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Department of Labor Issues FFCRA Regulations: 20 Need-to-Know Provisions for Employers

Service

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Department of Labor (DOL) regulations issued on April 1, 2020, interpreted the Families First Coronavirus Response Act (FFCRA) and clarified several questions that the text of the law raised concerning employers' duties to provide paid sick and family leave for reasons related to the COVID-19 pandemic. As expected, the FFCRA regulations left some questions unanswered and raised new issues. Below, we highlight the 20 points that employers should be aware of.

Definitions

1. **Quarantine or isolation order.** As many feared, the DOL broadly defined "a quarantine or isolation order" to include the numerous shelter-in-place or stay-at-home orders that are now in effect, covering nearly every square mile of our country. As a counterweight to the definition, however, the regulations repeatedly make clear that an employee subject to a stay-at-home order is not entitled to leave unless the employer "has work" for them and that, "but for" the stay-at-home order, the employee cannot perform the work, including via telework. *See* 29 CFR § 826.10(a) and #9 below.

2. **"Vulnerable" populations.** While merely being afraid or concerned to go to work because of COVID-19 would not be a sufficient basis for leave, the DOL acknowledges that some state and local orders specify a category of citizens that must shelter in place or stay at home (e.g., due to age or medical condition). See §826.10(a) (definition of "Subject to a Quarantine or Isolation Order"). Where an employee's health condition is the basis for claiming he/she is covered by a stay at home order, it seems employers may ask about the condition to assess eligibility. More obviously, an employee whose healthcare

provider advises he/she stay home due to vulnerability to COVID-19 would demonstrate a COVID-19 related reason. See 29 CFR § 826.20(a)(3).

3. **Healthcare provider/emergency responder.** As laid out in the FFCRA text, "health care providers" and "emergency responders" may be excluded from FFCRA benefits. *See* FFCRA §§ 3105 and 5102(a).

   The regulations broadly defined "health care provider" to include "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." Further, any individual employed by an entity that contracts with any of the aforementioned institutions may be excluded from FFCRA benefits. *See* 29 CFR § 826.30(c)(1).

   Similarly, "emergency responders" are anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or others needed for the response to COVID-19.

   While the regulations seem to suggest employers have discretion when utilizing the exception, they are cautioned to be "judicious" in excluding employees from FFCRA coverage.

4. **Place of care**. In evident recognition that nationwide pandemic precautions may extend into summer, a "place of care" can include summer camps, summer enrichment programs and respite care programs.

5. **"Substantially similar condition."** The DOL did not define a "substantially similar condition" such that there is still no eligibility created under the sixth "catch-all" basis for FFCRA leave.

Employers covered

6. **Aggregation rules.** The regulations clarified that "fewer than 500 employees" includes all full-time and part-time employees, employees on leave, employees of temporary agencies who are jointly employed by the agency and the employer, and day laborers supplied by a temporary agency. If the company is a "joint" or "integrated" employer, the employees of all entities are counted together. They also clarified that independent contractors do not count, nor do employees on layoff or furlough who have not returned to work. *See* 29 CFR § 826.40. Insofar

as the regulations did not define "furlough" it is unclear whether it includes employees not working but receiving pay.

7. **Business viability exception for small employers.** An employer with fewer than 50 employees may obtain an exemption from providing expanded Family and Medical Leave Expansion Act (FMLA) (herein, Emergency Family and Medical Leave Expansion Act [EFMLEA], which, as a reminder, covers only leave for a school/childcare provider/place-of-care closure) leave to an employee if the employer demonstrates that providing such leave would jeopardize the viability of the business as a going concern. *See* 29 CFR § 826.40(b). The employer should create and retain (but not send to the DOL) documentation supporting the employer's reasons for denying leave which could include that allowing leave would cause the business to cease operating at a minimal capacity, or that the employer would not be able to find a substitute worker to enable it to continue to operate at a minimal capacity.

8. **Private right of action.** Employees do not have a private right of action against employers under the EFMLEA, except if the employer is already subject to the FMLA (i.e., generally speaking, employers with 50 or more employees). *See* 29 CFR § 826.151(b). An employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage under the Fair Labor Standards Act (FLSA). *See* 29 CFR § 826.150(b).

Eligibility requirements

9. **"No work" requirement.** Employees are only entitled to paid sick leave or EFMLEA if "but for" their COVID-19 related reason, they would be able to work. Thus, the employee's inability to work must be connected to one of the six reasons for leave under the FFCRA. If there are other reasons for which the employee cannot work or telework, such as the employee's position was eliminated, or the employer's business closed whether due to a governmental order or the economic downturn, the employee is not entitled to leave. Simply put, if there would otherwise be no work for the employee to do, the employee is not eligible for leave.

