

LABOR BULLETIN

No. 20-20

May 6, 2020

TO: CONTRACTOR MEMBERS SIGNATORY THROUGH THE BUILDERS' ASSOCIATION

Following discussions with fund professionals and labor, the Builders' Association wishes to clarify some issues arising from the paid sick leave and expanded family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA) as they relate specifically to union contractors.

The information contained in this bulletin is intended only to provide general information in summary form on legal and business topics. The contents hereof do not constitute legal advice and should not be relied on as such. You should always consult your own attorney to advise you about the best course of action under your particular circumstances.

Summary

This bulletin will address the following:

- 1) Which employers must provide paid leave under the FFCRA;
- 2) What constitutes the "regular rate";
- 3) What payments are required to maintain an employee's health care coverage;
- 4) Whether other fringe fund contributions should be made;
- 5) How to document paid leave requests;
- 6) How the payments to maintain health care coverage will be billed; and
- 7) How to properly claim tax credits for amounts paid under the FFCRA.

FFCRA Applicability

As an initial matter, the FFCRA's paid leave provisions apply to employers with less than 500 employees. The Act also includes a provision allowing the Secretary of Labor to establish an exemption for those employers with less than 50 employees.

The Secretary of Labor subsequently determined that an employer with fewer than 50 employees is **only** exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19-related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19-related reasons when doing so would jeopardize the viability of the small business as a going concern.

In all other circumstances, an employer with fewer than 50 employees **is** subject to the paid leave requirements. For more information on the necessary steps an employer must take to claim the exemption, please see the answers to [Questions 58 and 59](#) in the Department of Labor's (DOL) FFCRA Question and Answer guidance.

Regular Rate

The next issue concerns what amounts should be paid under the FFCRA. Both of the paid leave provisions refer to the employee's "regular rate" under the [Fair Labor Standards Act](#), which does not include fringe benefits paid to a multi-employer plan. The answer to [Question 82](#) describes in detail how to calculate an employee's regular rate for purposes of the FFCRA. In most cases, the regular rate will be the employee's straight time wage rate. However, please keep in mind that these amounts [cap out](#) at different levels for paid sick leave and paid expanded family and medical leave on both a daily and aggregate basis.

Maintenance of Health Care Coverage Required

While the plain text of the FFCRA does not address it, the guidance published by the DOL acknowledges that other statutes do require the maintenance of health care coverage while an employee is on paid leave under the FFCRA. The Family and Medical Leave Act of 1993 (which the FFCRA expands to include paid family and medical leave) requires an employer to maintain an employee's health care coverage while they are out on FMLA leave. Similarly, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires an employer to maintain health care coverage during paid sick leave. Please see the answer to [Question 30](#) in the DOL's Question and Answer guidance.

While health care coverage must be maintained, the [FMLA regulations](#) provide that multiemployer plans containing an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan are **not** required to maintain the regular contribution rate when an employee is on paid leave. Most of the plans on which the Builders' Association staff sit as trustees have such language. The amount necessary to maintain health and welfare fund coverage will be determined by the fund trustees. Each fund will communicate to contributing employers what this amount will be. Further logistical issues will be discussed below.

Other Fringe Funds

While the FFCRA and other federal employment laws discussed above do not require payment of additional fringe funds (pension, training, etc.) when an employee is on paid leave, collective bargaining agreements that require payment for **hours paid** versus **hours worked** can still require payment of those funds. Unlike some others, the collective bargaining agreements negotiated by the Builders' Association only require contributions for **hours actually worked**.* As paid leave is, by definition, not compensation for hours worked, no contribution is required for the other fringe funds.

*(The lone exception is the Association's collective bargaining agreement with Iron Workers Local 10. However, Local 10 has agreed to waive the hours paid requirement with respect to FFCRA paid leave **only**. Therefore, employers signatory with Iron Workers Local 10 will not need to remit the other fringe funds when an employee is on FFCRA paid leave.)

