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CLIENT ALERT

FAMILIES FIRST CORONAVIRUS RESPONSE ACT: DEPARTMENT OF LABOR PUBLISHES TEMPORARY RULE AND FURTHER GUIDANCE

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In a series of publications from the Department of Labor ("DOL"), including fact sheets, questions and answers, and a field staff bulletin, culminating in the issuance of a temporary rule, the DOL has provided much-needed guidance about what employers must do to comply with the Families First Coronavirus Response Act ("FFCRA").

Background about the FFCRA

The FFCRA, which was signed into law on March 18, 2020, provides that employers with fewer than 500 employees must provide two weeks (up to 80 hours) of paid sick leave, at either full pay or two-thirds pay (depending on the reason for leave), and subject to certain caps for employees who are unable to work or telework because they are:

1. subject to a state, federal, or local quarantine or isolation order related to COVID-19;
2. advised by a healthcare provider to self-quarantine;
3. experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. caring for an individual who is subject to a government order or has been advised to self-quarantine by a healthcare provider;
5. caring for a son or daughter whose school or place of care has closed or is unavailable due to COVID-19; or
6. experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The FFCRA also provides for up to 10 additional weeks of leave at two-thirds pay for employees who are unable to work because they need to care for a child whose school or care provider has closed or is unavailable for COVID-19-related reasons.

Upon the passage of the FFCRA in mid-March, employers were left with many unanswered questions regarding exactly how the FFCRA would affect their businesses and what they would have to do to comply with the Act. Through a series of publications and the much-anticipated regulations issued on April 1, 2020 (the effective date of the Act), the DOL has provided answers to many employer questions.

Here is a summary of several key aspects of the DOL's temporary rule and guidance on the FFCRA.

Effective Date and Grace Period for Good Faith Compliance

The FFCRA regulations were released on April 1, 2020 – the same day that the FFCRA became effective – and will continue to be in effect through December 31, 2020.

The short turnaround time between the passage of the FFCRA and its effective date, combined with the late issuance of the DOL's temporary rule, provided no time for employers to familiarize themselves with the details of how they must comply with the Act. For that reason, the DOL also announced that it will provide a 30-day grace period during which it will not enforce penalties against employers for noncompliance, as long as they are attempting to comply with the FFCRA's requirements in "good faith." In its subsequent publication to its field agents, the DOL clarified that the 30-day grace period runs through April 17 (30 days after the FFCRA's signing, rather than its effective date). Employers are considered to be complying in good faith when violations are remedied, the employee is made whole as soon as practicable, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Fewer than 500 Employees

Employers are only covered by the FFCRA if they have fewer than 500 employees. The DOL provides guidance about how employers should count their employees to determine whether they are subject to the FFCRA. For the purpose of determining coverage, "employees" includes all employees within the United States, including employees on leave, temporary employees who are jointly employed by the employer and another employer (regardless of whether the employees are on the employer's payroll), and day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client). Independent contractors are not considered employees for purposes of the 500-employee threshold, and that number also does not include employees who have been laid off and not subsequently rehired.

An employer is expected to count the relevant number of employees as of the date that an employee would take leave. Therefore, it may be that an employer would have to provide paid leave to one employee if the employer has fewer than 500 employees on the date that particular employee takes leave, but would not have to provide paid leave to a second employee if the employer has since exceeded the 500-employee threshold by the time that second employee would take leave.

Finally, the DOL instructs that the FLSA's "joint employer" test (whether separate entities are both considered the employer) and the FMLA's "integrated employer" test (whether affiliated companies count as a single employer) apply when making the determination of how many employees an employer has. Employers that are uncertain as to whether certain employees should be counted toward the 500-employee threshold for coverage under the FFCRA should contact counsel for assistance in making that determination.

Small Business Exemption

One aspect of the FFCRA for which many employers wanted additional clarity was the provision granting discretion to the DOL to exempt certain employers with fewer than 50 employees when compliance would "jeopardize the viability of the business as a going concern." First, the DOL explains that the exception will only apply to paid sick leave or expanded medical leave for employees who are unable to work because they need to care for a child whose school or care facility has closed for COVID-19-related reasons. The small business exemption, therefore, would not apply to any of the other qualifying reasons for which an employee would qualify for paid sick leave under the FFCRA.

Second, the DOL provides additional guidance for how an employer can demonstrate jeopardy to the viability of the business. A small business may claim the exemption if an authorized officer of the business has determined that any of the following apply:

- The provision of paid sick leave or expanded family and 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;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave 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
- 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 employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Clarification on Qualifying Reasons for Paid Leave

The DOL also provides more details about the six requirements for employees to qualify for paid leave, including the following reasons.

