

## ***DOL and IRS Release Guidance on the Families First Coronavirus Response Act (FFCRA), Effective April 1***

March 25, 2020

The Department of Labor and the Internal Revenue Service have begun to issue informal guidance regarding the application of the FFCRA. The most recent guidance was released today, a “Questions and Answers” website provided by the DOL with the following key points:

- The FFCRA paid leave provisions are effective on **April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.** As a result, the requirements are not retroactive and employers cannot count paid leave they have provided to their employees before April 1, 2020.
- The calculation of the number of employees takes into account all employees in the United States and its territories, including employees on leave, temporary employees jointly employed by multiple employers, and day laborers supplied by a temporary agency. Independent contractors are not counted. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted. In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA.
- There has been no further guidance regarding the **small business exemption**, except that the DOL encourages businesses to document the reasons for their need for an exemption, which will be addressed in more detail in forthcoming regulations.
- **How to count hours for part-time employees:** A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, employers are to calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, employers may use a six-month average to calculate the average daily hours. Part-time employees may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that. If this calculation cannot be made because the employee has not been employed for at least six months, employer should use the number of hours that the employer and the employee agreed that the employee would work upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment. **For full-time employees with varying schedules, the same calculation is made, except that the paid sick leave time cannot exceed 80 hours.**

## EMPLOYMENT Alert

*This alert was prepared by Hand Arendall Harrison Sale's Employment and Labor Practice Group. For further information or assistance, please contact Christine Hart or the Employment and Labor Group attorney with whom you normally work.*

Christine Hart

Author

[chart@handfirm.com](mailto:chart@handfirm.com)

251-694-6358

Mark T. Waggoner

Practice Group Chair

[mwaggoner@handfirm.com](mailto:mwaggoner@handfirm.com)

205-324-4400

Practice Group Members:

Roger L. Bates

Windy Cockrell Bitzer

Lisa Darnley Cooper

J. Cole Davis

Tracy R. Davis

Christine Hart

Heather K. Hudson

C. Dennis Hughes

Robert C. Jackson

John S. Johnson

Tracy T. Miller

Amy E. Myers

Edward T. Rowe

Drew Sinor

Emily Van Haneghan

George M. Walker

Copyright © 2020 Hand Arendall Harrison Sale LLC. All rights reserved.

This alert is for general information only and is not intended as and does not constitute legal advice or solicitation of a prospective client. It should not be relied on for legal advice in any particular factual circumstance. An attorney-client relationship with the Firm cannot be formed by reading or relying on this information; such a relationship may be formed only by a specific and explicit agreement with Hand Arendall Harrison Sale LLC.

NOTE: The following language is required by Rule 7.2 of the Alabama State Bar Rules of Professional Conduct: "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."

- **How to count overtime:** The Emergency Family and Medical Leave Expansion Act portion of the FFCRA requires employers to pay their employees for hours the employee would have been normally scheduled to work, **even if that is more than 40 hours in a week**. The Emergency Paid Sick Leave Act portion of the FFCRA requires that paid sick leave be paid **only up to 80 hours over a two-week period**. No overtime premium wage is required.

The DOL provided the following example: “an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.”

- The **regular pay rate** for purposes of the paid leave is the average of the employee’s regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for the employer for six months, the employer uses the average of the regular rate for each week of work. **Employees who are paid with commissions, tips, or piece rates should have those wages incorporated into the regular pay rate calculation.**
- Employees may not take a full paid sick leave twice for two qualifying reasons; 80 hours is the maximum.
- As expected, employees who are home with their children because their school or place of care has closed or is unavailable are eligible for up to twelve total weeks of paid leave. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave at 2/3 pay, which covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer’s policy. After the first ten workdays have elapsed, employees will receive 2/3 pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.
- Employee eligibility under the expanded FMLA is based on an employee being on payroll for the 30 calendar days immediately prior to the day the employee’s leave begins. So if an employee was on the payroll as of March 2, 2020, he or she is eligible to take leave on April 1, 2020. Employees who transitioned from temporary to permanent status may count their time as temporary employees towards the 30 days.

In addition, the DOL announced that it will observe a **temporary period of non-enforcement for the first 30 days** after the Act takes effect, **so long as the employer has acted reasonably and in good faith to comply with the Act**. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

The IRS also issued a news release, which provided the following important information regarding the tax credits available to employees for payment of the paid leave:

- Employers receive 100% reimbursement for paid leave, **including health insurance costs**. Employers do not face payroll tax liability for providing the paid leave.
- Employers can access funds that would be otherwise used for payroll tax withholdings to provide the paid leave, rather than deposit those funds with the IRS as part of the quarterly payroll tax return.
- Refunds will be sent as quickly as possible. **Employers will be able to seek an expedited advance from the IRS through a claim form that should be released this week.**

Also note that while **public agencies** with at least one employee are required to provide paid leave and expanded FMLA to its employees, in addition to any sick leave already provided, public agencies are not eligible for the tax credits provided in the FFCRA.

---

Copyright © 2020 Hand Arendall Harrison Sale LLC, All rights reserved.

This alert is for general information only and is not intended as and does not constitute legal advice or solicitation of a prospective client. It should not be relied on for legal advice in any particular factual circumstance. An attorney-client relationship with the Firm cannot be formed by reading or relying on this information; such a relationship may be formed only by a specific and explicit agreement with Hand Arendall Harrison Sale LLC.

NOTE: The following language is required by Rule 7.2 of the Alabama State Bar Rules of Professional Conduct: "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."