



Coronavirus: New emergency leaves take effect in Puerto Rico

Employment Alert

COVID-19 Alert

8 April 2020

By: Janine Guzman | Mariana Muñiz-Lara

Private employers in Puerto Rico will need to comply with two new emergency paid leaves established by the federal government in the response to coronavirus disease 2019 (COVID-19), to become effective on April 1, 2020. A new local emergency paid leave is also pending approval.

Families First Coronavirus Response Act

Given that Puerto Rico is a territory of the United States, US federal labor laws and regulations generally apply in Puerto Rico. Employers are encouraged to stay informed of the federal laws being enacted, most of which are being announced in the DLA Piper Employment alerts regarding federal response to the COVID-19 pandemic. The Families First Coronavirus Response Act (FFCRA) does not specifically exclude Puerto Rico and amends statutes that apply in Puerto Rico, so it may be reasonably assumed that the FFCRA applies in Puerto Rico.

The FFCRA was signed into law by the US President on March 18, 2020 and will be effective from April 1, 2020 to December 31, 2020; it does not have retroactive effect. This law applies to private employers with 500 employees or fewer, based on the total number of full-time and part-time employees within the United States (including Puerto

Rico and other territories), including employees currently on leave and temporary employees, but excluding independent contractors.

Paid sick leave

The FFCRA requires private employers to provide emergency paid sick leave for up to 10 days or 80 hours to employees unable to work on-site or telework due to specific COVID-19-related situations. The paid sick leave is available to all workers, regardless of how long the employee has been working for the employer. For part-time employees, the number of hours to be paid will be the average of hours worked in a two-week period. The leave is paid at the employee's regular rate of pay, with a cap of \$511 per day, if leave is due to (1) federal, state or local quarantine or isolation order; (2) self-quarantine advised by a healthcare provider; or (3) the employee experiencing symptoms of COVID-19. The leave is paid at two-thirds of the employee's regular rate of pay, with a cap of \$200 per day, if leave is due to (1) caring for an individual in quarantine; (2) caring for a son or daughter whose school or daycare has been closed; or (3) a substantially similar condition specified by the federal government. The FFCRA prohibits employers to require employees to exhaust any other paid leave in order to use the emergency paid sick leave.

Expanded FMLA

The FFCRA also amends the federal Family Medical Leave Act (FMLA) in order to provide with up to 12 weeks of job-protected FMLA leave if an employee is unable to work on-site or telework due to a need to care for a child under 18 years of age whose school or daycare has been closed. Under the expanded FMLA leave, the first 10 days of such leave are unpaid (because they should be covered by the paid sick leave) and employees are entitled to paid leave in an amount equal to two-thirds of the employee's regular rate of pay for the remaining 10 weeks, capped at \$200 per day up to a maximum benefit of \$10,000. Unlike the paid sick leave, this special FMLA leave is only available to employees who have been working for at least 30 calendar days. Unlike standard FMLA leave, employers with fewer than 50 employees will be required to provide this expanded FMLA leave, although they may request to be exempted.

Exemption for employers with fewer than 50 employees

The potential exemption does not apply to every employer with fewer than 50 employees. Employers with fewer than 50 employees are only entitled to claim an exemption from the duty to provide the paid sick leave and the expanded FMLA leave if it is requested due to the closure of its employees' child's school or daycare in light of COVID-19; the exemption does not apply in cases in which the leave is requested due to other covered reasons, including a government mandated quarantine.

An eligible small business must be able to prove that providing the leave related to school and daycare would jeopardize its viability as a going concern. In order to prove this, an authorized officer of the small business must determine that one or more of three circumstances are met:

1. The provision of Paid Sick Leave or Expanded Family Medical Leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employees requesting leaves under FFCRA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employees requesting leaves under FFCRA, and these labor or services are needed for the small business to operate at a minimal capacity.

As of now, the Department of Labor (DOL) has not established any form or procedure to apply for the exemption. Instead, it has requested employers to keep records that evidence their compliance with the criteria for the exemption, but not send any of these materials to the DOL. The DOL expects to issue a regulation, in addition to this guidance, at the beginning of April 2020.

Leaves not available to furloughed employees

The DOL clarified that employers that close their worksites, either before or after the effective date of the FFCRA (April 1, 2020), do not have an obligation to pay the paid sick leave or the expanded FMLA leave provided by the FFCRA. That is, if the employer suspends its employees due to a government mandated quarantine, lack of work or a reduction in business, those employees will not be entitled to the benefits of the FFCRA.

On March 27, 2020, the Puerto Rico Secretary of Labor sent a letter to the US Secretary of Labor requesting the DOL to amend the interpretation in order to cover employees who have not been able to work or telework due to a government mandated quarantine, such as the one imposed in Puerto Rico since March 16, 2020, as opposed to employees whose employers had to close due to a particular reduction of work or of client demand. However, for now, is encouraged that the DOL interpretation (no leave due if closed during quarantine) be followed.

Under the DOL guidance, an employer that starts providing the paid sick leave under the FFCRA on April 1, 2020, but later decides to cease operations or reduce workforce due to the COVID-19 pandemic, must pay any paid sick leave or expanded FMLA leave up to the date in which it ceases operations. As of the date the employer closes the worksite or furloughs employees, such employees will no longer be entitled to the leaves. That is, the employee will not receive the benefits under FFCRA during any period in which the business is closed or the employee is not being paid.

