




COVID-19

UPDATE:
April 6, 2020

**Coronavirus / COVID-19
Response Team**


MILLER 
JOHNSON
Attorneys

1

MILLER 
JOHNSON
Attorneys

**How the DOL Regulations
Change What You Think You
Know About the FFCRA**

» Sandy Andre
Mike Stroter

MILLER 
JOHNSON
Attorneys

The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer–client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

3

Agenda

- Review of DOL Temporary Rule re: FFCRA
 - Not New
 - New
 - Clarifications
 - Explanations
- Q & A

4

Payout Upon Separation

- Not new:
 - Does not create an obligation to payout unused Paid Sick Leave or Expanded FMLA upon employee's termination, resignation, retirement, separation
- But remember:
 - Michigan Payment of Wages and Fringe Benefit Act
 - Fringe benefits include "time off for sickness or injury"
 - Employer is required to pay fringe benefits in accordance with written contract or written policy
 - Other state laws

Employee Eligibility: Recall/Rehire

- Not new:
 - Expanded FMLA: employed at least 30 calendar days
- But additional guidance on how to treat recalled/rehired employees
 - "This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer."

Definitions: “Telework”

- Not new:
 - Department’s regulations and interpretations of FLSA generally apply to employees who are teleworking
- But: Adjusting its “continuous workday guidance”
 - An employer allowing telework during the COVID-19 pandemic ***shall not*** be required to count as hours worked all time between the first and last principal activity performed . . . as hours worked.

Covered Reason #1: “Quarantine/Isolation”

- Not new:
 - Employees not eligible for EPSLA:
 - If a business closes temporarily due to a downturn in business related to COVID-19
 - If a “quarantine/isolation” order forces a business's customers to Stay Home
 - If a “quarantine/isolation” order forces a business to close
- But:
 - Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine or otherwise restrict their own mobility

Michigan EO 2020-21

- Stay at Home Order
 - Employers can designate *certain workers* to come in to work if they cannot do their work remotely
 - All other workers cannot leave home for work, but they can work remotely from home if possible
- Generally, this is:
 - A “quarantine/isolation” order forcing a business to close= **Not eligible for EPSLA**
 - A “quarantine/isolation” order forcing a business’s customers to stay home= **Not eligible for EPSLA**

Michigan EO 2020-36: A different kind of “Stay Home” order

- FFCRA:
 - Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein
- EO 2020-36 permits certain employees to stay in their home under certain circumstances
- EO 2020-36 does not prohibit telework

Covered Reason #2: “Advised to Self-Quarantine”

- An employee who is self-quarantining is able to telework, and therefore ***may not*** take paid sick leave for this reason, if
 - (a) his or her employer has work for the employee to perform;
 - (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; ***and***
 - (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work

Questions ?

Covered Reason #3: “Symptoms & Seeking Diagnosis”

- An employee who is waiting for the results of a test is able to telework, and therefore ***may not*** take paid sick leave, if:
 - (a) his or her employer has work for the employee to perform;
 - (b) the employer permits the employee to perform that work from the location where the employee is waiting; and
 - (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work

Covered Reason #4: “Care for Others”

- This qualifying reason applies only if but for a need to care for an individual, the employee would be able to perform work for his or her employer.
- Accordingly, an employee caring for an individual ***may not*** take paid sick leave if the employer does not have work for him or her.
- Furthermore, the employee must have a genuine need to care for the individual.

Covered Reason #5: “School/Place of Care Closure”

- An employee may take paid sick leave to care for his or her child ***only*** when the employee needs to, and actually is, caring for his or her child.
- Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee’s child needs.

Covered Reason #6: “Substantially similar condition”

- The sixth reason for paid sick leave applies if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

Varied Schedule Employees: Time Entitlement

- Use the ***daily average*** to compute the two-week average.
- An employer may also use twice the number of hours that an employee was scheduled to work per workweek, averaged over the six-month period.

Expanded FMLA: Unpaid = 2 weeks

- Original:
 - The first 10 days may consist of unpaid leave
- New:
 - The unpaid period for Expanded FMLA lasts for two weeks rather than ten days.
 - Reason: Ensure consistency between two types of paid leave under FFCRA

“Regular Rate”

- Section 826.25 requires an employer to use an average of the employee’s regular rate over multiple workweeks.
- Such an average should be weighted by the number of hours worked each workweek
- The Department: compute the average regular rate over the same period used by the EPSLA and the EFMLEA to compute the employee’s average number of hours worked per day, i.e., ***a six-month period ending on the date on which the employee first takes paid sick leave or expanded family and medical leave***

“Regular Rate”

- In most situations, this will be relatively straight-forward:
 - Weekly Regular Rate =
 - Total compensation for week / Total hours for week
 - Regular Rate for 6 mos. Period prior to leave =
 - Total compensation for 6 mos. / Total hours for 6 mos.

“Regular Rate”

- The regular rate in the first week is \$10 per hour ($\$400 \div 40$ hours), and the regular rate for the second week is \$20 per hour ($\$200 \div 10$ hours).
- Thus, the weighted average regular rate over this two-week period is \$12 per hour ($\$600 \div 50$ hours)

Questions ?

“Health Care Provider”

- Not new: Definition
- New: Explanation
 - “Health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational.”

“Emergency Responder”

- Not new: Definition
- New: Explanation
 - The authority for employers to exempt emergency responders is reflective of a balance struck by the FFCRA. On the one hand, the FFCRA provides for paid sick leave and expanded family and medical leave so employees will not be forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19. ***On the other hand, providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society, including the functions of emergency responders.***

Employee Count: 500-employee threshold

- Not new:
 - Should include full-time, part-time, employees on leave, temporary employees who are jointly employed, and day laborers; independent contractors do not count towards the threshold
- New:
 - Employees who have been laid off or furloughed and have not subsequently been reemployed do not count towards the threshold

Intermittent Leave

- Not new:
 - Intermittent leave is always predicated on agreement by the employer
- Clarification:
 - Intermittent can be taken for ANY of the covered reasons, if: (1) the employer agrees, and (2) the employee is working remotely
 - However, if the employee is working onsite, leave can be taken intermittently only for care of child related to school/place of care closure.

Notice Requirement: Poster

- Not new:
 - Model Notice
- New/Clarification:
 - For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of the FFCRA notice satisfies their FMLA general notice obligation.

Notice Requirement: Designation Notice

- Clarification:
 - The FFCRA regulations do not require employers to respond to employees who request or use EFMLEA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances.

Just for fun: EPSLA's 80-hour limit

- Once an employee takes the maximum 80 hours of paid sick leave, he or she is not entitled to any paid sick leave from a subsequent employer.
- If an employee changes positions before taking 80 hours of paid sick leave, then his or her new employer (if covered by FFCRA) must provide paid sick leave until the employee has taken 80 hours of paid sick leave total regardless of the employer providing it.

MILLER JOHNSON
Attorneys



Sandy Andre
616.831.1731
andres@millerjohnson.com



Mike Stroster
616.831.1780
strosterm@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007

30