

Labor Department Issues Additional Guidance on Families First Coronavirus Response Act Implementation

March 27, 2020

Late yesterday, the Department of Labor (DOL) issued additional guidance on implementation of the new Families First Coronavirus Response Act (FFCRA). We urge all employers to thoroughly read the expanded question and answer guidance, found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

The key takeaway: if you were planning on offering FFCRA paid sick leave to employees because your business is now closed due to the Governor's Executive Order 2020-21, **think again** – that leave will **NOT** be considered as qualified FFCRA paid sick leave.

Specifically, two very important questions were answered that apply to many Michigan employers, as follows:

If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?

No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or or local requirements, you are not eligible for unemployment insurance.

If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?

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No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

The DOL did not specifically reference shelter-in-place orders or "stay home/stay safe" orders such as the one issued by Gov. Gretchen Whitmer on March 23; however, its guidance leads to the conclusion that such orders will likely be considered a state "directive."

Therefore, until the DOL issues something more definitive on this point, employers who have closed or sent employees home (with or without pay) because of a shelter-in-place or "stay home/stay safe" directive or order should **not** count any paid time for the laid-off or furloughed employees as Paid Sick Leave or Expanded FMLA and should not expect to be eligible for payroll tax credits for any pay they may provide to those individuals while they are off work due to the order or directive.

Employees who remain employed and working, may be eligible for the Expanded FMLA and/or Paid Sick Leave if they experience a qualifying reason other than the employer closing down as described above.

Additional clarification was provided on the use of intermittent leave, which is not addressed by the statutory text. The DOL has concluded that:

- Employees may take intermittent paid sick leave while teleworking for any COVID-19 related reason in the Emergency Paid Sick Leave Act (with agreement from the employer);
- Employees who are teleworking but cannot telework their normal hours can use intermittent leave if they need to care for a child whose school or place of child care is closed, or child care provider is unavailable, because of COVID-19 related reason, if the employee and employer agree.

The guidance explains that intermittent leave can be taken in any increment, provided that the employer and employee agree – for those who are teleworking. Unless an employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments and cannot be taken intermittently if it is for any of the following reasons:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;

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- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The guidance also explains that once an employee takes paid sick leave under the Emergency Paid Sick Leave Act, the employee must continue to take sick leaves each day until the employee has either: 1) used all the paid sick leave or 2) no longer has a qualifying reason for taking paid sick leave. If the leave is not exhausted by the employee, they can use the remaining sick leave at a later time up to Dec. 31, 2020, if another qualifying reason occurs.

Stay tuned, as new information is made available, we will update you.

Please contact your Plunkett Cooney attorney if you have questions concerning the new laws that continue to be enacted.