APRIL 1, 2020

DOL Releases Additional FFCRA Guidance Clarifying Common Areas of Concern (Part 3)

Ahead of the Families First Coronavirus Response Act (FFCRA) effective date of April 1, 2020, the DOL continues to release guidance on its interpretation of the law. In Part Two of this series of articles (availabe at: https://www.boardmanclark.com/publications/hr-heads-up/dol-releases-additional-ffcra-guidance-clarifying-common-areas-of-concern-part-2) we provided an overview on the DOL's FAQ responses in questions #15-37.

The full list of DOL FAQs on the FFCRA may be found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

In Part Three of this series of articles, we outline the topics contained in FAQs #38-59. As we have previously advised, the DOL appears to be continually updating these FAQs with new information and without advance notice. The following is a description of the DOL's FAQs as they appear on March 31, 2020. Because the DOL's FAQ responses are subject to change, employers seeking the latest guidance on the FFCRA should consult with their attorney to ensure they are reviewing the latest and most accurate DOL guidance.

The primary topics covered in questions #38-59 are:

- Definition of "son or daughter"
- Definition of "health care provider" who can issue an order to quarantine
- Reporting FFCRA violations
- Right to return to work after FFCRA leave
- FFCRA's Interaction with the "regular" FMLA
- Exemption for health care providers and emergency responders
- Small business hardship exemption

DEFINITION OF "SON OR DAUGHTER"

An employee is eligible for FFCRA leave if he/she is caring for the employee's son or daughter if the "school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions." In question #40, the DOL defines "son or daughter" for purposes of the FFCRA. "Son or daughter" means the employee's own child, including a biological, adopted, foster, stepchild, legal ward, or a child for whom the employee is standing in loco parentis (someone who has day-to-day responsibilities to care for or support a child).

For example, a grandparent who is raising a grandchild as his/her own child on a day-to-day basis would likely qualify for FFCRA leave if the grandparent is unable to work or telework because of the need to care for the grandchild due to school closure and childcare unavailability. Additionally, the DOL interprets "son or daughter" to mean an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability.

DEFINITION OF "HEALTH CARE PROVIDER" WHO CAN ISSUE AN ORDER TO QUARANTINE

In question #55, the guidance defines "health care provider" for purposes of establishing whose orders to quarantine trigger FFCRA leave. As used to determine whether advice to quarantine triggers an employee's eligibility for FFCRA emergency paid leave, "health care provider" means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

REPORTING FFCRA VIOLATIONS

Questions #41 and 42 address employees' options for reporting FFCRA violations. The DOL encourages employees to first report alleged improper refusals of FFCRA leave to their employer to resolve their concerns. However, the DOL advises employees that if their covered employer improperly refuses to provide FFCRA leave, they may report potential violations to the DOL's Wage and Hour Division (WHD) and file a complaint with the WHD.

Employees may also file a lawsuit against their employer in court without first filing a complaint with the WHD.

JOB RESTORATION AFTER FFCRA LEAVE

Question #43 addresses job restoration following FFCRA leave. The DOL states that "in most instances," employees are entitled to be restored to the same or equivalent position upon return from FFCRA leave. Employers are prohibited from firing, disciplining, or otherwise retaliating or discriminating against employees for taking FFCRA leave.

Employees are not protected, however, from employment actions that affect employees regardless of whether they took FFCRA leave. For example, if the employer implements large scale temporary or permanent layoffs or closes the worksite due to legitimate business reasons, employees are not entitled to job restoration if they were part of the layoff or worksite closure. Therefore, employers may generally still take the business actions, such as layoffs, they would have taken regardless of whether an employee has taken or is currently on FFCRA leave.

Highly compensated "key" employees (as defined under the FMLA) are not entitled to job restoration. It is not clear from the guidance whether under the FFCRA an employer must notify these "key" employees in writing upon receipt of notice of their need for leave that they are "key" employees and that the employer will not restore them to their previous position upon completion of their FMLA leave. Such notice to "key" employees is required under "regular" FMLA leave.

Additionally, employers with fewer than 25 employees can refuse to return an employee to work if the employee takes FFCRA expanded FMLA leave to care for a son or daughter whose school or place of care are closed if all of the following hardship conditions exist:

- The employee's position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the employee's leave;
- The employer made reasonable efforts to restore the employee to the same or an equivalent position;
- The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and

- The employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is earlier.

This guidance clarifies that the "reasonable efforts to contact the employee" requirement only applies to employers who are relying on the exception for employers with fewer than 25 employees. Other employers who might lay off employees due to legitimate business reasons are not subject to this one-year contact requirement. However, employers with 25 or more employees are subject to all the other job restoration requirements.

