



March 23, 2020

*Via Electronic Mail*

Honorable Cheryl Stanton  
Administrator,  
Wage and Hour Division,  
U.S. Department of Labor (DOL)  
200 Constitution Avenue, NW  
Washington, D.C. 20210

RE: Regulations and Guidance on the Families First Coronavirus Response Act (FFCRA)

Dear Ms. Stanton:

The National Automobile Dealers Association (NADA) represents over 16,000 franchised automobile and commercial truck dealers nationwide who sell new and used motor vehicles and engage in service, repair, and parts sales. Together they employ more than 1.1 million people, yet the majority are small businesses as defined by the Small Business Administration.

NADA is very appreciative of the hard work and effort DOL is committing to the expeditious issuance of rules and guidance designed to provide the regulated community with clarity on how the two new FFCRA Emergency Leave Divisions/Acts should be implemented.<sup>1</sup> As DOL has stated, FFCRA is meant to “enable employers to keep their workers on their payrolls, while at the same time ensuring that workers are not forced to choose between their paychecks and the public health measures needed to combat the virus.”<sup>2</sup>

The COVID-19 national emergency is having a devastating impact on dealership customers, on dealership employees, and on dealerships themselves. Nonetheless, dealers are working hard to provide vital vehicle sales and essential vehicle services to those consumers and businesses who need them, while simultaneously taking essential steps to protect dealership employees and their communities. The comments and suggestions below reflect significant input from NADA’s members and their employees, from state and local dealership associations, and from front-line industry advisors including attorneys, accountants, and human resource managers.

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<sup>1</sup> Division C: Emergency Family and Medical Leave Expansion Act and Division E: Emergency Paid Sick Leave Act; Pub. L. No: 116-127 (March 20, 2020).

<sup>2</sup> DOL/U.S. Department of Treasury press release: [www.dol.gov/newsroom/releases/osec/osec20200320](http://www.dol.gov/newsroom/releases/osec/osec20200320), 3/20/20.

**I. To Provide Dealership Employees With The Opportunity to Apply for FFCRA’s Emergency Leave, DOL Should Establish a One-Time Process by Which Employers That Fall Above the Applicable 500-Employee Limits Due to the Family and Medical Leave Act’s (FMLA) “Integrated Employer” Test or the Fair Labor Standard Act’s (FLSA) “Enterprise” Test, May Nonetheless Elect to Be Subject to the New Leave Mandates.**

Certain dealers own and/or operate a few dealerships in several locations. FMLA regulations include an “integrated employer” test for use when determining whether such separate business entities should be considered one employer for purposes of the law’s 50-employee floor. NADA is assuming that DOL will apply the “integrated employer” test<sup>3</sup> for use in determining whether separate business entities constitute a single employer for purposes of the 500-employee limit set out in Division C of FFCRA.<sup>4</sup>

FLSA rules use an “enterprise” test to evaluate whether separate business entities constitute a single employer. The DOL has stated that *[a]lthough the standards are somewhat different, it is our opinion that an employer who meets the “enterprise” test under the Fair Labor Standards Act (FLSA) will ordinarily meet the integrated employer test.*<sup>5</sup> NADA assumes that the DOL will apply the “enterprise test” for use in determining whether separate business entities constitute a single employer for purposes of the 500-employee limit set out in Division E of FFCRA.<sup>6</sup>

By establishing a process by which employers with multiple smaller locations may elect to subject themselves to the new emergency leave mandates, DOL will further FFCRA’s goals by increasing the number of employees who will have the opportunity to request emergency leave. Note: NADA is suggesting *a one-time, irrevocable election that would apply to each of the employer’s business entities at issue (and to the eligible employees of those business entities).*<sup>7</sup>

Example: assume four business entities, each with 150 employees, constituting one employer under application of the “integrated employer” and “enterprise” tests. Together they would exceed the Division C and E 500-employee thresholds. DOL would allow the “employer” to, at its choosing, subject all four entities to the FFCRA emergency leave mandates through a one-time, irrevocable election. Where any one business entity of the employer itself exceeds 500 employees, that entity would not itself fall under the new emergency leave mandates.<sup>8</sup>

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<sup>3</sup> 29 CFR § 825.104(c)(2).

