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U.S. COVID-19: DOL PUBLISHES TEMPORARY RULES ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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Over the past two weeks, the Department of Labor ("DOL") has issued a variety of informal guidance regarding the Families First Coronavirus Response Act ("FFCRA"). The FFCRA became effective on April 1, 2020, and on that same day, the DOL published a set of temporary rules interpreting the law (the "Rules"), which are effective immediately. 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.

Our summaries of the DOL's informal guidance are available here, here, here, here, and here. Below is a summary of new or revised information outlined in the Rules (that was not previously summarized in our earlier posts) that employers should consider as they begin complying with the FFCRA.

- Covered Employers:
  - *500-Employee Threshold*: The Rules confirm that the following individuals do not count toward the 500-employee threshold:
    - Independent contractors who provide services for an employer; and
    - Employees who have been laid off or furloughed and have not subsequently been reemployed.[1]
      - In light of this rule, employers who are above but relatively close to the 500-Employee Threshold should realize that, going forward over the course of 2020, layoffs and/or furloughs could bring them under the threshold and thus require compliance with the FFCRA.

- *Small Business Exception*: According to the Rules, employers should apply this exception on an individual employee basis. In other words, an employer should only deny applicable Paid Sick Leave and/or Emergency FMLA Leave to a specific employee, if such employee's absence (and/or payment of wages to such employee) would cause the employer to jeopardize the viability of the business as a going concern. In addition, the Rules require small business to document the applicability of the exception and to retain these records for four years.

- Eligible Employees:

  - *Emergency FMLA Leave for Rehired Employees*: The Rules confirm that pursuant to an amendment in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), an employee who is terminated and rehired will qualify for Emergency FMLA Leave if the employee:

    - Was terminated on or after March 1, 2020;
    - Was employed for at least 30 of the last 60 calendar days prior to termination; and
    - Is subsequently rehired by the same employer prior to December 31, 2020.

  - *Health Care Providers and Emergency Responders*: Although an employer may exclude health care providers and emergency responders from coverage under the FFCRA, the Rules confirm that such exclusion does not impact these employees' ability to take other forms of paid leave (either under the employer's policy or under other state or federal law).

- Employee Must be Unable to Work (On-Site or Telework) to be Entitled to Paid Sick Leave and/or Emergency FMLA Leave:

  - *COVID-19 Qualifying Reason Must be "But For" Cause of an Employees' Inability to Work*: The Rules confirm that an employee is only entitled to Paid Sick Leave and/or Emergency FMLA Leave if "but for" the qualifying COVID-19 related reason, the employee would have been able to work or telework. As such, if an employer closes its business, reduces an employee's hours, or otherwise furloughs an employee due to a lack of work (even if such lack of work is due to a government closure order), the employee is not entitled to Paid Sick Leave and/or Emergency FMLA Leave.

  - *Special Considerations for Employees who Telework*:

- For purposes of the FFCRA, an employee can "telework" if:
  - The employer has work for the employee to perform;
  - The employer permits the employee to perform that work from the location where the employee resides or is being quarantined or isolated; and
  - There are no extenuating circumstances that prevent the employee from performing that work.

- Non-exempt employees who telework still need to record and be compensated for all hours worked, including overtime hours. If a non-exempt employee does not accurately record his or her time, the employer does not need to provide compensation for unreported hours unless it knew or should have known about such time.
- Regulations regarding compensable worktime under 29 CFR 790.6 do not apply to employees who telework in connection with COVID-19. As such, if an employer permits an employee to telework a flexible schedule, the employer does not need to compensate the employee for all hours between his or her first work activity and last work activity. Instead, only those hours during which the employee performs work must be compensated.

- Qualified Reasons for Paid Sick Leave: The Rules confirm the following six reasons qualify for Paid Sick Leave under the FFCRA:
  - *Employee is Subject to a Federal, State, or Local Quarantine or Isolation Order ("Quarantine Order")*: The Rules broadly define "quarantine or isolation order" to include all governmental orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. Again, however, if the order is not the "but for" cause of the employee's inability to work or telework, the employee is not entitled to Paid Sick Leave.
  - *Employee is Advised by a Healthcare Professional to Self-Isolate ("Quarantine Recommendation")*: The Rules make clear that the advice to self-isolate must be based on a health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. And again, if the advice is not the "but for" cause of the employee's inability to work or telework, the employee is not entitled to Paid Sick Leave.
  - *Employee is Experiencing Symptoms of COVID-19 and is Seeking a Medical Diagnosis*:
    - Symptoms of COVID-19 include a fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.

