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US DOL PUBLISHES REVISED GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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This weekend, the Department of Labor ("DOL") released a revised and updated set of Questions and Answers ("Q&A") regarding the Families First Coronavirus Response Act ("FFCRA"). As we've summarized in earlier posts, the FFCRA was signed into law on March 18, 2020 and generally requires U.S. employers with fewer than 500 employees to provide paid sick leave ("Paid Sick Leave") and emergency family and medical leave ("Emergency FMLA Leave") benefits to employees in connection with COVID-19.

Notably, the new guidance includes a revision to the guidance that was just issued last Thursday, March 26, regarding what documentation employers must collect from employees requesting leave under the FFCRA. Our summary of the DOL's initial guidance is available here, but please note that in light of the DOL's updated guidance, employers should rely on this post's summary of documentation requirements. The new guidance does not explicitly outline what documentation employers must collect. Instead, it notes that if employers want to seek a tax credit for the Paid Sick Leave or Emergency FMLA Leave, they should "retain appropriate documentation." The DOL then refers employers to consult with "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."

In addition to this revision, the updated guidance includes a number of questions and answers regarding new and key topics. Below are details from the updated Q&A for employers to consider as they prepare to comply with the FFCRA.

- **Health Care Providers and Emergency Responders**: Employers are permitted to exclude "health care providers" and "emergency responders" from the right to take both Paid Sick Leave and Paid Emergency FMLA Leave, and furthermore are permitted to make such exclusion decisions on a case-by-case basis. Although the updated Q&A broadly defines these terms as set forth below, the DOL encourages employers to be "judicious" when using these broad definitions to

exempt employees from FFCRA leave, in order to minimize the spread of the virus associated with COVID-19:

- "Health Care Providers" include:[1]
  - **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 (whether the entity is permanent or temporary);
  - any individual employed by an entity that contracts with any of the above to provide services or to maintain the operation of the facility;
  - anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and
  - any individual that the highest official of a state or territory determines is a health care provider necessary for that state's or territory's response to COVID-19.

- "Emergency Responders" include any employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19, as well as any individual that the highest official of a state or territory determines is an emergency responder necessary for that state's or territory's response to COVID-19.

- **Small Business Exception:** The updated Q&A finally clarifies the circumstances that will exempt employers with fewer than 50 employees (including religious and other non-profit organizations) from complying with certain of the FFCRA's paid leave provisions. Notably, this exemption appears to apply only to Emergency FMLA Leave and Paid Sick Leave relating to an employee being unable to work due to caring for a son or daughter due to school or place of childcare closures or child care provider unavailability for COVID-19 related reasons. Specifically, this limited exemption will apply when compliance would jeopardize the viability of the small business as a going concern, based on a determination by an authorized officer of the small business that one of the following applies:
  - The provision of Paid Sick Leave or Emergency FMLA 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 Emergency FMLA 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 Emergency FMLA Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

As previously stated by the DOL, small businesses should document the bases for the determination that this exception applies, but should not send such documentation to the DOL.

- **Calculating the 500 Employee Threshold**: The updated Q&A confirms that the traditional FMLA requirement of meeting the employee threshold for "for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar" in order to be a covered employer does not apply to determining coverage under the FFCRA. Instead, employers should use the number of employees on the day the employee's leave would start to determine whether the employer has fewer than 500 employees. **Importantly, this means that whether a particular employer is a "covered employer" under the FFCRA could change over the course of 2020.** For example, if an entity which has more than 500 employees as of April 1 undergoes workforce reductions in the coming months that reduce its employee count to below 500, the entity would then become covered by the FFCRA.

- **Leave Related to "Child" Care**: With respect to the FFCRA's childcare provisions relating to school/childcare closures, the Paid Sick Leave and Paid Emergency Leave provision do not consistently refer to the term "child" or the phrase "son or daughter" and do not consistently indicate whether the child must be "under age 18." The DOL's guidance, however, uses the phrase "son or daughter" with respect to the childcare provisions of both Paid Sick Leave and Emergency FMLA Leave, and defines "son or daughter" to mean the employee's own child (including biological, adopted, or foster children), stepchild, a legal ward, or a child for whom the employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. Regarding age, while the text of the FFCRA suggests that Emergency FMLA Leave is only available when an employee's child is under age 18, the new guidance suggests that for both Paid Sick Leave and Emergency FMLA Leave relating to school/childcare closures, such leave is also available for employees caring for a son or daughter who is 18 years of age or older, if the son or daughter (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

- **Job Protections**: The new guidance indicates that both Paid Sick Leave and Emergency FMLA Leave must be "job protected leave," such that employees generally have a right to return to the

same or a substantially equivalent job when their leave concludes. The guidance identifies three exceptions to this general rule:

  - Employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took Paid Sick Leave or Emergency FMLA Leave (e.g., an employee who is on one of these types of leaves may be laid off for legitimate business reasons, such as the closure of their worksite, and thereby not be entitled to job restoration).
  - Employees who are highly compensated "key" employees, as that term is defined under the FMLA, are not entitled to job restoration.
  - With respect to Emergency FMLA Leave only, a special exception to job protection applies for employers with fewer than 25 employees.

- **Amount of FMLA (Traditional and Emergency FMLA) Leave**: The updated Q&A confirms that Emergency FMLA Leave is simply a new (and temporary) category of FMLA leave and will be subject to the familiar restriction that an employee is entitled to take only twelve (12) workweeks of FMLA leave (for all qualifying reasons combined) (or 26 workweeks of Military Caregiver leave) in the applicable 12-month period as defined by the employer's FMLA policy.
- **Full-Time vs. Part-Time Employees**: For purposes of Paid Sick Leave, a full-time employee is anyone who normally works 40 or more hours per week and a part-time employee is anyone who normally works fewer than 40 hours per week.
- **Protecting Employees' Rights**: The DOL expressly encourages employees to discuss any concerns about their employer's application of the FFCRA directly with the employer. The DOL then goes on to note that such concerns may be raised directly to the DOL, and that certain employees may be able to file a lawsuit against the employer without going directly to the DOL.

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[1] For purposes of determining whether a particular healthcare professional is qualified to advise an employee to self-quarantine for purposes of the "Quarantine Recommendation" qualifying reason for Paid Sick Leave, the new Q&A provides a different definition, indicating that "health care provider" means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

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MEET THE TEAM

Lily J. Kurland

Washington

lily.kurland@bclplaw.com
+1 202 508 6106

Christy E. Phanthavong

Chicago

christy.phanthavong@bclplaw.com
+1 312 602 5185
