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COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS
MARCH 30 UPDATE – UPDATE #9

THE U.S. DEPARTMENT OF LABOR ISSUES UPDATED GUIDANCE TO THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020, and is effective April 1, 2020.

Typically, when Congress passes an employment-related law, the Department of Labor (DOL) would issue regulations that implement the law. That is likely to occur, but because that takes time, the DOL has been publishing (and updating) its guidance for employers on its website in the form of Questions and Answers.

On March 27 the DOL published Answers to Questions 1 – 37, and on March 28, published its Questions and Answers 38 - 59. Importantly, the DOL also revised some of its earlier Answers to Questions.

Given the evolving developments, and sometimes changing guidance from the DOL, we encourage all employers to review the DOL guidance page for updated detailed Answers:

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

Some of the most significant questions answered by the DOL guidance include:

When does an employer calculate to determine if it has fewer than 500 employees?

The new guidance clarifies that the FFCRA applies to employers with fewer than 500 employees at the time the employee's leave is to be taken. This requires an employer to calculate how many employees it will have on a future date. It also requires employers to monitor that number; employers who have 500 or more employees on April 1 but who drop below 500 before the law expires on December 31, 2020, will become subject to the FFCRA's provisions. (DOL Question #2). So it is a moving target, and not a static calculation.

If employees have been let go because of a lack of work due to COVID-19, are they still entitled to paid sick leave or expanded family leave under the FFCRA?

The DOL has said that if an employer:

- closed a worksite before April 1,
- closes a worksite after April 1, or
- closes a worksite after April with an intention to re-open it at a future date,

then the employee is **NOT** entitled to paid sick leave or expanded family leave under the FFCRA. According to the DOL guidance, "This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive." (Questions 23, 24, and 27).

If an employer remains open but furloughs an employee or reduces an employee's hours because the employer does not have enough work, those employees are NOT entitled to paid sick leave or expanded family leave under the FFCRA. (Questions 26 and 28).

If an employer closes a worksite while an employee is on paid sick leave or expanded family and medical leave, the employer must pay the employee on such leave for leave used before the employer closed. As of the date of the worksite closure, the employee is no longer entitled to paid sick leave or expanded family and medical leave. (Question 25).

The DOL notes that employees who are let go or furloughed or had their hours reduced as discussed above may be eligible for unemployment insurance benefits. Information regarding Minnesota's expanded unemployment insurance benefits under Governor Walz' Executive Order 20-05 can be found here:

https://www.uimn.org/applicants/needtoknow/news-updates/covid-19.jsp.

https://mn.gov/deed/newscenter/covid/employers/employer-faqs/.

While the FFCRA remains important and many employers must comply with it, its scope and applicability is likely less broad than what many originally assumed. The DOL guidance interprets the law as providing more exceptions and exemptions than might appear at first glance. Rather than placing the primary burden on employers to provide paid leave to employees, the DOL guidance makes clear that the federal government instead focused on bolstering the existing unemployment compensation structure that the states administer.

What does it mean for an employee "to be unable to work, including telework, for COVID-19 related reasons?"

The DOL says an employee is unable to work if the employer has work for him or her and one of the FFCRA qualifying reasons prevents the employee from being able to perform that work, either at the normal worksite or by means of telework. The DOL added this clarification:

> If you and your employer agree that you will work your normal number of hours, but outside of your normally scheduled hours (for instance early in the morning or late at night), then you are able to work and leave is not necessary unless a COVID-19 qualifying reason prevents you from working that schedule. (Question 18).

So, *if* an employer permits teleworking and an employee is unable to perform the tasks permitted by teleworking because of one of the qualifying reasons for paid sick leave under the FFCRA, then the employee is entitled to take paid sick leave.

Similarly, *if* an employer permits teleworking and an employee is unable to perform the tasks permitted by teleworking because the employee needs to care for a child whose school or day care site has been closed, then the employee is entitled to take expanded family and medical leave. The DOL notes "to the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available."(Question 19).

Can FFCRA leave be taken intermittently?

Yes, but the employer has control over whether to allow it. And the answers depend on whether the employee is teleworking or working at their usual worksite. In general, the DOL encourages employers and employees to work collaboratively to "achieve flexibility and meet mutual needs."

The DOL says that intermittent leave *while teleworking* is allowed if one of the qualifying reasons are met, the employer allows it, and in an increment agreeable to both. (Question 20).

Intermittent expanded family and medical leave *while working at the employee's usual worksite* is allowed only with the employer's permission. (Question 22).

For intermittent paid sick leave *while working at the employee's usual worksite*, the leave must be taken in full day increments if it is being taken because of reasons 1-4 and 6 (the employee subject to an isolation order; the employee has been advised to self-quarantine; the employee is experiencing COVID-19 symptoms and seeking a diagnosis; the employee is caring for an individual subject to an isolation order or who has been advised to self-quarantine; or the employee is experiencing symptoms similar to COVID-19). Once an employee begins taking paid sick leave for one of these reasons, the employee must continue to take paid sick leave each day until the full amount of paid sick leave is used or the employee no longer has a qualifying reason for taking paid sick leave. This limit is imposed because if someone is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the virus from spreading to others.

