On March 24 and 25, the U.S. Department of Labor released guidance on the implementation of the Families First Coronavirus Response Act (FFCRA), which we wrote about here when it passed last week.

Among other things, the FFCRA requires covered employers to provide paid sick leave and expanded partially paid family and medical leave to certain employees affected by the coronavirus. The FFCRA's provisions are summarized in the table below and go into effect on April 1, 2020.

The guidance provides further detail concerning various aspects of the new law, including employers’ notice posting obligations and calculations of: (1) number of employees for purposes of determining covered employer status, and (2) employee rates of pay and hours worked for purposes of calculating leave obligations.

**Guidance for Calculating Number of Employees**
The FFCRA requires employers with fewer than 500 full-time and part-time employees to provide paid sick leave and expanded family and medical leave to employees affected by COVID-19 in certain specified ways. The Department of Labor’s guidance provides parameters for employers to calculate number of employees for purposes of FFCRA coverage.

- For purposes of the FFCRA, an employer should measure total number of employees in its employ as of the date a worker requests FFCRA-mandated leave.

- Employees on leave, employees jointly employed with another employer, and day laborers supplied by a temporary agency count toward the 500-employee threshold.

- Independent contractors under the Fair Labor Standards Act do not count toward the 500-employee threshold.

- Employees who are employed outside the United States do not count toward the 500-employee threshold.

- As a general proposition, a single corporation, including its separate establishments or divisions, is considered to be a single employer, and all of its employees are counted towards the 500-employee threshold.

- If two ostensibly separate entities are found to be “joint employers” of a group of employees under the Fair Labor Standards Act, all of their common employees are counted for purposes of determining whether paid leave benefits must be provided under the FFCRA.[1]

- Relatedly, if two or more entities meet the “integrated employer” test under the Family and Medical Leave Act (FMLA), then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the FFCRA.

Guidance for Calculating Hours/Rates of Pay

The Department of Labor’s guidance also provides assistance for calculating the paid leave benefits that must be provided to eligible workers.

- For part-time workers, hours are to be calculated by reference to the average number of hours the worker is typically scheduled in a two-week period. If the hours scheduled for the worker vary significantly, the average number of daily hours worked by the employee over the last six months should be used for calculating hours.

- If an employee has not worked for the employer for six months, the average of the employee’s weekly regular rate of pay is used to calculate paid leave.

- The regular rate of pay calculation should incorporate commissions, tips, or piece rates where those represent a portion of the employee’s income.
Employers are only required to compensate for up to 80 hours of paid sick leave. Where an hourly employee averages more than 40 hours of work per week, the employer is responsible for paying the equivalent of the employee’s hourly average during the first week of leave, then paying the balance (up to 80 hours) during the second week of leave (e.g., where an employee averages 45 hours/week, the employer should pay 45 hours for in week one of leave and 35 hours for week two).

Other Important Pieces of Guidance from the Department of Labor

The Department of Labor’s guidance also provides important information concerning other major provisions of the FFCRA.

- Employees who receive paid sick leave related to COVID-19 before April 1 will not be precluded from receiving the full range of benefits mandated by the FFCRA. The FFCRA’s provisions are not retroactive and any paid sick leave provided before April 1 does not count toward the Act’s requirements.

- Expanded family and medical leave is available to all employees who have worked for their employer for 30 days. For purposes of providing such leave, the employee’s number of days worked should be measured as of the day immediately preceding the requested leave benefits.
  - If an employee was hired through a temporary work agency but was subsequently hired full-time, the temporary work counts toward the 30-day threshold.

- Small businesses with fewer than 50 employees may be exempted from the FFCRA’s requirement to pay leave due to school closure or child care unavailability if the leave requirements would jeopardize the viability of the business. Such businesses should document why they meet criteria set forth by the Department of Labor for an exemption, which will be set out in future regulations.
  - The DOL guidance explicitly states that small businesses seeking such an exemption should not send materials to the agency.

- Employers will receive a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. These qualifying wages include all those paid to an employee with a qualifying reason, up to the appropriate amounts, as well as to amounts paid to maintain health insurance coverage.

- Employers must also post the Department of Labor’s required notice detailing the FFCRA’s benefits and requirements in a conspicuous place on the employers’ premises.

Summary of Covered Employer Obligations to Provide Paid Leave

Here is a summary of covered employer obligations under the FFCRA for employee leave related to COVID-19.
<table>
<thead>
<tr>
<th>Reason for Employee’s Inability to Work or Telework</th>
<th>Duration of Paid Leave</th>
<th>Calculation of Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19</td>
<td>Full-time employee is eligible for 80 hours of leave; part-time employee is eligible for the number of hours of leave the employee works on average over a two-week period</td>
<td>Either employee’s regular rate of pay or the applicable minimum wage, whichever is higher, up to $511/day and $5,110 in the aggregate over the two-week period</td>
</tr>
<tr>
<td>2. Has been advised by a health care provider to self-quarantine related to COVID-19</td>
<td>Full-time employee is eligible for 80 hours of leave; part-time employee is eligible for the number of hours of leave the employee works on average over a two-week period</td>
<td>Either employee’s regular rate of pay or the applicable minimum wage, whichever is higher, up to $511/day and $5,110 in the aggregate over the two-week period</td>
</tr>
<tr>
<td>3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis</td>
<td>Full-time employee is eligible for 80 hours of leave; part-time employee is eligible for the number of hours of leave the employee works on average over a two-week period</td>
<td>Either employee’s regular rate of pay or the applicable minimum wage, whichever is higher, up to $511/day and $5,110 in the aggregate over the two-week period</td>
</tr>
<tr>
<td>4. Is caring for an individual subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine related to COVID-19</td>
<td>Full-time employee is eligible for 80 hours of leave; part-time employee is eligible for the number of hours of leave the employee works on average over a two-week period</td>
<td>$200/day and $2,000 in the aggregate over the two-week period</td>
</tr>
<tr>
<td>5. Is caring for a child whose school or place of care is closed (or child)</td>
<td>Full-time employee is eligible for up to 12 weeks of leave (2 weeks of paid sick leave followed by 10 weeks of paid expanded family &amp; medical leave)</td>
<td>Entitled to 2/3 of their regular rate or 2/3 of applicable minimum wage, whichever is higher, up to</td>
</tr>
<tr>
<td>Care provider is unavailable) for reasons related to COVID-19</td>
<td>40 hours/week; part-time employee is eligible for leave for the number of hours he is normally scheduled to work over that period</td>
<td>$200/day and $12,000 in the aggregate over the 12-week period</td>
</tr>
</tbody>
</table>

| 6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury | Full-time employee is eligible for 80 hours of leave; part-time employee is eligible for the number of hours of leave the employee works on average over a two-week period | 2/3 of employee’s regular rate of pay or 2/3 of applicable minimum wage, whichever is higher, up to $200/day and $2,000 in the aggregate |

We expect additional guidance from the Department of Labor on implementation of the FFCRA in the coming days. Schiff’s Coronavirus Task Force continues to address the significant business, legal, and economic challenges that accompany the COVID-19 pandemic. Stay tuned for additional insights on ongoing COVID-19 pandemic challenges and issues facing businesses.

[1] Joint employer status is a fact-bound analysis under the FLSA, and may be found in either of two scenarios: (1) where one employer entity employs an individual to work, but another entity simultaneously benefits from that work, and both exercise a sufficient degree of control over the employee’s working conditions (including with respect to such matters as hiring, firing, employment terms, discipline, work scheduling, daily supervision, and the like); and (2) where one employer employs an employee for one set of hours in a workweek, and another employs the same individual for a separate set of hours in the same workweek.

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