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DOL Issues Frequently Asked Questions for Employers on the Families First Coronavirus Response Act

Employers should be aware that the Department of Labor (DOL) has been issuing guidance with regard to the Families First Coronavirus Response Act (FFCRA) through its website.

There are two sets of Frequently Asked Questions (FAQs) that employers should note. The first set deals with requirements of the poster and posting of the notice, which may be found here.

The second set of guidance is a more general set of questions and answers with regard to the implementation and interpretation of the FFCRA. Those questions can be found here.

Although there is a lot of substantial information on both FAQ sites, employers should particularly note the following:

With regard to the poster/posting FAQs:

- The poster must be displayed in a conspicuous place on the premises. For employees who are no longer coming on site, this can be accomplished by posting on an employer's internal or external website or alternatively, emailing or direct mailing the notice.
- The poster must be posted by **April 1, 2020.**
- The poster does not need to be shared with laid-off individuals.
- Private sector employers with 500 or more employees do not need to post the poster.

Posters may be found here.

Related Practices

CARES Act Relief
COVID-19 Resource Center
Labor & Employment Relations
Labor-Management Relations

With regard to general guidance on the FFCRA, the DOL's FAQs include the following information, among other topics:

- **500 Employee Threshold:** The 500 employee threshold varies depending upon whether the employer is trying to comply with the Emergency Paid Sick Leave law (EPSL) or the Expanded Family and Medical Leave law (FMLA-X).
    - A private sector employer will have to comply with the FFCRA if, at the time the employee's leave is taken, the employer employs fewer than 500 full-time and part-time individuals within the United States, D.C. or any territory or possession of the U.S.
    - To make the determination, employers should include employees on leave, temporary employees who are jointly employed by the employer and another employer and day laborers. Independent contractors are not counted for this purpose.
    - EPSL and FMLA-X both look at whether an employer is a joint employer in determining total employees. Joint employers may be unrelated employers that are considered to both be the employer of an employee because of the degree of control over with a particular shared employee. When this occurs the shared employee(s) is counted as being in each employer's workforce. Joint employment status for purposes of these leave rights will be determined under the DOL's Fair Labor Standards Act rules. This is a departure from the normal FMLA rules, which contain their own joint employer analysis. Although it is a case-by-case analysis, the FLSA standard looks at the ability of the joint employer to directly or indirectly do the following with respect to the joint employee:
    - hire or fire the employee;
    - supervise and control the employee's work schedule or conditions of employment to a substantial degree;
    - determine the employee's rate and method of payment; and
    - maintain the employee's employment records.
- EPSL and FMLA-X also will look at whether related employers are integrated employers.[1] For this purpose, the FMLA's integrated employer standard applies. Although it is a case-by-case analysis, the FMLA standard looks at:
    - common management;
    - interrelation between operations;
    - centralized control of labor relations; and
    - the degree of common ownership or financial control.
- **Small Business Exemption**. The FAQ explains how the DOL is thinking about the small business exemption from FFCRA compliance. For employers with fewer than 50 employees

where compliance would jeopardize the business's viability as a going concern, the DOL will expect to see the following:

- An authorized officer of the business determining one or more of the following:
  - providing EPSL or FMLA-X 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;
  - Absence of the employee or employees requesting EPSL or FMLA-X would entail a substantial risk to financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, responsibility; or
  - There are not sufficient workers who are able, willing and qualified, and will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting EPSL or FMLA-X, and these labor or services are needed for the small business to operate at a minimal capacity.
- At the moment, the DOL requests that any business attempting to make an argument that the business has fewer than 50 employees and compliance with the law would jeopardize the business's viability as a going concern should document why the business (1) has fewer than 50 employees; and (2) meets the criteria which is to be set forth by the DOL at a later date. **The DOL currently is not requiring employers seeking this exemption to submit anything to the DOL. The DOL indicates that it will issue further regulations on this subject.**

- **Hour Counting for Part-Time Employees.** For a part-time employee (considered to be someone regularly scheduled under 40 hours per week), overtime hours must be included when factoring in how much time the employee would have worked on average over a two-week period if the individual is generally "a part-time employee" or a variable hour employee.
- **No Retroactive Credit for Leave Provided Before April 1, 2020.** Leave rights begin on April 1, 2020 under this law. Consequently, leave provided prior to April 1 cannot be retroactively designated as satisfying these two leave rights.
- **Tax Credit.** Employers who intend to claim a tax credit under the FFCRA for payments made to employees under the law, should retain appropriate documentation in their records of compliance with the law. Such documentation may include notice of closure or unavailability from a children's school or place of care, notice published in a newspaper, or information provided from a medical provider.
- **Changed Schedules.** Eligibility requires the employees to be unable to work, including telework, for a COVID-19 related reason. If the employee and the employer agree that the employee can work the normal amount of hours, but outside the normally scheduled hours, then the employee was able to work and leave is not necessary.

- **Child Definition.** Although the FFCRA provides that the leave to care for a child who is out of school or childcare applies only to a child under 18, the DOL is interpreting the definition of child to conform to the FMLA's definition of a child. Therefore, such leave could be used for a child over the age of 18 where the child is incapable of self-care. Employers dealing with this issue should consult with counsel as other definitions, such as the definition of a school, may still confuse this issue.

- **Intermittent Leave.** Employers may agree to permit leave on an intermittent basis. An employer is not required to agree to this. If agreed to, employees who are not teleworking must take leave in full day increments.

- **Furloughed, Laid-Off, or Terminated Employees.** Leave is not available to individuals who have been furloughed, laid off or terminated.

- **Healthcare Provider and Emergency Responder Exemptions**. The updated FAQs contain a significantly broader definition of health care provider than what is contained in the FMLA and provides for a clearer definition of emergency responder. The expanded definition includes not only direct providers of health-related care services, but also entities that contract with such health care providers and/or produce medical products or COVID-19 related medical equipment. Employers seeking to utilize the exemption should consult with counsel.

These FAQs have changed three times since the initial set was issued. Consequently, employers should regularly check whether or not the DOL has revised prior guidance or added to this list. As always, for any questions associated with the list and our particular circumstances, please contact your Michael Best attorney

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[1] Note that this is a slight but significant change from prior guidance the DOL provided, in which they indicated that the integrated employer test would only be applied to FMLA-X. It now appears they intend to apply it to both types of leave.

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