

## COVID-19 Help for Small Businesses

April 21, 2020

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### New Department of Labor Guidance on Interaction Between New Leave Laws and Existing Employer Policies

Many employers have asked whether they can require employees to use, or whether employees can elect to use, the employer-provided paid time off accrued pursuant to an employer policy (PTO), versus emergency paid sick leave and/or family medical leave under the Families First Coronavirus Response Act (FFCRA). Yesterday, the Department of Labor (DOL) released new guidance that helps employers (and their lawyers) better determine when they may require employees to use PTO and when they must offer leave pursuant to the FFCRA.

Recall that the FFCRA has two leave components – emergency family medical leave to provide leave to employees with childcare responsibilities and emergency paid sick leave to provide paid sick leave to employees who are sick with COVID-19 or caring for a sick loved one. The key here is to start with the proposition that emergency paid sick leave is meant to be in addition to any form of paid or unpaid leave provided by an employer's existing policy. Employers, therefore, may not require employer-provided paid leave to run concurrently with (cover the same hours as) paid sick leave under the FFCRA. But as the DOL guidance now makes clear, employers and employees can make agreements allowing employees to supplement their paid FFCRA sick leave with accrued PTO.

Emergency family medical leave is somewhat different, depending on which point in time is at issue. During the first two weeks of unpaid emergency family medical leave, employers cannot require employees to take PTO, but the employee may elect to do so or, alternatively, request to use paid sick leave if they qualify.

But in the final ten weeks of unpaid emergency family medical leave, employers can require employees to use emergency family medical leave and PTO concurrently. When this option is exercised, the employer must pay the employee's full pay during the leave until the employee has exhausted available PTO — including vacation or personal leave (typically not sick or medical leave). Additionally, when emergency family medical leave and PTO runs concurrently, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay up to \$200 per day. If the employee exhausts available PTO, but has more emergency family medical leave available, the employee will receive any remaining paid emergency family medical leave up to the normal FFCRA daily and aggregate limits.

How this will work in practice remains to be seen, and the DOL provided no specific examples in the guidance. The new guidance also addresses employees working irregular hours and salaried workers. A link to the DOL guidance is here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

We strongly recommend that employers update their leave policies and forms to reflect this guidance. Contact one of GMH's Coronavirus Task Force attorneys if you need assistance.

GMH's Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer's "Stay Home, Stay Safe" Order, we are working remotely and available to assist you. Please contact any of the below lawyers for more Coronavirus support.

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