TIME USED ON "REGULAR" FMLA COUNTS AGAINST FFCRA LEAVE

Questions #44 and 45 address the intersection of "regular" FMLA and FFCRA leave. If an employer is covered under the "regular" FMLA (which requires the employer to have 50 or more employees) prior to April 1, 2020, an employee's eligibility for expanded FMLA leave under the FFCRA depends on how much leave the employee has already taken under the "regular" FMLA.

Employees may only use a total of 12 workweeks for both "regular" FMLA and expanded FMLA under the FFCRA leave during a 12-month period, which is determined by the 12-month period the employer uses for their regular FMLA period. Any time the employee has already taken for regular FMLA leave in the employer's FMLA period will count against how much time the employee is entitled to for expanded FMLA leave under the FFCRA. If an employee has already used all of their available weeks on regular FMLA, the employee is not eligible for expanded FMLA leave under the FFCRA.

For example, an employee takes regular FMLA leave in January 2020 for two weeks. The employee therefore only has 10 weeks remaining in the employer's FMLA period to use for both regular and expanded FMLA under the FFCRA. If the employee uses the remainder of the 10 weeks to take expanded FMLA under the FFCRA, the employee has then exhausted the FMLA leave entitlement for the employer's FMLA period and may not take any further time under either the regular or expanded FMLA. There may be circumstances where Wisconsin FMLA might entitle an individual to additional FMLA. Those circumstances will depend on the type of additional leave sought and the method an employer uses for calculating the federal 12-month period.

If an employee exhausts his/her regular and expanded FMLA leave, the employee may still be eligible to take emergency paid sick leave under the FFCRA. The emergency paid sick leave provision of the FFCRA is not a form of FMLA and may not be counted against the employee's 12-week FMLA cap.

However, employees may elect to take their first 10 working days of expanded FMLA leave under the FFCRA (which would otherwise be unpaid) concurrently with their emergency paid sick leave in order to receive pay for those 10 working days. If the employee chooses to take emergency paid sick leave and the first 10 working days of expanded FMLA leave under the FFCRA concurrently, those first 10 working days of concurrent leave count against the employee's 12 weeks of regular and expanded FMLA.

The DOL states that the above analysis does not apply to employers who only become covered under the regular FMLA after April 1, 2020. It is unclear exactly how expanded FMLA leave under the FFCRA and regular FMLA leave will work for employees who work for an employer that becomes covered under the regular FMLA after April 1, 2020.

EMPLOYERS CAN EXEMPT HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS FROM FFCRA

Questions #56 and 57 discuss the exemptions for health care providers and emergency responders. Employers with employees who are "health care providers" can elect not to provide FFCRA leave to such employees.

The DOL clarifies that a "health care provider is 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," any entity that contracts with these institutions to provide such services, and any entity that provides medical services, products, or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, or treatments.

Employers with employees who are "emergency responders" can also elect to exempt such employees from receiving FFCRA leave.

The DOL defines an 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, 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."

Any employer seeking to utilize the health care provider or emergency responder FFCRA exemptions should consult with counsel to ensure their business operations meet the DOL's evolving exemption requirements. Additionally, the DOL encourages employers to be "judicious" when using this exemption to minimize the spread of COVID-19.

SMALL BUSINESS HARDSHIP EXEMPTION

The FFCRA provides that, by regulation, the DOL can provide an exemption from providing FFCRA leave for employers with fewer than 50 employees if doing so "would jeopardize the viability of the small business as a going concern." Until now, it has been unclear what was required to meet this small business hardship exemption.

According to questions #58 and 59 in the recent guidance, in order to be exempted from providing FFCRA leave for employees needing to take leave for childcare unavailability, an "authorized officer" of a business with fewer than 50 employees must determine that:

1. The provision of FFCRA 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 FFCRA 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 FFCRA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL states that the hardship exemption only exempts small businesses from "certain" paid sick leave and expanded medical leave requirements. Importantly, the DOL guidance does not mention whether employers are exempt from providing emergency paid sick leave for employees who are subject to a quarantine order due to COVID-19, seeking a medical diagnosis for COVID-19, or are caring for an individual who is subject to a quarantine order. The current DOL guidance only provides for a hardship exemption for the childcare unavailability provisions of the FFCRA. Additional guidance, including formal regulations, are anticipated which might further clarify the availability of the exemption for reasons other than childcare unavailability.

CONCLUSION

The DOL continues to roll out new guidance on a nearly daily basis. Notwithstanding the April 1, 2020 effective date for the FFCRA leave, uncertainty remains with respect to this law. Employers are urged to consult with legal counsel to assist them in navigating the latest legal developments. The Boardman Clark Labor & Employment team is willing and able to assist employers with all aspects of this evolving law.

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