Documenting Paid Leave

Arnold, Newbold, Sollars & Hollins, P.C., fund counsel for many of the Kansas City-area funds, has developed a template that employers may customize and use to have employees document their paid leave. This document contains important information that an employer will need to obtain the refundable tax credits for paid leave expenditures and for future audits by the fringe funds. Please find it [here](#).

If an employee goes on paid leave under the FFCRA, the employer shall notify the Health & Welfare Fund administrator at least 14 days before the onset of the leave, except in an emergency, and then no later than seven days after the leave begins. The employer shall provide the fund administrator with the completed document referenced above.

Billing by the Fringe Funds

For funds on which a member of the Builders' Association staff serves as a trustee, amounts paid to the Health & Welfare Fund to maintain health care coverage while on paid leave under the FFCRA should **not** be remitted under the same process as those for hours worked. Instead, payments to maintain employee health care coverage while on FFCRA paid leave will be remitted monthly, in arrears, upon billing by the Fund Office. The contribution rate and the weekly number of hours to maintain coverage will be determined by the fund trustees and each fund will communicate this amount to contributing employers.

Refundable Tax Credits

Employers that provide paid leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. An employer should retain appropriate documentation in its records, including, but not limited to, the document requesting leave, invoices from the fringe funds for amounts paid to maintain health care coverage, and proof of payment. Please see the [answer to Questions 44-46](#) for additional information on recordkeeping requirements.

Generally, the tax credits for qualified sick leave wages and qualified family leave wages are increased by the qualified health plan expenses allocable to each type of qualified leave wages. In other words, the amounts paid to the Health and Welfare Fund to maintain an employee's health care coverage while on paid leave under the FFCRA are also eligible for the refundable tax credit, as the employees are not paying a portion of their health care costs with after-tax dollars under these plans.

Remember that while an employer may pay other amounts in addition to those required by the FFCRA, the employer is not entitled to a tax credit for any paid leave that is not required to be paid or exceeds the limits set forth under the FFCRA.

The Internal Revenue Service (IRS) has released guidance regarding dollar for dollar tax credits provided to employers paying paid leave to employees under the Families First Coronavirus Relief Act. Of particular note is the response to [Question 2](#), which states in part: "Eligible Employers will claim the credits on their federal employment tax returns (e.g., Form 941, Employer's Quarterly Federal Tax Return), but they can benefit more quickly from the credits by reducing their federal employment tax deposits. If there are insufficient federal employment taxes to cover the amount of the credits, an Eligible Employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19."

Please also be aware that an employer can receive both the tax credits for qualified leave under the FFCRA and a Paycheck Protection Program (PPP) loan. However, if an employer receives tax credits for qualified leave wages, those wages are not eligible as "payroll costs" for purposes of receiving loan forgiveness under the PPP per the answer to IRS [Question 19](#).

Similarly, an employer may receive both the tax credits for qualified leave wages under the FFCRA and the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), but not for the same wage payments pursuant to the answer to IRS [Question 18](#). These provisions are in place to prevent "double dipping."

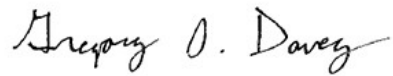
Conclusion

The above is intended as an overview of the complicated interplay of the FFCRA, pre-existing employment law, and the unique nature of the organized industry. Additional answers can be found in the Q&A guidance published by the [DOL](#) and [IRS](#). We also encourage you to visit the Builders' Association's COVID-19 Action Center located on our [home page](#) for the latest updates and information, and prior bulletins regarding Labor & Employment Relations, Safety, Health, and Environmental Services, Government Relations, and the Care for Construction Heroes task force.

If you have questions, please call the Association office at (816) 595-4102.

Sincerely yours,

THE BUILDERS' ASSOCIATION

A handwritten signature in black ink that reads "Gregory O. Davey". The signature is written in a cursive style with a large, stylized 'G' and 'D'.

Greg Davey
Labor Relations Director