<sup>4</sup> *Employer Threshold: Section 101(4)(A)(i) shall be applied by substituting ‘fewer than 500 employees’ for ‘50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year’.*

<sup>5</sup> 29 CFR § 779.201; Wage and Hour Division: [www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-111.htm](http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-111.htm).

<sup>6</sup> *“Covered Employer” is defined to include “...any person engaged in commerce or in any industry or activity affecting commerce that— (aa) in the case of a private entity or individual, employs more than 500 employees; and (bb) in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees; ....”*

<sup>7</sup>Of course, such irrevocability should be premised on a determination by Treasury as that entities covered by way of election are entitled to the same treatment as any other covered by its applicable reimbursement rules.

<sup>8</sup> In other words, if a hypothetical employer included three business entities, two with 100 employees and one with 600, a one-time election by the employer would only subject the two 100 employee entities to the new mandates.

NADA submits that DOL has both the authority and discretion to allow for the one-time, irrevocable election option outlined above, especially since FFCRA doesn't specify how (if at all) the "integrated employer" test should apply to Division C or how the "enterprise test" should apply to Division E.<sup>9</sup> DOL also has more than sufficient general authority under both the FMLA and the FLSA to appropriately apply its existing regulations to the new statutory mandates.<sup>1011</sup>

## **II. Additional Requests for Clarification**

NADA urges DOL to also provide clarification on the issues outlined below.

### **A. Issues Applicable to both Division C and E of FFCRA**

- Clarify the effective date.
- Clarify retroactivity. The joint DOL/IRS press release stated that "small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees." Clarify the extent to which, if at all, the IRS tax credits apply to paid leave provided prior to the effective date.
- Clarify how businesses with under 50 employees can easily demonstrate that offering leave would jeopardize their business viability. The process for doing so should be streamlined and online. NADA strongly urges DOL to act pursuant to its statutory authority and discretion to issue a blanket 50-employee floor, and to clarify that employers with less than 50-employees may opt into the emergency leave mandates at their discretion using a process similar to that suggested above for larger employers. Importantly, most small businesses with less than 50 employees are totally unfamiliar with the FMLA and its rules. DOL should also clarify how the "integrated employer" and "enterprise" tests would apply to a blanket 50-employee floor.
- Clarify the definition of "employee" by indicating how part-time, furloughed, temporary, or on-call employees should be counted.
- Clarify exactly what documentation of eligibility employers should obtain from employees who request leave emergency leave. Also clarify how long such documentation should be retained. DOL should provide reasonable flexibility with respect to leave request substantiation and recordkeeping.

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<sup>9</sup> See FFCRA Division E § 5111 (3); see also FFCRA, Division C § 3102 (b)(3); 5 U.S.C §§ 553(b)(B) and 553(d)(A).

<sup>10</sup> See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (directing courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.)

<sup>11</sup> See 29 U.S.C. § 2653.

## B. Division C - Emergency Family and Medical Leave Expansion Act

- Clarify whether two parents may ask for leave for the same childcare. Also clarify what information employers must obtain to verify that caregiving parents are unable to work and that they lack care alternatives.

## C. Division E - Emergency Paid Sick Leave

- Clarify whether both parents may invoke paid sick leave under Sec. 5102 (a)(5) and what information must be provided. See bullet under Division C above. Clarify that, at an employee's request, an employer may pay a full-time caretaking employee up to 80 hours of emergency paid sick leave in lieu of the initial 10 days of unpaid emergency FMLA leave permitted by Division C.
- List examples of conditions considered to be "substantially similar" or not within Sec. 5102(a)(6). For example, would a "substantially similar condition" be an employee who was in close contact with a person (e.g. roommate, significant other, coworker) who was "advised by a health care provider to self-quarantine due to COVID-19 concerns?"
- Issue an employee notice poster and clarify how employers should comply with the Sec. 5103 notice requirement, especially where employees are absent from the workplace due to voluntary or mandatory, full or partial, closures.
- With respect to the first category of employees potentially eligible for Division E leave, please provide as much clarity as possible regarding the nature and scope of what is meant by *the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.*

On behalf of NADA, I thank the DOL in advance for its consideration of the above. Please feel free to contact me with any questions or concerns at 703-827-6869 or [dgreenhaus@nada.org](mailto:dgreenhaus@nada.org).

Respectfully,



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Environment, Health and Safety