



National Compliance Update

USI EMPLOYEE BENEFITS

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DOL Updates FFCRA FAQs

The Department of Labor (“DOL”) added new FAQs providing additional guidance on the paid leave protections under the Families First Coronavirus Response Act (“FFCRA”). This new guidance provides helpful clarification for employers on various topics. With respect to employers, this new guidance provides:

- further clarification on who must provide paid sick leave or expanded family and medical leave when an individual is employed by a temporary staffing agency;
- when and if paid sick leave or expanded family and medical leave must be provided when childcare arrangements have been modified; and
- information on documentation an employer may require from employees to demonstrate efforts to obtain a COVID-19 diagnosis.

Additional details are provided below.

EMPLOYEES OF TEMPORARY STAFFING AGENCIES

There has been much confusion regarding the FFCRA’s applicability to employees who work for temporary staffing agencies. Specifically, where an employee works for a temporary staffing agency with more than 500 employees, but is placed with an employer with fewer than 500 employees, it has been unclear whether such employee would be eligible for FFCRA benefits and, if so, who would be required to provide those benefits. Prior guidance has referenced joint employers, but the new guidance provides better clarification as to whether such an employer would, in fact, be a joint employer. The guidance states that if the employer directly or indirectly exercises significant control of the terms and conditions of the employee’s work, it would be a joint employer and would be required to provide such employee with paid sick leave or expanded family and medical leave. The guidance clarifies that in determining whether the employer exercises such control, the DOL would consider the following:

- whether the employer has the power to hire or fire the employee;
- whether the employer supervises and controls the employee’s schedule or conditions of employment;
- whether the employer determines the employee’s rate and method of pay; and
- whether the employer maintains the employee’s employment records.

The guidance provides that if such an employer provides the employee with paid sick leave or expanded family and medical leave as the employee's joint employer, the temporary staffing agency (who is not required to provide such benefits) may not retaliate against the employee for taking such leave, including discharging, disciplining or discriminating against the employee.

MODIFICATIONS TO CHILDCARE

The FFCRA provides that an employee may take paid sick leave or expanded family and medical leave if the employee is unable to work because he or she must care for a child whose school is closed because of COVID-19. The guidance addresses two issues related to FFCRA leave in this situation:

- may an employer require documentation when an employee has been teleworking for weeks while having children home without issue, but at some point, claims he or she now needs to take paid sick leave and expanded family and medical leave to care for those children; and
- may an employee take paid sick leave or expanded family and medical leave to care for children when distance learning is complete and the school closes for summer vacation.

Documentation

Earlier guidance provided that an employer may require that an employee provide the qualifying reason for the leave and submit either an oral or written statement that the employee cannot work due to this reason, in addition to requiring other documentation in support of the leave. The new guidance clarifies that while an employer may ask an employee to note changed circumstances in his or her statement, the employer should be cautious in doing so because it could increase the likelihood that any decision denying the leave based on that information is a prohibited act. The guidance points out that there could be other valid reasons why the employee's situation changed. For example, the employee may not have been able to care effectively for the children while teleworking, or perhaps the employee now needs the leave because his or her spouse needs to work. Such valid reasons do not allow an employer to deny leave to the employee. However, the guidance confirms that where an employee unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations such as taking leave to care for his or her children when the employee does not actually have children and is not taking care of another child, an employer may discipline such an employee.

School Closing for Summer

The guidance reiterates that a request by an employee to care for his or her children whose school is closed is a qualifying reason for paid sick leave and expanded family and medical leave under the FFCRA where the school is closed for COVID-19. If the school is closed for any other reason, such as summer vacation, the employee would no longer be entitled to the leave. However, the guidance further states that the leave may still be available to the employee where the employee's childcare that was to be provided during the summer, such as camp, is closed or unavailable due to COVID-19.

DOCUMENTATION FOR A DIAGNOSIS

The guidance clarifies that employers may only request minimal documentation from an employee who wants to take leave to seek a medical diagnosis of COVID-19. An employer may only require an employee to identify symptoms and a date for a test or doctor's appointment and nothing further,

as the intent is to allow employees exhibiting COVID-19-like symptoms to take leave to help slow the spread of COVID-19. It should be noted, however, that when an employee takes unpaid leave under FMLA, or any other type of paid leave, the documentation requirements under FMLA or such other leave would apply.

RESOURCES

For the DOL FFCRA Q&As, visit <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

USI [usi.com/locations](https://www.usi.com/locations)

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