- Paid Sick Leave is only available during the time the employee is taking affirmative steps to obtain a medical diagnosis.
  - If the employee is eligible to (and can) telework, this generally means that Paid Sick Leave is not available during the time during which an employee is waiting for test results.
  - If the employee is not eligible to telework, this generally means that Paid Sick Leave is available during the time during which an employee is waiting for test results.
  - If the employee does not meet the criteria to be tested for COVID-19, Paid Sick Leave is not available for this qualifying reason, but may be available under the second Qualifying Reason if the employee is advised to self-isolate.
- If the employee continues to have symptoms of COVID-19 after seeking care and a diagnosis and is unable to telework, the employee may continue to use Paid Sick Leave.
- If an employee tests positive for COVID-19, but is asymptomatic, the employee may continue to use Paid Sick Leave if a healthcare provider recommends that the employee self-quarantine and the employee is unable to telework.

- *Employee is Caring for an Individual Subject to a Quarantine Order or Quarantine Recommendation*: The Rules confirm that in order for an employee to be entitled to Paid Sick Leave under these circumstances:
  - The individual for whom the employee is caring must qualify for the Quarantine Order or Quarantine Recommendation leave as described above.
  - The individual must have a genuine need for care from the employee.
  - The individual for whom the employee is caring must be:
    - An immediate family member,
    - A roommate, or
    - A similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

- *Employee is Caring for his or her Son or Daughter Because the Child's School or Childcare Provider is Closed or Unavailable ("Childcare"):*
  - For consistency's sake, the Rules make clear that the need for (and use of) Childcare Paid Sick Leave will generally be interpreted consistently with the need for (and use of) Emergency FMLA Leave.
  - Similarly, Childcare Paid Sick Leave and Emergency FMLA Leave is available not only with respect to child under age 18, but also for a child over age 18 who is incapable of self-care because of a mental or physical disability. The DOL has adopted this interpretation despite the reference in the FFCRA to a child being under age 18, based on a desire to be consistent with the definition of son or daughter under the FMLA.
  - Notably, neither Childcare Paid Sick Leave nor Emergency FMLA Leave is available if someone other than the employee can care for the child.

- *Employee is Experiencing a Substantially Similar Condition*: The Rules confirm that a "substantially similar condition" will be determined by the Secretary of the Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor. However, no additional information on this point is provided in the Rules, except to note that such determination may be made any time between now and December 31, 2020.

- Qualified Reason for Emergency FMLA Leave: As noted above, for consistency's sake, the Rules make clear that the need for (and use of) Childcare Paid Sick Leave will generally be interpreted consistently with the need for (and use of) Emergency FMLA Leave. Notably, neither Childcare Paid Sick Leave nor Emergency FMLA Leave is available if someone other than the employee can care for the child.
  - Despite the above clarification, the DOL has not yet addressed the issue of the amount of Emergency FMLA Leave available to spouses who work for the same employer. Until further guidance is received, the recommended course of action is to permit both spouses to use the full amount of Emergency FMLA leave (rather than a reduced, "combined" amount), so long as the other requirements for taking such leave are met (e.g, no one else is available to care for the son or daughter at the time a particular employee uses leave).

- Documentation Employees Must Submit When Requesting Paid Sick Leave and/or Emergency FMLA Leave:
  - The Rules generally align with guidance that the Internal Revenue Service recently published on this topic; provided, however, that the Rules permit employees to submit both oral and

written statements outlining the employee's need for leave. If an oral statement is submitted, employers are instructed to document the oral statement for tax credit purposes.

- The Rules also confirm that employees should be given an opportunity to cure any failure to provide sufficient notice of or documentation supporting a need for leave before the employer denies the request.

- Paid Leave:
  - *Regular Rate:* The Rules confirm that wages for both Paid Sick Leave and the paid portion of Emergency FMLA Leave are calculated based on an employee's "regular rate" (either the full amount or 2/3 of that amount, capped as necessary under the FFCRA). The Rules also confirm that the FLSA's rules regarding the calculation of an employee's regular rate apply to the FFCRA.
  - *Exempt Employees*: The Rules confirm that wages paid under the FFCRA, including leave for which the employee is paid at 2/3 the employee's regular rate, will not impact an employee's exempt classification under the FLSA.
  - *Amount of Paid Sick Leave for Part-Time Employees with Varying Schedule*: The Rules provide for a complex formula when determining the amount of Paid Sick Leave available to part-time employees with varying schedules. The formula is fact-specific, so employers should consult the Rules directly when determining the amount of Paid Sick Leave available to such an employee.

- Intermittent Paid Sick Leave and/or Emergency FMLA Leave:
  - *Availability of Intermittent Leave:* The Rules generally confirm the DOL's earlier guidance on when intermittent leave is available, including when such leave is available for employees who telework versus employees who work on-site.
  - *Agreement on the Terms of Intermittent Leave*: Provided that the FFCRA permits the requested leave to be taken intermittently, both the employee and the employer must agree on the scope of the intermittent leave, including the dates/times of intermittent leave and whether intermittent leave will be used for all applicable available Paid Sick Leave and/or Emergency FMLA Leave. This agreement, however, does not need to be in writing, so long as both parties clearly understand the terms of the agreement.

