

DOL Releases Revised FFCRA Regulations on Concurrent Leave

The Department of Labor (DOL) has published corrections to its regulations on the Families First Coronavirus Response Act (FFCRA). As revised, the regulations allow employers to require employees to use employer-provided paid leave (paid time off, vacation, etc.) and expanded family and medical leave concurrently, except in certain circumstances.

First, an employer may not require an employee to use employer-provided paid leave before or concurrently with emergency paid sick leave. As such, an employer may not require concurrent use of employer-provided paid leave and expanded family and medical leave if the employee is already using emergency paid sick leave. In practice, this will generally mean the employer cannot require an employee to use employer-provided paid leave during an employee's first two (2) weeks of expanded family and medical leave. During these first two (2) weeks (which is otherwise unpaid), emergency paid sick leave will be used; if emergency paid sick leave has been previously exhausted, an employer may require (or an employee may elect) to use employer-provided paid leave concurrently with expanded family and medical leave.

Second, an employer may only require an employee to use employer-provided paid leave concurrently with expanded family and medical leave if that employer-provided paid leave could otherwise be used to care for a child. For example, if an employer has a general paid time off policy that allows an employee to take paid leave for any reason, then the employer can require concurrent use of that leave. But if an employer policy provides leave only for certain reasons that do not involve care of a child (i.e. personal illness), then the employer cannot require an employee to use that type of leave concurrently with expanded family and medical leave

Employers should note that if they require concurrent use of employer-provided paid leave and expanded family and medical leave, they may only claim tax credits for the leave required under the FFCRA. So, if an employee uses employer-provided paid leave and expanded family and medical leave concurrently, the employer may seek reimbursement for 2/3 of the employee's regular rate of pay, up to \$200 per day, but not for the additional 1/3 of an employee's regular pay that may be due under the employer's own policy. This is also the case if an employer and employee mutually agree that the employee will use employer-provided paid leave to supplement emergency paid sick leave.

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