Subject to a state, federal, or local quarantine or isolation order – The DOL explains that the determination for when an employee is subject to a state, federal, or local quarantine or isolation order refers to a broad range of governmental orders, including orders advising citizens to shelter in place, stay at home, or otherwise restrict their mobility. However, the FFCRA's sick leave provision does not apply when an employer would not have work for the employee to do even if he or she were not required to comply with the order; for example, when the business for which the employee works has closed. The sick leave provision also does not apply

when an employer permits an employee to telework and there are no extenuating circumstances that would prevent the employee from performing such work.

Advised by a healthcare provider to self-quarantine – The DOL clarifies that a "healthcare provider" is a licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of the FMLA. Further, the employee must be "unable to work" during the time that he or she is self-quarantining at the healthcare provider's direction. Therefore, if the employer permits the employee to telework, the employee would not be eligible for FFCRA sick pay unless there are extenuating circumstances that prevent the employee from teleworking, such as experiencing serious symptoms of COVID-19.

Needs to care for his or her son or daughter whose school or place of care has closed – The employee must be able to perform work "but for" the need to care for his or her child. Therefore, if the employer has no work for an employee to do, that employee would not qualify for paid leave. In addition, the employee may only take paid leave when the employee has to care for, and actually is caring for, his or her child. If another suitable individual is available to provide care, the employee will not qualify. Finally, the DOL explains that for the purposes of the FFCRA, a "son or daughter" includes an employee's biological, adopted, or foster child; stepchild; legal ward; or child for whom the employee is standing in loco parentis – someone with day-to-day responsibilities to care for or financially support a child. A "son or daughter" is also an adult son or daughter (18 years of age or older) who has a mental or physical disability, and is incapable of self-care because of that disability.

Impact of Employer Closures or Furloughs

The FFCRA is not retroactive. Therefore, if an employer closed operations or sent employees home before the date the FFCRA was enacted, whether due to lack of work or to a federal, state, or local directive, those employees are not entitled to leave under the FFCRA. In those cases, the DOL advises that employees seek unemployment benefits.

If an employer closes operations after April 1 due to lack of business or because of a federal, state, or local directive, its employees are not entitled to paid sick leave or expanded family and medical leave under the FFCRA even if they requested leave before the closure. If any employee is already out on qualifying paid sick leave or expanded family and medical leave, the employer must pay for any paid sick leave or expanded family and medical leave that the employee used before the employer closed. Employees are no longer eligible as of the date an employer closes an employee's worksite. Likewise, if an employer remains open but furloughs employees on or after April 1, those furloughed employees are not entitled to paid sick leave or expanded family and medical leave under the FFCRA.

Coordination of Other Forms of Paid Leave

FFCRA paid sick leave is in addition to any other form of employer-paid leave. An employer cannot require an employee to use other employer-provided leave before or concurrently with the paid sick leave provided under the FFCRA. However, if an employer and employee agree, the employee may supplement his or her paid sick leave under the FFCRA with other employer-provided leave so the employee receives his or her full compensation.

With respect to expanded medical leave, the first two weeks of leave are unpaid. Employees may elect to use FFCRA paid sick leave or employer-provided leave for those two weeks. If an employee chooses to use FFCRA paid sick leave for those first two weeks, the employee may also supplement his or her FFCRA paid sick leave with any accrued employer-provided leave (personal leave, vacation, PTO), as long as the employer agrees. For the remaining 10 weeks of expanded family and medical leave, employees may elect and employers may require that employees use leave that would otherwise be available to care for a child (personal leave, vacation, PTO) concurrently with the 12 weeks of allotted expanded family leave.

Extended Family and Medical Leave and the FMLA

The amount of expanded family and medical leave available to an employee under the FFCRA will depend on whether the employee has already used any of his or her normal 12 weeks of FMLA leave for other reasons. If, for example, an employee has already taken FMLA leave during the 12-month period that his or her employer uses to calculate FMLA leave, the employee is only eligible to use the remaining balance of available FMLA leave for qualifying leave under the FFCRA. Likewise, if an employee uses a portion of the allotted 12 weeks

for qualifying expanded family and medical leave under the FFCRA, that time will count against the employee's available FMLA leave balance for the 12-month period. Paid sick leave is not a form of FMLA leave and does not count toward the 12-week FMLA cap unless an employee takes the paid sick leave concurrently with the first two weeks of expanded family and medical leave.

