

**Update and Clarification: March 26, 2020**

Please note, we have provided clarification on the first round of regulations and guidance issued by the DOL yesterday. The revised section is highlighted below. Employers should expect further guidance from the Department of Labor over the next several days. At the time of this publication, all information contained summarizes the most current updates from the Department of Labor. We will continue to send out updates as new information is shared.

1. The effective date of the FFCRA is April 1, 2020, not April 2<sup>nd</sup>, as has been previously published.
2. Employers are required to post an FFCRA poster, which will be available to you later this week. Seay Management will email the link to you so you can print it out and post it.
3. The requirements cover all employers of under 500 employees. There is a small exemption for employers of under 50 employees, which we'll discuss below.
4. These regulations do not apply to employees who are laid off or furloughed. They apply to employees who are on the payroll and who qualify as having a COVID-19 event, as described below.
5. Covered employees (those with a COVID event and who will receive the new FFCRA benefit) are the following:
  - a. *Employees subject to a federal, state or local quarantine or isolation order.* By way of explanation, the CDC defines "quarantine" as separating and restricting the movement of people who were exposed to a contagious disease to see if they become sick, and "isolation" as separating sick people with a quarantinable communicable disease from people who are not sick. This is from the CDC website. Whether this applies to "Stay at Home" or "Shelter in Place" orders is yet to be seen.
  - b. *Been advised by a health care provider to self-quarantine, owing to COVID-19.* Like other absences for sickness, our opinion is that you should have a doctor's statement supporting this need. Otherwise, it is possible that employees not so advised could make this claim deceptively.
  - c. *Experiencing COVID-19 symptoms and seeking a medical diagnosis.* This seems like it could be a giant loophole and we recommend getting a doctor's statement supporting the need for the employee to stay home.
  - d. *Caring for an individual subject to quarantine or isolation or self-quarantine.*
  - e. *Caring for a child whose school or place of care is closed or unavailable, for COVID-19 reasons.* There is a small exemption for this requirement, for employers of less than 50 employees.
  - f. *Experiencing "substantially similar" conditions specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.* This is another wide open loophole and no guidance has been forthcoming on what this means.
6. Therefore . . . employees who qualify for one of the six coverage requirements above must receive 80 hours up paid sick time. These 80 hours are not in the place of current PTO and sick time, they are in addition to current PTO and sick time and must be used prior to current PTO and sick time.
  - a. A covered employee who cannot work because of a COVID-19 event as described above must receive up to 80 hours of paid sick pay at his or her regular rate of pay, capped at a maximum of \$511 per day.

- b. A covered employee who is caring for an individual as described above must receive 80 hours of paid sick pay at 2/3rds of his or her regular rate, capped at a maximum of \$200 per day.
  - c. An employee who has worked at least 30 days, and is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19 must receive 10 additional weeks of pay at 2/3rds the regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).
7. Under normal conditions, employers of less than 50 employees are exempt from regular Family and Medical Leave, but that seems not to be the case with FFCRA. The current understanding is that all employers of less than 500 employees are covered under all of these provisions, even employers of less than 50 employees.

However, there is a small exemption for employers of less than 50 employees that applies to the FFCRA requirement for school closings and child care, and here it is – employers with less than 50 employees may receive an exemption for the requirement to provide leave owing to school closings or the unavailability of child care, *if this would jeopardize the ongoing viability of the business*. The guidance states that employers desiring this exemption should document why the business meets the exemption criteria set forth for by the Department of Labor.

To date, the Department of Labor has not set forth any criteria so we are hopeful it is forthcoming soon. The Department of Labor adamantly states that employers should not send any materials to them at the moment. Our sense is that this may be one of those situations where an employer can claim the exemption and then maintain documentation supporting it, in the event that there is a Department of Labor investigation. You can see that this exemption is, at the moment, frightfully unclear.

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What we have learned so far is that (1) the implementing regulations are not final and are being “rolled out” as we go, (2) there are a ton of unanswered questions, and (3) these requirements are going to be a huge hit for small businesses. There is a provision for tax credits and there may be other help available through the Small Business Administration and other sources. Your accountant will be able to help you with those issues. In the meantime, we will keep you constantly up to date on the HR and employment side. Please contact your Seay Management Consultant if you have any questions about the FFCRA or any other HR issue. And . . . “If you have an employment issue, and you need an answer and no one else can help, you need to call . . . The Seay Team.” We appreciate having you as a friend and client of our firm.

The Seay Management Team

It is our goal to:

1. Help ensure that your business is in compliance with all of the state and federal employment regulations and guidelines which affect your company and your employees;
2. Help eliminate your financial exposure in these areas; and
3. Develop the policies and systems which will help you employ and maintain a satisfied, happy and productive work force.

