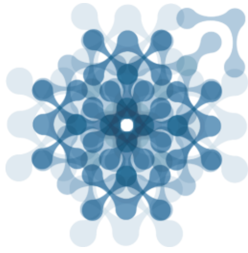

KUTAKROCK

COVID-19
SPECIAL PUBLICATION

Employment Law

May 5, 2020

# DOL Publishes Further Questions and Answers Regarding the Families First Coronavirus Response Act

The U.S. Department of Labor ("DOL") continues to update its guidance for employers and employees on their rights and responsibilities under the Families First Coronavirus Response Act ("FFCRA").

This update summarizes the additional clarifications provided in the Questions and Answers ("Q&A"), specifically on how to calculate an employee's average rate of pay for purposes of the FFCRA when the employee works irregular hours or receives irregular pay. The additional Q&A also provide clarification on when an employer may require an employee to use existing leave under a company policy for paid sick leave under the Emergency Paid Sick Leave Act.

**Calculating the Number of Paid Sick Leave Hours for Employees with Irregular Hours**

If an employee normally works an irregular schedule in a two-week period, the employer must estimate the number of hours worked. According to the DOL, two weeks is a full 14 days; it is not based on a 5-day workweek.

To assist employers in estimating a two-week average, the DOL has provided the following guidelines:

- The estimate must be based on the average number of hours the employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. The average must include all scheduled hours. Thus, hours worked, and hours which an employee took leave, are included in the estimate.

- The DOL provided two examples based upon the same underlying time period. In both circumstances, the six-month period used for estimating average hours consists of 183 calendar days from October 14, 2019 to April 13, 2020.

    - First example: During the six-month period, Employee 1 worked 1,150 hours over 130 workdays and took a total of 50 hours of personal and medical leave. Thus, the total number of hours is 1,200 hours.
        - Divide the number of hours per calendar day by the hypothetical 183 hours = 6.557 hours per calendar day.
        - The two-week average is thus computed by multiplying 6.557 x 14 (two-week period) = 91.8 hours. Because this average is greater than the statutory maximum of 80 hours, Employee 1, who works full-time, is therefore entitled to 80 hours of paid sick leave.

    - Second example: During the six-month period, Employee 2 worked 550 hours over 100 workdays and took a total of 100 hours of personal and medical leave. The total number of hours is 650 hours
        - Divide the number of hours per calendar day by the hypothetical 183 calendar days = 3.55 hours per calendar day. The two-week average is thus computed by multiplying 3.55 hours x 14 (the two-week period) = 49.7 hours. Employee 2, who works part-time, is therefore entitled to 49.7 hours of paid sick leave.

The DOL has further clarified that the rate of pay for an employee's sick leave is equal to the employee's regular rate of pay.

**Calculating the Number of Expanded Family and Medical Leave Hours for Employees with Irregular Hours**

If an employee who has been employed for at least six months works an irregular schedule such that it is not possible to determine the number of hours in a "normal" work day, the employer must determine the employee's average workday hours, including any leave hours.

This calculation is made by dividing the number of hours employee was scheduled to work per workday (not calendar day) by the number of workdays over the six-month period. In making this calculation, the six-month period starts on the employee's first day of expanded family and medical leave. The calculation also includes both hours actually worked and hours for which the employee took leave.

By way of example, consider two employees with irregular schedules who both take leave on April 13, 2020. For both employees, the six-month period would consist of 183 calendar days from October 14, 2019 to April 13, 2020.

- First example: The first employee worked 1,150 hours over 130 workdays and took a total of 50 hours of leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours.
  - The number of hours per workday is calculated by dividing 1,200 by 130, which equals 9.2 hours per workday.
  - Thus, the employee should be paid for 9.2 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum

- Second example: The second employee worked 550 hours over 100 workdays and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 650 hours.
  - The number of hours per workday is computed by dividing 650 by 100 which equals 6.5 hours per workday.
  - Thus, the employee should be paid for 6.5 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum.

**Computing an Employee's Average Rate of Pay for FFCRA Payment Purposes**

As set forth above, the employer must pay an employee based upon the employee's average rate of pay. The DOL has provided a formula for that calculation as well.

The average regular rate must be computed over all full workweeks during the six-month period ending on the first day that paid sick leave or expanded family and medical leave is taken. Therefore, for an employee who is paid a fixed hourly rate or salary equivalent, the average regular rate of pay is simply that fixed rate. For an employee whose rate may fluctuate (i.e. due to tips, commissions, piece meal or employees paid day rates, employees working at two or more rates, or a fixed salary with fluctuating hours), the employer must calculate the average regular rate using the following formula:

1. First, compute the employee's non-excludable remuneration for each full workweek during the six-month period. Commissions and piece-rate pay counts towards this amount. Tips, however, count only to the extent that the employer applies them towards minimum wage obligations (i.e., taking a tip credit). Overtime premiums do not count towards the employee's regular rate. Unlike when computing average hours, the employer should not count payments the employee received for taking leave as part of the regular rate. co
2. Second, compute the number of hours the employee actually worked for each full workweek during the six-month period. Unlike when computing average hours, the employer should not count hours when the employee took leave.
3. Third, divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period. The result is the average regular rate.