Employees who are still working but whose working hours are reduced are not considered as being unable to work or telework to qualify for the leaves under FFCRA. Therefore, employers who cannot have their employees working on their full schedules do not have to provide leave benefits under the FFCRA to compensate for the hours that their employees are no longer scheduled to work, even if the reduced schedule is related to the COVID-19 pandemic.

However, employees who are required to work their full schedules (in Puerto Rico, employees identified as essential in a business exempted from mandatory quarantine) and are not able to do so due to a COVID-19 pandemic reason contemplated in the FFCRA may take paid sick leave or expanded FMLA leave, as applicable, for the hours the employee is not able to work. In this case, the amount of leave to which the employee is entitled will be computed based on the employee's work schedule before it was reduced.

Tax credits

Employers will receive tax benefits equal to 100 percent of the leaves provided. The employers will be able to retain an amount of the payroll taxes, related to the withholding from their employees' paychecks and the employees' share of Social Security and Medicare taxes, equal to the amount of qualifying sick and FMLA leave that they paid, rather than deposit them with the Internal Revenue Service (IRS). If there are not enough payroll taxes to cover the cost of the leaves paid, employers will be able to file a request for an accelerated payment from the IRS. However, the tax benefits provisions will not become effective until Puerto Rico adopts a plan, with the approval of the US Treasury, on how to implement the distribution of the new credits to its residents.

Temporary non-enforcement

Conscious of the difficulties that the COVID-19 pandemic has caused and the lack of clear guidance on the application of recently enacted legislation, the DOL has established a temporary non-enforcement period, until April 17, 2020, in which the DOL will not file enforcement actions for violations of the FFCRA against employers which are taking reasonable and good faith efforts to comply with the FFCRA's paid leave requirements. The non-enforcement policy will apply if the violation was not willful and the employer commits in writing to comply in the future and remedy any violation, including by paying any leave due to employees as soon as practicable.

Puerto Rico House Bill 2428

House Bill 2428 was approved by both Puerto Rico legislative chambers and sent to the governor for her consideration on March 19, 2020. It has not yet been enacted. It will become effective immediately upon the governor's approval.

The bill requires private employers to provide a five-day paid emergency leave to employees who suffer, or who are suspected to suffer, from COVID-19, if the disease persists after they have exhausted their accrued sick leave and any other accrued leave the employee may have the right to use. The federal FFCRA leaves, if applicable, would have to be exhausted before taking advantage of this leave.

House Bill 2428 would amend Article 6 of Act 180-1998, regulating minimum wage, sick leave and vacation in Puerto Rico, and would also apply in the case of another epidemic disease for which the government declares a state of emergency.

The governor of Puerto Rico declared a state of emergency due to COVID-19 pandemic on March 12, 2020, and, on March 15, 2020, ordered a general lockdown from March 16, 2020 to March 30, 2020, which was extended on March 30, 2020, until April 12, 2020. Only businesses that provide essential services may physically operate during this period; telework is not affected.

It is important to note that, contrary to the federal leave requirements discussed above, the local bill is only available to employees who are sick or may be sick and not to every employee unable to work due to other COVID-19 pandemic related situations. Also, unlike the federal FFCRA leave requirements, the local leave law requires exhausting other accrued leaves in order to benefit from it.

Given that vacation leave should be requested by the employee, the employee would presumably be able to request vacation leave for additional days absent from work after exhausting any applicable FFCRA leaves, their accrued sick leave and the potential emergency leave. The employee who is not working due to illness and who does not have vacation leave after exhausting the other leaves would not have the right to pay under local regulations, but may be eligible to request benefits from the public Non-Occupational Temporary Incapacity Insurance (SINOT). The use of these leaves may not be considered negatively in the employee's performance appraisal.

On March 23, 2020, the Puerto Rico Secretary of Labor issued her second opinion related to the COVID-19 pandemic, Opinion 2020-02. The secretary clarified that non-exempt employees may request time off to be charged to their vacation leave, but employers cannot compel employees to use the vacation leave. However, if the non-exempt employee does not have any available leave to use, the employer is not obligated to provide any compensation if the employee is not performing any work. As to vacation leave, it was also determined that it is discretionary for employers to allow employees to take vacation leave before their probationary period has ended. As to sick leave, it is accrued since the beginning of the employment period and may be used regardless of how long the person has been employed. The secretary encouraged employers to be flexible when granting leaves. She also encouraged employers to continue paying employees' full salaries, even if they are not working, and stated that nothing impedes providing partial payments, payments in advance, special compensations and emergency bonuses, considering the economic condition of the business. Employees affected by temporary closures may request unemployment benefits through the Puerto Rico Labor Department's webpage.

Employers who have employees working from home are encouraged to keep in mind that exempt employees must be paid their full weekly salary if they perform any work during the week, even if the productivity is lower. Meanwhile, non-exempt hourly workers must only be paid for the hours they work. Leaves do not apply while the employee is not sick and is able to work remotely.

If you have any questions regarding these new requirements and their implications, please contact the authors, any member of the DLA Piper Employment group, or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

This information does not, and is not intended to, constitute legal advice. All information, content, and materials are for general informational purposes only. No reader should act, or refrain from acting, with respect to any particular legal matter on the basis of this information without first seeking legal advice from counsel in the relevant jurisdiction.

AUTHORS



Janine Guzman

Partner

San Juan | T: +1 787 945 9101



janine.guzman@dlapiper.com



Mariana Muñoz-Lara

Associate

San Juan | T: +1 787 945 9101

mariana.muniz@dlapiper.com
