

Emergency Paid Sick Leave: U.S. Department of Labor Enforcement Efforts On The Rise

By Bruce Sarchet and Christopher Benton | June 25, 2020 | Littler.com



Back in February of this year, when employees were still reporting to work and the COVID-19 pandemic was just starting to gain national attention, there was great concern that infected employees with insufficient sick leave would report to work because they needed income. The federal government's first response was to provide for "emergency paid sick leave" under the Families First Coronavirus Response Act (FFCRA). Tax credits were provided so that, in essence, the government would be subsidizing these new paid leaves.

The United States Department of Labor (DOL) was charged with enforcing this brand new law. While actual enforcement was delayed at first, lately the DOL has become quite active in prosecuting cases against

businesses. Employers should be aware of these recent developments, and take steps to evaluate their own compliance with their new obligations under federal law.

Overview of FFCRA Requirements

As has been reported previously in prior Littler articles, the FFCRA requires private employers with fewer than 500 employees, and certain public employers, to provide employees with paid sick leave and expanded family medical leave related to COVID-19. Qualifying employees who are unable to work or telework due to one of six enumerated reasons relating to COVID-19 are entitled to two weeks (up to 80 hours) of paid sick leave.

The FFCRA also requires that employers provide an additional 10 weeks of paid expanded family and medical leave at two-thirds of the employee's regular rate of pay when the employee is not able to work because the employee needs to care for a minor child whose school or child care provider is closed due to COVID-19 restrictions.

Finally, covered employers qualify for full reimbursement through tax credits for any sick leave and family medical leave paid to qualifying employees under the FFCRA through December 31, 2020.¹

Enforcement of the Families First Coronavirus Response Act

When the FFCRA first went into effect, the statute itself provided for a temporary non-enforcement period for the first 30 days. That non-enforcement period expired on April 20, 2020.² Since then, the DOL's Wage and Hour Division has started investigating and enforcing FFCRA violations. The DOL announced numerous enforcement actions on its website stemming from public and private employers failing to pay the required FFCRA leave, denying employees' use of FFCRA leave, or even firing employees for attempting to use FFCRA leave. A few of these recent enforcement actions are summarized below.

- A company in Arizona had to pay \$1,600 to an employee who qualified for paid sick leave when the employee's doctor instructed him to self-quarantine.
- A company in California had to pay \$2,606 to an employee who qualified for paid sick leave when the employee had instructions from a doctor to self-quarantine while waiting for COVID-19 test results of a family member.
- A company in Texas had to pay \$1,200 to an employee who qualified for paid sick leave when the employee was hospitalized for a positive COVID-19 diagnosis.
- A company in Indiana had to pay \$3,017 to an employee who qualified for paid sick leave when the employee was experiencing COVID-19 symptoms and seeking a medical diagnosis.
- A company in Hawaii had to pay \$800 to an employee who qualified for paid sick leave when the employee had to care for a child whose school closed due to COVID-19.
- A company in Arizona had to pay \$1,000 to an employee who qualified for paid sick leave after a healthcare provider ordered him to self-quarantine for COVID-19 related reasons.
- A school district in Arizona had to pay \$1,000 to an employee who qualified for paid sick leave to care for her children whose school closed due to COVID-19.
- A government agency in California had to pay \$3,680 to an employee who qualified for paid sick leave for time the employee spent at home caring for her child whose school closed due to COVID-19.
- A government agency in New Mexico had to pay \$1,411 to an employee who qualified for paid sick leave and was a single mother who had to care for her three children whose school closed due to COVID-19.
- A company in Georgia had to pay \$1,060 to an employee who qualified for paid sick leave due to a healthcare provider's recommendation that the employee self-quarantine while waiting for COVID-19 test results.
- A company in Maryland had to reinstate an employee after the DOL determined that the employer denied emergency paid sick leave and wrongly terminated the employee when the employee had to take care of their child due to a COVID-19 school closure.
- A non-profit company in Florida had to pay \$911 to an employee after the DOL determined that the employer wrongly forced the employee to use their accrued personal sick leave due to self-quarantining, rather than the emergency paid sick leave provided for under the FFCRA. The employer also had to reinstate the employee's personal sick leave.
- A company in Florida had to pay an employee two weeks' worth of emergency paid sick leave after the DOL determined that the company failed to pay the employee for two weeks spent out of work due to a doctor's instruction to self-quarantine.

Practical Approach When Employees Seek Paid Sick Leave Due to COVID-19

As shown with the above, the DOL has become increasingly active in enforcing alleged violations of the FFCRA. Given this trend, and recalling that tax credits are available to mitigate the cost, employers should carefully evaluate each request for either emergency paid sick leave or emergency family and medical leave. In deciding whether to grant or deny a requested leave, employers should factor in the availability of tax credits. While this sick leave is “paid,” in essence it is the federal government, not the individual business, that is making the payment.

Also worthy of consideration is the time and effort that employers might spend in responding to a DOL investigation, along with the potential damages that might be awarded down the road. Accordingly, while employers typically focus on getting employees to report to work to avoid operational strain, a more holistic approach may serve some employers well under these circumstances. Employers should take care when evaluating requests, as always, granting requests as appropriate that are supported by bona fide reasons—and particularly where adequate documentation can be assembled to support the request for a tax credit. While this approach may create some added business disruptions due to employee absences, responding to a DOL enforcement action also will create business disruptions. Employers should not lose sight of all these factors as they assess requests for emergency paid sick and emergency family and medical leave under the FFCRA.

As a reminder, the emergency leave provisions of the FFCRA are scheduled to expire at the end of 2020. Until that time, employers should carefully weigh their options when faced with an employee request to take such leave.