Availability of Intermittent Leave

Depending on the reason for leave and whether the employee is working at an employer's worksite or teleworking, employees may be able to use paid sick leave or expanded family and medical leave intermittently.

When working at employer's worksite – For employees working at their usual worksites, whether they can take intermittent leave will depend on the reason they qualify for paid leave. If an employee qualifies for paid sick leave for any reason other than the need to care for a child whose school or day care has closed, the employee cannot take leave intermittently. Instead, the employee must take paid sick leave in full-day increments until they use the full amount of leave or no longer have a qualifying reason for taking paid sick leave. If, on the other hand, an employee qualifies for paid sick leave due to the need to care for a child whose school or place of care is closed, the employee can take FFCRA paid sick leave intermittently as long as the employer agrees. For example, if an employee only has to be home to care for a child a few days per week, the employee can take those days intermittently and be at work the other days if the employer agrees. The same is true for expanded family and medical leave. The DOL encourages employers and employees to collaborate to achieve maximum flexibility, and expresses its support for such arrangements even if they are in less-than-full-day increments.

When teleworking – The DOL also provides guidance about intermittent leave and teleworking. If an employee is not able to telework during his or her normal scheduled hours because of a qualifying reason for paid leave, the employee may take paid sick leave or expanded family and medical leave intermittently, as long as the employer agrees. The DOL, again, encourages employers to collaborate with employees to achieve a flexible arrangement that combines teleworking with intermittent leave. Under an intermittent telework schedule, an employee may take intermittent leave in any increment, provided that the employee and the employer agree.

Amount of Paid Sick Leave

Employees under the FFCRA are entitled to two weeks (up to 80 hours) of paid sick leave. Full-time employees are those who are normally scheduled to work at least 40 hours per workweek, and they would receive paid sick leave for a two-week period. Any other employee is considered part-time. Part-time employees are entitled to leave for their *average* number of work hours in a two-week period. If a part-time employee's hours typically vary, employers should use the six-month average for that employee to calculate the employee's average daily hours. The employee may take paid sick leave for that average number of daily hours per day for up to a two-week period, as needed. If an employee has not been employed for at least six months, employers should use the number of hours that the employee and employer agreed that the employee would work upon hire, and if there is no such agreement, the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Regular Rate of Pay Calculations

The DOL also provides guidance about how an employee's regular rate of pay is calculated for purposes of the FFCRA. The DOL explains that all compensation, including commissions, tips, and piece rates, should be included in the regular rate calculation, and an employee's regular rate should be based on the average of the regular rate over a period of up to six months before the date that the employee takes leave. If an employee has not worked for the employer for six months, the employee's regular rate of pay will be the average of his or her regular rate for each week worked for the employer. The DOL also provides an alternative method of calculating an employee's regular rate by adding all compensation paid to an employee over the previous six months (or lesser period of time worked) and dividing that amount by all hours worked over that same period of time.

Reinstatement Rights

Employers are generally required to restore employees to the same or equivalent position when they return to work after taking leave under the FFCRA. However, an employee is not protected from employment actions, such as layoffs, that would have otherwise affected the employee, but an employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. Further, certain highly compensated "key" employees (as defined under the FMLA) or employees who work for employers with fewer than 25 employees who take leave to care for a son or daughter whose school or place of care is closed are not entitled to reinstatement if: (1) the employee's position no longer exists due to economic or operating conditions due to COVID-19; (2) the employer made reasonable efforts to restore the employee to the same or an equivalent position; (3) the employer made reasonable efforts to contact the employee if an equivalent position becomes available; and (4) the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the employee's leave began, whichever is earlier.

Documentation for Employer Tax Credits

Under the FFCRA, employers are entitled to tax credits to cover the cost of providing required paid sick leave and expanded family and medical leave. The DOL guidance explains that employers seeking tax credits for employees' paid sick leave will have to "retain appropriate documentation" of the need for leave and are "not required to provide leave if materials sufficient to support the applicable tax credit have not been provided." The DOL does not go into detail about what documentation would be sufficient to support requesting the tax credit. Instead, it refers employers to consulting "Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit."

Posting Requirements

Finally, the DOL has provided sample posters for employers to post in a "conspicuous" location, along with the other required employee notices and posters. For employees who are currently working from home, the DOL advises that an employer can satisfy the posting requirements by emailing or direct-mailing notices to employees or by posting notices on an internal or external employee information website.

ADDITIONAL INFORMATION

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