



BRUBAKER CONNAUGHTON
GOSS & LUCARELLI
ATTORNEYS AT LAW

DEPARTMENT OF LABOR ISSUES FFCRA INTERPRETIVE GUIDANCE AND POSTER

March 26, 2020

The Department of Labor (DOL) recently released several new resources pursuant to the Families First Coronavirus Response Act (FFCRA). Although the text of the statute indicates an effective date of April 2, 2020, the DOL has taken the position that FFCRA is effective as of **April 1, 2020**.

On March 25, 2020, the DOL published the [poster](#) which employers are required to post in a conspicuous place where notices to employees are customarily posted. Employers are encouraged to immediately print a copy of the poster and post it with their other state and federally required employment law posters.

On March 24, 2020, the DOL release four guidance documents:

- [A Fact Sheet for Employees](#)
- [A Fact Sheet for Employers](#)
- [Questions and Answers Guidance](#)
- [Field Assistance Bulletin](#)

DOL Questions and Answers Guidance

While the Fact Sheets provide a general summary of FFCRA, the Questions and Answers publication provides interim guidance on how the Department is interpreting certain provisions under FFCRA which were left unclear by the text of the law. Some of the more significant questions answered by the Questions and Answers include:

- ***As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?***

For employers whose employee census fluctuates above and below 500, an employer will be considered to have fewer than 500 employees if, ***at the time an employee's leave is to be taken***, the employer employs fewer than 500 full-time and part-time employees within the United States. Employees include: employees on leave; temporary employees jointly employed with another company; and day laborers supplied by temporary agencies. Independent contractors are not considered employees.

The Guidance also addresses whether related companies with fewer than 500 employees can be combined for purposes of exceeding the 500-employee threshold. Companies will be considered separate employers unless they satisfy the DOL's [FLSA joint employer test](#) published earlier this year. Related companies may also be considered a single entity for purposes of the family and medical leave provisions of FFCRA if they satisfy the FMLA [integrated employer test](#).

If you believe that your company may be exempt from FFCRA under a joint employer analysis, we encourage you to consult with BCGL about your FFCRA strategy.

- ***If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?***

The DOL is still developing the criteria and process that it will use to consider small business exemption requests. We do not expect that employers will receive further exemption guidance prior to FFCRA's effective date of April 1, 2020, and recommend that employers be prepared to comply with the law. BCGL is available to assist you in implementing strategies to prepare for FFCRA.

- ***Can my employer deny me paid sick leave if my employer gave me paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?***

The DOL Guidance makes clear that leave provided prior to April 1, 2020 cannot be used to satisfy FFCRA's paid leave requirements.

Field Assistance Bulletin

The Field Assistance Bulletin provides technical guidance to DOL regional offices concerning enforcement of FFCRA. The Department will not bring enforcement actions against a public or private employer for violations of FFCRA occurring within the first thirty (30) days of enactment (March 18 through April 17), ***provided that the employer has made reasonable, good faith efforts to comply with the Act.*** According to the DOL, an employer acts "reasonably" and "in good faith" when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable;
2. The violations of the Act were not "willful"; and
3. The Department receives a written commitment from the employer to comply with the Act in the future.

If an employer fails to remedy the violation or provide written commitment to comply with FFCRA in the future, the Department may move forward with enforcement.

Opportunity for Comments

In addition to developing the criteria for the small business exemption, there are a number of other outstanding issues under FFCRA for which DOL Guidance is needed. The DOL is currently conducting an online dialogue for stakeholders to provide input which the Department will use to develop compliance assistance materials. Employers can register for the online dialogue and provide feedback [here](#).

BCGL's Employment Team of Theresa Mongiovi (theresam@bcgl-law.com) and Angela Sanders (angelas@bcgl-law.com) are available to assist you with questions about FFCRA, policy preparation, and development of coronavirus strategies for the workplace.