Department of Labor Issues New Guidance On Families First Coronavirus Response Act

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On Saturday, the Department of Labor published additional guidance on the two emergency leaves available under the Families First Coronavirus Response Act (FFCRA).

(We reported on the provisions of this new law in our initial report here.) The new guidance clarifies a range of questions about how the new law will apply when it goes into effect on April 1, including when leave is available; when employees and businesses can be exempted from the requirements; how the leave interacts with existing sick leaves under employer policies and state laws; and application of the employer tax credit for paid leave.

Definition of "Unable to Work" and COVID-19 Related Closures

The new guidance makes clear that employers who have shuttered their operations in response to government orders closing non-essential businesses will not need to pay out leave benefits. An employee can take sick leave or emergency family and medical leave only when they are unable to work or telework due to one of the six qualifying reasons listed. As the guidance notes, for an employee to be "unable to work," the employer must have work available for them to perform. There is no work to be performed when an employer is closed because it is a non-essential business and is ordered to shut down, so employees who are out of work in those circumstances would not be eligible for paid leave. Similarly, if an essential employer stays open but furloughs or lays off part of its workforce – whether due to business conditions or government closure orders – those employees would not be able to use leave under the law.

The DOL guidance also clarifies that if an employer closes or conducts layoffs while an employee is on leave, it is not obligated to provide paid leave from the date of the closure or layoff. Of course, employers must pay employees for any leave that they had used but that had not been paid out at the time of closure or layoff. Employers also cannot retaliate against employees for taking leave, so employers should take care to make sure that any partial layoffs or furloughs are done in a non-discriminatory manner.

Intermittent Leave

According to the new guidance, intermittent leave will be available under the FFCRA only in two circumstances. First, both paid sick leave and emergency family and medical leave will be available on an intermittent basis when leave is needed due to a school or child care closure and the employer and the employee both agree to intermittent leave. Second, paid sick leave for any other reason can be taken on an intermittent basis if the employee is teleworking and the employer agrees to permit intermittent leave. However, if an employee is still working on site, he or she cannot take intermittent leave. Instead, they must use their leave consecutively until they either run out of leave or no longer have a qualifying reason for leave (for instance, their quarantine period ends). This requirement ensures that sick or potentially infected employees stay out of the workplace and avoid infecting others.

Exemptions

Individual Employees – Health Care Providers and Emergency Responders

The new guidance clarifies both the exemptions for "Health Care Providers" and "Emergency Responders." The FFCRA uses the term "Health Care Providers" in two ways: first, to define who can certify the need for leave, and second, to define which employees an employer can choose to exempt from the leave provisions. The FFCRA incorporates the FMLA's definition of Health Care Providers, which is restricted to employees who are capable of providing a diagnosis or comparable assessment sufficient to justify the need for

leave. This definition was too restrictive to serve the purpose of the health care provider exemption, however, so the Department of Labor expanded the definition of "Health Care Provider" for purposes of the exemption only to include essentially all employees of medical or health care businesses, testing laboratories, pharmacies, producers and manufacturers of drugs, vaccines, or other COVID-19 related treatments, and other such businesses and organizations. This change does not change the definition of "Health Care Provider" for purposes of certifying the need for leave, however..

The guidance also clarifies the definition of "Emergency Responders" to include military, national guard, law enforcement, hospital and medical personnel (including nurses), 911 operators, and other such first-line employees. Under the guidance, state authorities may also define additional categories of employees to be "Emergency Responders" and "Health Care Providers" that employers can exempt from coverage.

Small Business Exemption

The new guidance establishes three circumstances in which employers with fewer than 50 employees can claim an exemption to providing leaves under the FFCRA due to hardship:

> (1) if providing leave would make operating expenses larger than revenues and "cause the small business to cease operating at a minimal capacity";
>
> (2) if the employee or employees absence would significantly risk the financial stability or continued operations of business because of the employee's specialized skill, knowledge, or responsibilities; and
>
> (3) if, after providing leave, there are not enough other workers to perform work needed to keep business operating at a minimal capacity.

If any of these three situations apply, the employer can claim an exemption from providing leave. The employer does not need to apply to the DOL to obtain this exemption but may take it immediately. However, the DOL recommends keeping thorough records of the need for the exemption when it is taken.

Interaction Between Emergency Leave and Other Paid Time Off

The Act clarifies that emergency family and medical leave must count against an employee's net leave under the Family and Medical Leave Act (FMLA). This is because the emergency leave is a subset of regular FMLA leave that happens to be paid. Accordingly, if an employee uses 12 weeks of emergency FMLA leave in a 12 month period, they will not be eligible to use any more FMLA leave for another purpose (such as a serious health condition) until the 12 months have passed. Likewise, if an employee has already used some or all of their FMLA leave in the last 12 months, their emergency leave will be reduced accordingly.

Other leaves can only overlap if the employer and employer agree to have them run concurrently. Thus, any existing sick leave, vacation pay, or other paid time off (including, for example, state paid family and medical leave) must be available in addition to the paid leaves under this new law. Employers cannot force employees to exhaust their existing sick leave before using emergency leave. They can, but do not have to, offer employees the option of using existing sick leave to "top up" the emergency benefits (which, in some cases, only provide 2/3 of an employee's regular pay).

Health Insurance

The guidance confirms that employers must continue to provide health insurance benefits to employees on leave on the same terms and conditions as when they were regularly working. This requirement applies to the emergency sick leave as well as emergency family and medical leave. Thus, employers will need to continue paying their portion of the employee's health insurance premium while they are on leave. Employers will also need to follow the same rules for any "waiting period" as they would if the employee were still working.

Tax Credit

The guidance also clarifies that employers will not be able to claim a tax credit for providing benefits that are in addition to what the FFCRA requires. Thus, if an employer pays an employee their full pay – instead of the two-thirds required – during emergency family and medical leave, they will only be able to claim a tax credit for two-thirds of the employee's pay.

This guidance provides some much needed clarity as employers are preparing to implement the new paid leaves starting April 1, 2020. Hopefully now employers can have much more certainty as they move forward in responding to this crisis. And if employers are looking

for greater clarity under the law, the DOL appears to be listening to employer questions and is likely to provide additional guidance in response to those questions.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Page or contact your Foley Hoag attorney.

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