Department of Labor Issues New Regulations Interpreting FFCRA

Written by Erin Olesen, Christopher Feudo, Jonathan A. Keselenko

April 2, 2020

On Wednesday, April 1, 2020, the U.S. Department of Labor (DOL) issued new formal regulations interpreting the Families First Coronavirus Response Act. Those regulations largely formalized the informal guidance the DOL has provided online in a question-and-answer format (our alerts on this guidance can be found here), but also addressed several issues for the first time.

Availability of Telework

First, the regulations define the terms and conditions governing "telework," and when an employee is able to "telework" and thus does not need a leave of absence. As expected, "telework" is treated equivalent to on-site work, and time teleworked must be paid the same as time worked on-site. However, unlike with on-site work, non-exempt employees who are teleworking under the Act do not need to be paid for all time between the start of work and the end of work under the traditional "continuous workday rule". This permits flexibility where an employee is unable to telework on the same schedule that he or she works on-site. For instance, where a non-exempt employee could work two-hour intervals across the day trading off with his or her spouse to cover child care duties, the employer would only need to pay for the hours actually worked rather than the fourteen hours between the start and end of the work day. This does not apply to teleworking situations that are not due to COVID-19 or offered as an alternative to leave, nor does it apply to exempt employees, who, with limited exceptions, must be paid the same weekly salary each week in order to continue qualifying for the exemption.

The regulations also clarify that an employee who would normally be able to telework instead of taking leave, but who no longer can due to "extenuating circumstances" such as a power outage, would then become eligible for leave because they could no longer telework.

Documentation to Support Leave

The regulations provide additional clarity on the specific documentation employees must provide employers to validly request leave. As to any type of leave under the Act, the employee must provide their name, the dates of the request, the qualifying reason for leave, and a statement that they cannot work because of the qualifying reason. Additionally, for specific types of leave, employees must provide additional information as follows:

- For leave because the employee or someone they are caring for is subject to a government quarantine or isolation order, the employee must provide the name of the government entity issuing the order.
- For leave because a healthcare provider has recommended that the employee or someone they are caring for self-isolate, the employee must provide the name of the health care provider.
- For leave due to a school or child care closure, the employee must provide the name of the child, the name of the school or care provider, and a statement that there is no other suitable person available to provide care.

Once an employee has submitted a request for leave, employers are not obligated to provide notice under the Family and Medical Leave Act (FMLA) if they are not otherwise covered by the FMLA and do not have established policies and practices for administering their FMLA obligations.

Interaction between Act and COVID-19 Related Employer Policies

The regulations clarify how other voluntary COVID-19 related leave programs interact with the Act. Per the regulations, such policies that were voluntarily issued before April 1, 2020 would qualify as an "existing employer policy" under the Act. Accordingly, employers

would need to provide any paid leave under the Act in addition to leave provided under such policies. In line with this interpretation, the regulations also note that leave under the Act cannot be applied retroactively to time off taken before April 1.

Enforcement Mechanisms

Finally, the regulations address enforcement of the Act and consequences for failing to provide leave. Although generally the enforcement mechanisms under the Act are the same as under the Fair Labor Standards Act (FLSA) and FMLA – both the DOL and the affected individuals can bring claims, and workers can file a complaint with the DOL – employees cannot file a private lawsuit against employers who were not previously covered by the FMLA. The regulations also reaffirm that, through April 18, 2020 the DOL will not seek enforcement against employers that make a good faith attempt to comply with the new law. In the event that either the DOL or a worker brings suit against an employer, the regulations establish that the remedy for any denied sick leave will be the federal minimum wage for each hour denied, plus the same amount in liquidated damages.

In light of the new guidance provided by the DOL's regulations, employers should review their policies now to make sure they are in compliance.

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.

RELATED INDUSTRIES

- Life Sciences
- Professional Services
- Technology
- Energy & Cleantech
- Healthcare

RELATED PRACTICES

- Labor & Employment
- COVID-19 Task Force
- Business Counseling
- Emerging Company and Venture Capital
- Public Companies
- Litigation
