Monday, March 30, 2020

The Department of Labor has been hard at work issuing FAQs to try to explain the provisions of the Families First Coronavirus Response Act before it goes into effect on April 1, 2020. To see earlier reports on these FAQs, see our blog posts on March 27th and March 28th.

The latest FAQs (we are now up to 59 FAQs from the DOL on this subject), include further details about the planned exception for certain small employers.

Employers should keep in mind that FAQs may be considered by courts as informal guidance but do not have the force of law (or even of regulations, which have not yet been issued by the DOL). As is evident by the manner in which the DOL is currently publishing these, they can also be changed by the DOL without notice. Therefore, to the extent employers rely upon these, before the DOL issues official regulations, they should check to make sure they are reviewing the current version and print a copy of the DOL’s website page containing these FAQs at that time, which may be necessary to establish good faith, if the information later changes.

The FFCRA provides that the DOL can issue regulations exempting small businesses with fewer than 50 employees from certain provisions of the Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion Act, when the imposition of such requirements would jeopardize the viability of the business as a going concern. Based on the law and the FAQs, it appears this exception will only exempt certain small employers from the paid sick leave and expanded FMLA when the reason it is needed is due to a school or child care closure. Even if an employer qualifies for this exception, they still must provide up to 80 hours of paid sick leave for employees to use for the other reasons under the new Emergency Paid Sick Leave Act, including when an employee is unable to work or telework due to a need for leave because: (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL’s recent FAQs provide some guidance as to what criteria a small employer must meet in order to qualify for the exemption. In particular, in order to qualify, the business must be less than 50 employees, the leave needed must be due to a school or child care closure or the unavailability of a child care provider due to COVID19, and an authorized officer of the business must determine that one of the following apply:

1. 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;
2. 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

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 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.

Below are the specific FAQs from the DOL addressing these issues:

58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- 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.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

1. employer employs fewer than 50 employees;

2. leave is requested because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and

3. an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Jackson Lewis P.C. © 2020

Source URL: https://www.natlawreview.com/article/dol-s-faqs-provide-more-details-about-small-employer-exception-under-ffcra