It is important to note that when an employee receives a fixed salary irrespective of the number of hours worked in a workweek, the calculation still must be performed, because the regular rate may vary alongside the number of hours

worked in each week. In this case, the employer would add up the salary paid to the employee over all full workweeks in the past six months, and then divide that sum by the total number hours worked in those workweeks. If the employer lacks records for the number of hours the employee worked, the employer should use a reasonable estimate.

Finally, the six-month period used to calculate all paid sick leave and expanded family and medical leave under the FFCRA is the six-month period based on the first date the employee takes such leave. In other words, if an employee takes FFCRA leave, returns, and then takes additional qualifying FFCRA leave(s), the six-month period is not recalculated.

**Rounding Numbers**

When calculating any number of hours of paid sick leave with an irregular schedule or the number of hours an employee should be paid for each day of expanded and family and medical leave, an employer may round to the nearest tenth, quarter or half hour. The method of rounding must be done consistently for each employee. An employer may not, for example, round for some employees but not for others. In addition, if the employer typically tracks work time in quarter-hour increments, it may continue to do so; however, the employer may not round to the nearest quarter hour if it typically tracks time in tenth-of-an-hour increments.

**Requiring Employees to Use Existing Leave Under Company Policy**

The DOL has clarified an outstanding question for employers on when leave may be concurrent. The DOL's updated guidance specifically addresses the issue of expanded family and medical leave, leave to care for a child due to school or place of care closure or child care unavailability, and leave that intersects with employer practices and collective bargaining agreements

According to the DOL, paid sick leave under the Emergency Paid Sick Leave Act is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. Therefore, an employer may not require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the Emergency Paid Sick Leave Act.

An employer, however, may require any paid leave available under company policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run concurrently with paid expanded family and medical leave. Under these circumstances, the employer must pay the employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan—including vacation and/or personal leave (typically not sick or medical leave). However, the employer may obtain tax credits for only those wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits ($200 per day or $10,000 in total).

If an employee exhausts available paid leave under the employer's plan, but has more paid expanded and medical family leave available, the employee may receive any remaining paid expanded and medical family leave in the amounts and subject to the daily and aggregate limits.

Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay under the Emergency Family and Medical Leave Expansion Act, such that the employee may receive the full amount of the employee's normal compensation.

Finally, an employee may elect—but the employer may not require—to take paid sick leave under the Emergency Paid Sick Leave Act or paid leave under the employer's plan for the first two weeks of unpaid expanded family and medical leave, but not both. Where an employee has used some or all paid sick leave under the Emergency Paid Sick Leave Act, however, any remaining portion of that employee's first two weeks of expanded family and medical leave may be unpaid. During this period of unpaid leave, the employee may choose—but the employer may not require—to use paid leave under the employer's policies that would be available to the employee to take to care for the employee's child or children because their school or place of care is closed or the child care provider is unavailable due to a COVID-19 related reason concurrently with the unpaid leave.

If an employer fails to comply with these guidelines and the DOL brings an action, the penalty would be the full amount due under the FFCRA which is the greater of the employee's regular rate or the applicable minimum wage (federal state

or local) for each hour of uncompensated sick leave (subject to the FFCRA maximums). No employee may recover more than the amount due under the FFCRA, even when the employer initially agrees to pay the employee more.

As final clarification, if an employer and an employee are in a state where a "shelter-in-place," or "stay-at home" order was issued by any level of governmental authority, this leave only qualifies for FFCRA leave when the order is the reason the employee is unable to perform work (or telework) that is offered. Paid leave is not available where the employer does not have work for an employee as a result of the order (or for other reasons). For instance, if an employer closes a location because of a quarantine or isolation order and, as a result of that closure, there is no work for the employee, the employee is not entitled to leave under the FFCRA and may seek unemployment compensation through the relevant state unemployment insurance office.

If you have any questions about how the DOL's guidance affects your enterprise, please contact your Kutak Rock attorney, or any of the attorneys in the Employment Law Group, and we would be happy to discuss this with you.

This Client Alert is a publication of Kutak Rock LLP. It is intended to notify our clients and friends of current events and provide general information about labor and employment issues. This Client Alert is not intended, nor should it be used, as specific legal advice, and it does not create an attorney-client relationship.

© *Kutak Rock LLP 2020* – All Rights Reserved. This communication could be considered advertising in some jurisdictions. The choice of a lawyer is an important decision and should not be based solely upon advertisements.