

New COVID-19 Guidance for Public Sector Employers

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On March 18, 2020, Congress passed the Families First Coronavirus Response Act ('FFCRA') to address some of the effects COVID-19 has caused in workplaces across the country.

As we have written previously, the U.S. Department of Labor's Wage and Hour Division ("WHD") published its initial guidance in the form of FAQs to provide compliance assistance for employers related to the FFCRA. Here, we address the guidance the WHD has provided regarding the public sector.

Generally, with a few exceptions, all employees working for entities with fewer than 500 employees are eligible for paid sick leave or expanded family and medical leave under the FFCRA. Employers are prohibited from discharging, disciplining, or otherwise discriminating against those employees who avail themselves of the benefits of the FFCRA. Public sector employees (those who work for federal or state governments, municipalities, counties, or similar governmental entities regardless of the number of employees they employ) are entitled to the same benefits available to non-public sector employees (*see* FAQs 52-54).

With respect to paid sick leave, in addition to similar exceptions that apply to other employees (health care providers and emergency responders), certain U.S. Government Executive Branch employees may be excluded from taking certain kinds of paid sick leave by the Office of Management and Budget (OMB).

Expanded paid family and medical leave is generally available to non-federal public sector employees. The vast majority of federal employees, however, are covered under Title II of the Family Medical Leave Act (FMLA), which was not amended by the FFCRA, and are thus not entitled to expanded family and medical leave. Additionally, as with paid sick leave, the OMB may exclude certain categories of Executive Branch employees. Public sector health care providers and emergency responders may also be excluded by their employers.

While public sector employees who believe they are entitled to but are denied paid sick leave or expanded family and medical leave are encouraged to raise their concerns with their employers to resolve their disputes, they may also contact the WHD directly (where they will be put in touch with the nearest WHD office) or file a lawsuit against their employers without attempting first to resolve the dispute or contacting the WHD. Some public sector employers, however, may be immune from such lawsuits.

Remember that the USDOL's FAQs are guidelines and not the law. On April 1, 2020, however, the USDOL released its Temporary Rule regarding FFCRA. As it relates to public employers, the Temporary Rule tracks with the FAQs (see "Public Employers" section under the Temporary Rule, to be codified as 29 C.F.R. § 826.40(c)). The USDOL will likely continue to update its guidance while we navigate this ever-changing new normal in the world of workplace relationships. We will continue to provide updates as further guidance is provided.

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