

DOL Releases FFCRA Regulations

By Allen Smith, J.D.

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The U.S. Department of Labor (DOL) issued temporary regulations (<https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>) for the Families First Coronavirus Response Act (FFCRA) on April 1, which confirmed that employees must give notice to their employers of the need to take leave and must provide supporting documentation for requests for paid sick leave and emergency family and medical leave. The IRS also provided guidance on needed documentation. (<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>)

On the surface, the requirement for documentation appears to conflict with the U.S. Centers for Disease Control and Prevention's (CDC's) recommendation that employers should not require a positive COVID-19 test result or a health care provider's note to validate an employee's illness, qualify for sick leave or be eligible to return to work. Health care provider offices and medical facilities "may be extremely busy and not able to provide such documentation in a timely manner," the CDC had previously stated.

However, the regulations and recommendation aren't mutually exclusive, according to Kathy Dudley Helms, an attorney with Ogletree Deakins in Columbia, S.C., because the documentation doesn't have to take the form of a health care provider's note.

[Looking for state-specific information? See [State & Local Updates](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/default.aspx) (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/default.aspx)]

Qualifying Reasons for Leave Related to COVID-19

Under the FFCRA, an employee at a business with fewer than 500 employees or at certain public entities is entitled to take leave related to COVID-19 if the employee is unable to work because he or she:

1. Is subject to a federal, state or local quarantine or isolation order.
2. Has been advised by a health care provider to self-quarantine.
3. Is experiencing symptoms associated with COVID-19 and is seeking a medical diagnosis.
4. Is caring for an individual subject to a quarantine or isolation order.
5. Is caring for a child whose school or place of care is closed or unavailable due to coronavirus-related reasons.
6. Is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services. The agency has not specified any other substantially similar condition as of yet.

Up to two weeks of paid sick leave is available to qualifying employees. For the first three reasons, the amount of pay is based on either the employee's regular rate of pay or the applicable state or minimum wage, whichever is higher, and it is to be paid at 100 percent, up to \$511 daily and \$5,110 total. For the fourth and sixth reasons, the amount of pay is two-thirds of either the employee's regular rate of pay or the applicable state or minimum wage, whichever is higher, up to \$200 daily and \$2,000 total.

SHRM RESOURCE SPOTLIGHT

Managing Communicable Diseases in the Workplace (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

An additional 10 weeks of partially paid expanded family and medical leave is available to some employees when their children's school or place of child care is closed. The payment amount in this instance is two-thirds of either the employee's regular rate or the applicable state or minimum wage, whichever is higher, up to \$200 daily and \$12,000 total (\$10,000 plus up to \$2,000 of unused paid sick leave if applied to the first 10 days). To be eligible for this leave, an employee must have been employed for at least 30 days prior to his or her leave request.

Note that an individual generally is entitled to paid sick leave under the FFCRA regardless of how much leave has been taken under the Family and Medical Leave Act (FMLA), the DOL said in recent guidance (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-guidance-ffcra-paid-parental-leave.aspx). But if someone takes paid sick leave concurrently with the first two weeks of emergency family and medical leave, which otherwise would be unpaid, those two weeks do count toward the 12 workweeks in the FMLA's 12-month period.

"This rule hopefully provides some answers and relief," said Wage and Hour Administrator Cheryl Stanton.

Additional information (<https://www.dol.gov/agencies/whd/pandemic>) about COVID-19 and the workplace, including fact sheets, questions and answers, and posters, is available from the DOL.

Documentation of Need for Leave

The DOL regulations explain that for paid sick leave or expanded family and medical leave, an employer may require employees to follow reasonable notice procedures as soon as practical. That can be after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave, the DOL stated in the preamble to the regulations.

The DOL said the employee must provide a signed statement containing:

- The employee's name.
- The date(s) for which leave is requested.
- The coronavirus-qualifying reason for leave.
- A statement that the employee can't work or telework because of this reason.

In addition, an employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject, if that is the reason for paid sick leave, according to the DOL.

An employee seeking leave because he or she is self-quarantined must provide the name of the health care provider making the quarantine recommendation. Someone caring for a person who is quarantined must provide either the government entity that issued the quarantine or isolation order or the name of the health care provider who advised the individual to self-quarantine.

The DOL said an individual requesting expanded family and medical leave must provide:

- The name of the child being cared for.
- The name of the school, place of care or child care provider that closed or became unavailable due to coronavirus reasons.
- A statement representing that no other suitable person is available to care for the child during the period of requested leave.

The last point is important, noted Jeff Nowak, an attorney with Littler in Chicago, and "mirrors the IRS' assumption that there's only one caregiver."

The normal FMLA certification rules apply to an employee's own serious health condition related to the coronavirus and to the employee's need to care for a spouse, son, daughter or parent with a serious health condition.

If an 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 request for leave, the regulations state.

"More guidance will be forthcoming," Stanton said.

IRS Guidance

The IRS issued guidance stating that eligible employers claiming tax credits for qualified leave wages "must retain records and documentation related to and supporting each employee's leave to substantiate the claims for the credits." Such employers also must retain:

- Form 941, Employer's Quarterly Federal Tax Return.
- Form 7200, Advance of Employer Credits Due to COVID-19.
- Any other applicable filings made to the IRS requesting the credit.

Question 44 in the IRS guidance outlines the information an eligible employer must both receive from an employee and maintain to substantiate eligibility for sick-leave or family-leave credits.

The employee must provide:

- His or her name.
- The date(s) for which leave is requested.
- A statement of the reason the employee is requesting leave and written support for such reason.
- A statement that the employee is unable to work, including telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the government entity ordering the quarantine or the name of the health care professional advising self-quarantine. If the person subject to quarantine is not the employee, that person's name and relation to the employee shall be provided.

If a school closes or a child care provider is unavailable, the statement from the employee should include:

- The name and age of the child or children.
- The name of the school or place of care that has closed or is unavailable.
- A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave.
- With the care of a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Question 45 provides further guidance about additional documentation that employers claiming tax credits must maintain, including:

- Documentation to show how the employer determined the amount of qualified sick- and family-leave wages paid to employees, including records of work, telework, qualified sick leave and qualified family leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that it allocated to wages.

Provide input as the DOL develops further guidance on the FFCRA. Participate online at <https://ffcra.ideascale.com> (<https://ffcra.ideascale.com/>) through April 10—an extended deadline.

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