



New DOL Guidance Excludes Workers from Federal Emergency Paid Sick Leave

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Foster Swift Legal Update E-blast

March 29, 2020

When Governor Whitmer issued Executive Order No. 2020-21 on March 18, 2020, many employees were forced to stay home because of COVID-19. Many employers reasonably concluded that these workers would qualify for future federal emergency paid sick leave under the Families First Corona Response Act (FFCRA), which will become effective on April 1, 2020. Employers must pay emergency sick leave to an employee who is unable to work due to a need for leave because her or she is subject to a State quarantine or isolation order related to COVID-19. Governor Whitmer's order was just such an isolation order, right? Wrong, says the Department of Labor.

On March 25, 2020, employers woke up to newly published Department of Labor (DOL) guidance which, although not as clear as employers would like, strongly suggests that Michigan employees who are unable to appear at their worksite because of Governor Whitmer's order do not qualify for emergency paid sick leave under FFCRA. Families First Coronavirus Response Act FAQ's

The new DOL guidance addresses this issue in a question and answer format as follows:

"If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?"

No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or *because it is required to close pursuant to a Federal, State, or local directive*. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility...

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It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or State or local requirements, you are not eligible for unemployment insurance..."

"If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?"

No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or *because it was required to close pursuant to a Federal, State or local directive*. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility."

The DOL simultaneously provided some comfort to employers trying to make imperfect but good faith efforts to follow the FFCRA. The DOL advised that it will not bring enforcement actions against any public or private employer for non-willful violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the FFCRA. To qualify for this good faith exception, employers must remedy any violations as soon as practicable, and the employer sends the Department a written commitment to comply in the future. DOL Field Assistance Bulletin No. 2020-1.

Here are some additional resources referenced in this article.

- Governor Gretchen Whitmer's Executive Order 2020-21
- Families First Coronavirus Response Act

Your employees are a huge investment for your organization. If you have questions about how this new law may impact your operations, please reach out to any of the following Foster Swift attorneys:

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