If an employee no longer has a qualifying reason for taking paid sick leave before the employee exhausts their paid sick leave, they may take any remaining paid sick leave at a later time,

until December 31, 2020, if another qualifying reason were to occur.

For intermittent sick leave *while working at the employee's usual worksite* for reason #5 (to care for the employee's child whose school or child care site is closed due to COVID-19), such leave can be taken only if the employer agrees. (Question 21).

How does leave under the FFCRA interact with other leave provided by employers?

The DOL encourages flexibility regarding how leave under the FFCRA interacts with other, existing leave. The DOL affirmed that employers must provide employees who qualify for both the new paid sick leave and expanded family and medical leave benefits in addition to whatever benefits the employer currently offers.

The DOL also affirmed that employees cannot "double dip" and get paid for leave under their employer's existing leave policies for the same hours, except that an employer may agree to allow its employees to use pre-existing leave to get the additional 1/3 of normal earnings in addition to the 2/3 pay provided by the FFCRA for paid sick leave reason #5 and expanded family and medical leave. (Question 31).

What documentation will be required for leave under the FFCRA?

This remains a work in progress.

In its Questions and Answers provided on March 27, the DOL provided very specific guidance regarding documentation required for FFCRA leave. That guidance surprisingly seemed strict and suggested that employers and employees must have detailed documentation.

The DOL changed its answers in the guidance it published on March 28. The latest guidance says that employers who wish to seek reimbursement of the costs of providing leave "should retain appropriate documentation in your records" and it suggests that employers consult IRS applicable forms, instructions, and information. As of the date of this guidance, the IRS had not published any such forms, instructions, or information. (Questions 15 and 16).

Our best current recommendation is that employers should require employees to provide reasonable documentation under the circumstances, and to consider provisionally granting the FFCRA benefits depending on the qualifying reasons. An employee unable to work because of an actual diagnosis of COVID-19 or who has been advised by a health care provider to self-quarantine, should probably be treated differently than employees caring for their child whose school or place of care is closed. The DOL has separately issued a Field Assistance Bulletin making clear that no enforcement actions will be taken for at least 30 days against employers who act in good faith in trying to implement the FFCRA.

Are there any exceptions regarding which employees must be provided with paid sick leave or expanded family and medical leave under the FFCRA.

Yes. The FFCRA says that any covered employer may exclude "health care providers" and "emergency responders." The DOL has finally provided some guidance, which suggests that employers have some discretion in concluding which employees might be exempt from the new obligations employers have to provide leave benefits under the FFCRA.

The March 28 DOL guidance defines health care provider for this purpose[1] broadly as:

> *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, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
>
> This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The DOL added:

> To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA. (Question 56).

The DOL defined "emergency responder" as:

> an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters,

[1] The DOL guidance states that the definition of "health care provider" for purposes of who may advise an employee or family member to self-quarantine and/or from whom an employee may seek a medical diagnosis, is the definition under the existing FMLA. (Question 55).

> emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19. an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The DOL similarly suggested that, in order to minimize the spread of COVID-19, employers be "judicious" when using this definition to exempt emergency responders. (Question 57).

What about smaller employers, those with fewer than 50 employees? Do any exceptions apply to them regarding the new leave obligations?

The FFCRA also says that small businesses - defined as fewer than 50 employees - are exempt from providing paid sick leave for reason #5 (to care for the employee's child whose school or child care site is closed due to COVID-19) to employees or providing expanded family and medical leave ***if*** providing either leave would jeopardize the viability of the business.

The March 28 DOL guidance provided criteria for determining whether a small business is exempt; a business is exempt if an "authorized officer of the business" determines that:

1. The provision of paid sick leave or expanded family and medical leave 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or

operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

(Questions 58 and 59).

Helpful Links

The DOL Fact Sheet for employers can be found here:

https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave.

The DOL Fact Sheet for employees can be found here:

https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave.

The DOL Questions and Answers can be found here:

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

The required posting regarding the FFCRA can be found here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

Our employment team is ready to assist you with any questions you may have about an employer's obligation arising under the FFCRA, ADA, FMLA, or other laws.

GENERAL REMINDERS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend monitoring of credible information sources such as the:

Centers for Disease Control
https://www.cdc.gov/coronavirus/2019-ncov/index.html

Minnesota Department of Health
https://www.health.state.mn.us/diseases/coronavirus/index.html

OTHER EMPLOYMENT GUIDANCE AND CONCERNS

For related guidance and questions about other employment topics related to COVID-19, please see Lind, Jensen, Sullivan, & Peterson's earlier updates and guidance:

http://www.lindjensen.com/category/covid-19/

WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind, Jensen, Sullivan & Peterson's separate guidance:

http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind, Jensen, Sullivan & Peterson by email or phone (612) 333-3637.

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