
New DOL Guidance on FFCRA Addresses Use of Employer PTO Policies

By Laura Calhoun / Apr 22, 2020

On April 20, 2020, the Department of Labor (DOL) provided new guidance for compliance with the paid sick leave provisions of the Families First Coronavirus Recovery Act (FFCRA). One important clarification involves the interplay between leave under the FFCRA and the employer's paid time off policy (PTO). The DOL made clear that the circumstances in which PTO may be used in conjunction with FFCRA leave will differ depending on whether leave is taken under the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act. To illustrate the distinctions, the following questions were answered:

Emergency Paid Sick Leave Act

1. Can an employer require PTO to run concurrently (cover the same hours) with Emergency Paid Sick Leave (EPSL)? No.
2. Can the employee and employer agree to have PTO run concurrently with EPSL? Yes, the employee can supplement the amount available under EPSL with PTO entitlements up to the employee's normal earnings.
3. Can the employer require the employee to exhaust PTO before taking EPSL? No.

Emergency Family & Medical Leave Expansion Act:

1. Can an employer require PTO to run concurrently (cover the same hours) with Emergency Family & Medical Leave (EFML) during the first two weeks of unpaid EFML? No.
2. Can an employer require PTO to run concurrently (cover the same hours) with EFML during the next 10 weeks of paid EFML? Yes. After the first two workweeks (typically 10 days) of EFML, the employer can require the employee to take PTO concurrently with the remaining weeks of EFML, but only if PTO would otherwise be available per the PTO policy in this circumstance. In other words, the employer's PTO policy must provide that PTO may be used for reasons such as school or daycare closures, vacation or personal leave (as opposed to medical leave if the employee is not ill).
3. Can the employee elect to have PTO run concurrently with EFML? Yes. The employee may elect to take either EPSL or PTO for the first two weeks of unpaid EFML. For the remaining 10 weeks of paid EFML, the employee may elect to take PTO concurrently with EFML if the employer's PTO policy otherwise allows PTO under the circumstances.
4. Can the employer and employee agree that PTO may be used while an employee is on paid EFML to supplement the 2/3 pay to allow the employee to receive the full amount of the employee's normal compensation? Per the DOL, this is permissible subject to state or federal law.
5. Can the employer require the employee to exhaust PTO before taking EFML? No.
6. Can the employer get tax credits during the time an employee is using PTO concurrently with paid EFML? Although the employer will pay the employee's full pay until the employee has exhausted available PTO, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act (\$200 per day or \$10,000 in total).

The DOL has also provided new guidance on how to properly calculate the number of hours and rate of pay for employees in various situations under the FFCRA. This includes how to determine the number of hours that must be paid when an employee works "irregular hours." In addition, the DOL set out the proper method of calculating an employee's "average regular rate" for employees paid on a compensation plan other than a fixed hourly rate. This includes employees who are paid on a piece rate or who receive other payments, such as commissions or tips, such that the regular rate may fluctuate from week to week. Clarification is also provided for calculating the regular rate of a salaried employee, which will vary depending on whether the employee is paid a salary for a specified number of hours each week (such as 40 hours) or if the salary is paid for all hours worked in a workweek regardless of the number of hours worked. The DOL has provided step by step instructions and examples for each of the above situations to assist in determining the proper number of hours and pay rate owed for EPSL and EFML.

The DOL further confirmed that for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes government shelter-in-place or stay-at-home orders. To qualify for leave, the employer must have work available that the employee is unable to perform because the employee is subject to the order. In contrast, employees are not entitled to leave under the FFCRA if the employer does not have work available because of the order or for other reasons.

Lastly, as a remedy for FFCRA leave violations, employees will be entitled to recover the full amount that would have been due. The DOL made clear that this amount is the greater of the employee's regular rate of pay or the applicable minimum wage for each hour of uncompensated paid leave taken, in each case, up to the applicable FFCRA maximum payment caps.

DOL enforcement of the FFCRA is underway; therefore, it is crucial for employers to understand and comply with the leave and pay requirements of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

Further information can be found on the DOL website, [Families First Coronavirus Response Act: Questions and Answers](#).