- Special Rule for Paid Sick Leave:

- *Paid Sick Leave Benefits When Changing Positions or Employers:* The Rules confirm that employees are only entitled to a maximum of 80 hours of Paid Sick Leave. This means that:

  - If an employee transfers internally to a new position with the same employer, the employee is not entitled to any more or less Paid Sick Leave following the transfer.
  - If an employee exhausts all of his or her available Paid Sick Leave prior to changing employers, the new employer is not required to provide the employee with any additional Paid Sick Leave, even if the new employer is a covered employer under the FFCRA.
  - If an employee does not exhaust all of his or her available Paid Sick Leave prior to changing employers, the new employer is required to provide the employee only with his or her remaining balance of Paid Sick Leave, and only if the new employer is a covered employer under the FFCRA.

- *Paid Leave Offered Prior to April 1, 2020:* The Rules confirm that Paid Sick Leave is in addition to any other paid leave that employers offered to employees before April 1, 2020, including other COVID-19 related leave. As such, employers are generally prohibited from taking such other forms of leave away from employees, except if:

  - The additional leave was offered in response to COVID-19 prior to April 1, 2020;
  - The employer has not yet updated its policies to incorporate the additional COVID-19-related leave; and
  - The change in leave is made prospectively, such that it only impacts leave that employees have not yet taken.

- Special Rules for Using Emergency FMLA Leave:

  - *Use of Emergency FMLA with Other Applicable Paid Leave*: Unfortunately, the Rules leave it unclear whether employers may require use of available paid leave to supplement (and run concurrently with) the partial pay for Emergency FMLA Leave. Contradictory provisions regarding such use appear in the Rules, so additional guidance is required from the DOL.
  - *Notable Interactions Between Traditional FMLA Leave and Emergency FMLA Leave*:

    - Definitions - Unless the FFRCA or the Rules specifically state otherwise, all traditional FMLA definitions generally apply to Emergency FMLA Leave. For example:

- Eligible Employees - Because the definition of "eligible employee" differs under traditional FMLA leave and Emergency FMLA Leave, an employer may have employees who are only eligible for Emergency FMLA Leave and not traditional FMLA leave (and vice versa, such as if an employer excludes health care providers or emergency responders from taking Emergency FMLA Leave).
- Covered Employers - Because of the definition of "covered employer" differs under traditional FMLA leave and Emergency FMLA Leave, an employer may only have to provide Emergency FMLA Leave and not traditional FMLA leave (and vice versa, such as if an employer has more than 500 employees).

- Total FMLA Leave Available (Traditional or Emergency FMLA Leave) - The Rules confirm that eligible employees are still only entitled to a total of up to 12 weeks of leave (for all qualifying reasons combined) in the employer's applicable 12-month period (except for Military Caregiver leave). Notably, if the FFCRA's period of enforceability (i.e. April 1, 2020 through December 31, 2020) spans two of the employer's applicable 12 month periods, employees are still only entitled to a maximum of 12 weeks of Emergency FMLA Leave.
- Notice Obligations - Unlike with traditional FMLA, employers do not need to (but they may choose to) provide employees requesting Emergency FMLA Leave with notice of their eligibility or rights and responsibilities under the FFCRA (beyond the notice that must be posted for all employees).

- Job-Protected Leave: The Rules confirm that both Paid Sick Leave and Emergency FMLA Leave are generally job-protected leaves of absences. As such, the Rules confirm that exceptions to this general rule apply for layoffs or terminations that would have otherwise occurred absent the employee's Paid Sick Leave and/or Emergency FMLA Leave and employment actions against certain key employees.
  - *Limited Exception for Employers with Fewer than 25 Employees*: The Rules also provide additional details as to when an exception to the job restoration requirement applies for very small employers. This exception applies if all of the following are true:
    - The employer has fewer than 25 employees;
    - The employee is returning from Childcare Paid Sick Leave and/or Emergency FMLA Leave;
    - The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19

related reasons) during the period of the employee's leave;

- The employer made reasonable efforts to restore the employee to the same or an equivalent position; and
- If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html

[1] Under traditional notions of a "furlough," an employee's employment is not terminated. Instead, the employee's hours of work are reduced or eliminated. As such, there is never a need to rehire such an employee. Given the Rules' reference to a "furloughed" employee being someone who has not "subsequently been reemployed," it is not clear from the guidance whether such a traditionally furloughed employee would qualify as an "employee on leave" (and thus be included in the employer's 500-employee threshold) or as a "furloughed employee who has not been rehired" (and thus not included in the employer's 500-employee threshold).

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