the number of hours that the employee actually worked during that workweek. More information is available here.

Q. As of now, the entire State of California is on shelter-in-place. Does that mean all of my employees in California with school-age kids (all of whom are home because the schools closed) will be entitled to expanded FMLA and paid sick leave?

Unfortunately, this is not one of the questions that the DOL elected to answer this go-round. But it’s a very good one. (P.S. If the employees can work from home, then they are not entitled to expanded FMLA leave or paid sick leave.)

Q. I don’t get how the expanded FMLA and the paid sick leave laws interact with each other. Please explain.

The expanded FMLA applies only when the employee can’t work or telework because he or she has to take care of his or her kids, who are home because of a school or day care closing because of coronavirus, or because the kids’ “child care provider” (i.e., babysitter or nanny) is not available because of coronavirus. *This is the only qualifying reason for expanded (and paid) FMLA leave.* The first 10 days (two weeks) of expanded FMLA leave are unpaid, but from that point forward, the employee would be entitled to paid FMLA leave at 2/3

March 25, 2020

Legal Bulletin #746

the employee's regular rate for a total of 10 additional weeks.

Having kids home from school or child care because of coronavirus is also a qualifying reason for paid sick leave, although there are also other qualifying reasons for paid sick leave. Paid sick leave is payable on Day One of the leave. The amount varies, depending on the reason that the employee needs the leave. But employees get a maximum of only 80 hours of paid sick leave, and then they're done.

The total dollar amount of paid leave is capped under both laws.

So, let's say an employee is eligible for expanded FMLA leave and paid sick leave -- in other words, he was employed at least 30 days before his leave began, and he has to stay home with his kids, whose school has closed for a coronavirus-related reason -- then his paid sick leave would cover the first 10 days of leave. That would exhaust his entitlement under the Paid Sick Leave Act. Then he would be entitled to 10 more weeks of paid leave under the expanded FMLA, which would be paid at 2/3 of his regular rate.

See? It's easy!

Q. As soon as I heard that President Trump signed the FFCRA into law, I began giving my employees paid leave if they were out of work for a reason related to coronavirus. On April 1, can I take a "credit" for this leave that I gave before the law took effect?

No, these provisions of the FFCRA do not apply retroactively, according to the DOL.

Q. Aren't we supposed to post a notice about these laws?

Yes. And the DOL says it will be issuing a notice no later than today.

Q. Is this it?

No. The DOL says that it will be issuing formal regulations, and will continue helping employers and employees comply with these new laws. And don't forget -- **as we reported earlier this week**, the DOL is taking a non-enforcement position for the first 30 days that the FFCRA is in effect, as long as the employer is trying in good faith to comply.

LEGAL BULLETIN

March 25, 2020



Legal Bulletin #746

For more information, check out our **Resource Center** for FAQs and updates about the coronavirus.

This is a publication of Constangy, Brooks, Smith & Prophete, LLP. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. This email could be considered advertising under applicable laws.

IRS Circular 230 Notice: Federal regulations apply to written communications (including emails) regarding federal tax matters between our firm and our clients. Pursuant to these federal regulations, we inform you that any U.S. federal tax advice in this communication (including any attachments) is not intended or written to be used, and cannot be used, by the addressee or any other person or entity for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.



www.constangy.com
Toll free 866.843.9555

Constangy, Brooks, Smith & Prophete, LLP

Constangy, Brooks, Smith & Prophete offers a wider lens on workplace law. We have counseled employers exclusively since 1946. With offices in 15 states, we are one of the largest labor and employment law practices in the U.S. Constangy has been named as a top firm for women and minorities by organizations including Law360, the National Law Journal and **Vault.com**. Many of our more than 190 attorneys have been recognized by leading authorities such as Chambers & Partners, Best Lawyers in America® and Martindale Hubbell. Find out more about us online at www.constangy.com or follow us on Twitter @ConstangyLaw.

Office Locations

Alabama, Arkansas, California, Colorado, Florida, Georgia, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, and Virginia.