COVID-19: FFCRA Answers Trickle in From the DOL

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With updated and amended information on the Families First Coronavirus Response Act (FFCRA) coming from the Department of Labor (DOL) nearly every other day, many (but not all) of our most burning questions are slowly being answered:

**Effective date:** The FFCRA goes into effect on April 1, 2020 not April 2, as previously expected.

**Small business exemption:** If you have fewer than 50 employees, and providing paid sick leave and expanded family and medical leave would jeopardize the viability of your business as a going concern, you should document why you meet the criteria for an exemption (soon to be spelled out more completely in regulations) but not provide any materials to the Department of Labor at this time.

**Retroactivity:** Paid sick leave and expanded family and medical leave are not retroactive. If you have been paying employees on leave before April 1 as a gesture of goodwill, and those employees become eligible for paid sick leave on April 1, you will nonetheless be required to offer the statutory benefits, unless there is no work available for the employee in the office or through telework.

**Documentation:** In order to take a tax credit, you will need to obtain and retain
appropriate documentation of the reasons for employees’ leave. The IRS will be publishing forms, instructions, and information about how to claim a tax credit, along with instructions about providing any required substantiation. You may require employees to provide you with appropriate documentation as required in the IRS forms, and you need not provide leave if they fail to provide materials sufficient to support the applicable tax credit.

Inability to work vs. lack of work: In a series of questions and answers, the DOL explains that paid sick leave and expanded family and medical leave are available only to employees who are unable to work (including telework) and for whom the employer would otherwise have work available. When an employer closes the worksite and does not have telework available to employees, or when an employer furloughs employees due to lack of work, there is no work available to the employees and therefore no need for or entitlement to leave. In these situations, affected employees will likely be eligible for unemployment benefits. The same is true if the employer closes the worksite (and does not have telework available) or institutes furloughs or layoffs that impact employees who are already out on paid sick or expanded family and medical leave. Once there is no work available for a given employee, he or she will not be eligible for paid sick leave or expanded family and medical leave.

Intermittent leave: The DOL’s recent guidance makes clear that paid sick leave and expanded family and medical leave may be taken intermittently in certain circumstances if the employer and employee agree. An employee who is working in the workplace (as opposed to teleworking) cannot take leave intermittently if they require leave because they are subject to an isolation order, have been advised by a health care provider to self-quarantine, or are caring for an individual who is subject to a government or health care provider-recommended self-quarantine. If an employee requires leave because of lack of child care or if the employee is able to telework, however, the employer may permit intermittent leave.

Supplementation of FFCRA leave with other paid benefit: Employers may permit, but may not require, employees to supplement the pay required under the FFCRA with any paid leave they might have under a paid leave policy.

Impact of prior use of FMLA leave on total leave entitlement under FFCRA: Employees are entitled to paid sick leave, regardless of whether they have previously exhausted all FMLA available to them (e.g. due to a serious health condition). However, FMLA leave taken during the previous 12-month period that the employer uses for FMLA leave will reduce the leave available to an employee under the expanded family and medical leave provisions. Please note that this creates an interesting inconsistency between newly hired employees who were not previously eligible for FMLA and tenured employees who have used FMLA in the past 12 months. An employee hired 45 days ago will be eligible for the full 12 weeks of expanded family and medical leave between April 1 and December 31, 2020, while a veteran employee who used four weeks of leave earlier this year for the birth of a child, for example, will only be entitled to eight weeks of leave during this same period of time.

Definition of Health Care Provider for purposes of ascertaining employees that may be excluded from paid sick leave and/or expanded family and
medical leave: Under the DOL’s most recent guidance, the definition of a health care provider who can be excluded from the FFCRA is substantially broader than a health care provider who can certify an individual’s serious health condition, or whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave. The types of providers who can certify an employee’s need for leave are limited to licensed doctors of medicine, nurse practitioners, and other health care providers permitted to issue certifications under the FMLA’s regulations.

In contrast, health care providers who may be excluded from paid sick leave and/or expanded medical leave include “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.” (Emphasis supplied). While this definition is exceptionally broad, the DOL has urged employers to be “judicious” when using this definition to minimize the spread of the virus associated with COVID-19. Employers should strongly consider providing this leave to health care providers they want to encourage to stay home because, for example, they are exhibiting symptoms or have had close contact with someone known to have the virus.

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