10. **No retroactive coverage.** There is no retroactive coverage for paid sick or EFMLEA leave taken before April 1, 2020. Employers that voluntarily offered and provided leave to their employee before April 1, 2020 must still provide leave under the FFCRA to which employees are eligible. As long as an employer had not already amended its leave policy to reflect the voluntary offering, it may stop paying for leave under its voluntary offering and transition the eligible employees to FFCRA coverage. An employer must pay employees for leave already taken under the voluntary offering before it is terminated, but the employer need not continue the offering in light of the FFCRA taking effect.

11. **No job-hopping.** If an employee takes paid sick leave at one employer and then goes to work for a new employer, she/he cannot take leave again.

12. **12-week limitation.** No employee is entitled to more than 12 weeks of leave in a FMLA year. Thus, an employee who has already taken some FMLA leave in the current 12-month period will have their eligible extended family and medical leave reduced by that amount. If an employee has exhausted their 12 weeks of leave, they are still eligible for paid sick leave for a qualifying reason.

13. **30-day employment requirement clarified.** EFMLEA requires that an employee be employed for at least 30 calendar days. The regulations added that if an employee is laid off and subsequently rehired by the same employer, the employee may be immediately eligible for EFMLEA leave if he/she was employed for 30 or more of the 60 calendar days prior to the layoff.

14. **"Son or daughter" over 14 and under 18 years.** The FFCRA adopted the FMLA definition of "son or daughter" which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*. It also includes children either under 18 years of age or 18 years of age or older who are incapable of self-care because of a mental or physical disability.

    As for children over 14, prior to the regulations, the IRS had issued guidance stating that an employee requesting leave to care for a child over the age of 14 for a school/place of care closure must certify that "special circumstances" exist requiring care of the child. The regulations failed to mention the "special circumstances" limitation for children over 14; however, the "Recordkeeping" section (§ 826.140) instructs employers to comply with the IRS FAQ document, which contains the "special circumstances" requirement, in order to claim the tax credit.

15. **No other caretaker available**. When seeking leave to care for a child, employees must certify that no other "suitable" caretaker is available, such as a co-parent, co-guardian or the usual childcare provider.

The above provisions are detailed in 29 CFR § 826.60.

Intermittent leave

16. **Limited to teleworkers**. For an employee whose job can be performed via telework, intermittent leave is permitted if both the employee and the employer agree on the increments of time in which leave may be taken. Written agreements are not required. If the employee is

reporting to a worksite, however, intermittent leave is not permitted if the leave is to care for the employee's or another individual's COVID-19 illness or symptoms. Once an employee begins taking paid sick leave for these reasons, he/she remains on leave in full-day increments until the qualifying reason no longer exists or the full amount of leave is completed. *See* 29 CFR § 826.50.

Concurrent use of multiple forms of leave

17. **Clarification needed.** If it wasn't already, the regulations made clear that emergency paid sick time and EFMLEA under FFCRA are designed to be taken concurrently. That is, paid sick leave provides pay for the first two weeks of leave during which time EFMLEA leave is unpaid. EFMLEA pay kicks in in the third week of leave.

    What is less clear is how and whether employers and employees can agree to supplement an employee's pay with employer-provided leave, for instance, to cover the one-third pay that an employee is not receiving under EFMLEA. Certain parts of the regulations seem to suggest that an agreement between employer/employee is necessary, while other language suggest the employee should have the option to choose to supplement or not.

Documentation requirements

18. **No documents, no credit.** Employers must request and retain for four years detailed documentation and/or certification in support of leave, including such information as:

    a. the employee's name
    b. the date(s) for which leave is requested
    c. the COVID-19 qualifying reason for leave
    d. a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason
    e. name of the government entity that issued the quarantine or order or the name of the health care provider who advised them or the individual they are caring for to self-quarantine

    For leave to care for a child whose place of care is closed:

    f. the names and ages of the children that require care
    g. the name of the school, place of care or childcare provider that is unavailable
    h. a statement representing that no other suitable person is available to care for the child during the period of requested leave
    i. an explanation of "special circumstances" requiring the employee to care for a child over 14

years of age during daylight hours

The employer must for four years keep the above documentation and documents reflecting the determination of the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave. *See* 29 CFR §§ 826.140 and 826.100. Otherwise, the IRS may deny the associated tax credits. Employers should not delay in becoming acquainted with IRS Form 7200 and instructions and related IRS guidance.

Restoration rights

19. **Layoff exception.** Generally, when leave is concluded, the employee has the right to return to his or her old job or to an equivalent one; however, if the employer conducts a layoff that would have included the employee on leave, the employer can deny restoration. *See* 29 CFR § 826.130.

20. **Small employers.** Employers who have less than 25 employees can deny restoration to an employee who was on leave to care for a child, if the employee's position was eliminated due to the public health emergency, reasonable efforts to place the employee in the same or equivalent position failed, and the employer continues to makes reasonable efforts to contact the employee if an equivalent position opens up during one year after leave ended.

Contact us

If you have questions about the FFCRA regulations, contact Stacey Bowman, Kate Leveque, Hillary Klein, Courtney Steelman, Sarah Quinn or your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.