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Update: Substitution of Other Paid Leave During FFCRA Leave

One of the more confusing issues regarding leave under the Families First Coronavirus Response Act (FFCRA) continues to be the substitution of other employer-provided paid leave during FFCRA leave. In a prior article, we commented on the temporary rule issued by the Department of Labor (DOL). Because the temporary rule was not clear, that previous article urged employers to be cautious before requiring an employee to substitute employer-provided paid leave while the employee is on expanded FMLA leave under the FFCRA.

Recent guidance and amendments by the DOL do little to clear up the confusion. On April 10, 2020, the DOL issued a correction to the temporary rule. This correction eliminated a paragraph in the temporary rule that implied that an employer was prohibited from requiring an employee to substitute employer-provided paid leave while an employee was on expanded FMLA leave under the FFCRA. However, the elimination of this paragraph did not completely resolve the lack of clarity on employer-mandated substitution of leave.

The DOL also issued additional FAQs on, or just before, April 22, 2020. One of the new FAQs (currently FAQ #86) generally states that an employer may require that any paid leave available to an employee under the employer's policies that would allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason runs concurrently with paid expanded FMLA leave under the FFCRA. In this situation, the employer must pay the employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan—including vacation and/or personal leave (typically employer-provided sick or medical leave would not be available to employees for reasons of child care unavailability). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the FFCRA ($200 per day or $10,000 in total). If the employee exhausts available paid leave under the employer's plan, but still has more paid expanded FMLA leave available, the employee will receive any remaining paid expanded FMLA leave in the amounts and subject to the daily and aggregate limits of the FFCRA.

However, that same FAQ states that "provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay [while the employee is on expanded FMLA under the FFCRA] so that the employee may receive the full amount of the employee's normal compensation."

This latest guidance injects further confusion into the issue of substitution of accrued leave, in that it appears to state that an employer cannot unilaterally require the use of an employee's accrued time to "top

off" off partially paid FFCRA time, but the employer can unilaterally require the use of full days of accrued leave.

Notwithstanding the confusion created by the recent DOL guidance, the following points are clear regarding substitution of leave:

1. Employers cannot require an employee to substitute employer-provided paid leave while an employee is out on emergency paid sick leave (for up to a total of 80 hours) under the FFCRA.

2. Employers cannot require an employee to substitute employer-provided paid leave while an employee is out on the first two weeks of unpaid leave under the expanded FMLA provisions of the FFCRA.

3. With respect to the final 10 weeks of expanded FMLA, an employer can only require an employee to substitute employer-provided paid leave for which the employee qualifies under the terms of the employer's leave policies, which most likely is PTO or vacation. A sick leave policy that is only triggered if an employee or his/her family are sick, for example, would not qualify for substitution under the expanded FMLA because expanded FMLA leave is only available due to child care unavailability (as specified in the statute).

Prior to the latest round of DOL FAQs, it appeared clear that an employer could require an employee to substitute appropriate employer-provided paid leave during the last ten weeks of expanded FMLA in an amount sufficient to "top off" the employee's pay at the employee's regular rate. This additional "top off" pay would be subject to all applicable payroll taxes and would not be eligible for FFCRA tax credits. However, as discussed above, the latest DOL FAQs seem to require that employers and employees agree to such a "top off." In practice, it appears that many employers and employees are reaching agreement to "top off" employees' pay. Until clearer guidance is available from the DOL, employers should continue to reach agreement with employees prior to substituting employer-provided paid leave to "top off" an employee's pay while they are on FFCRA leave.

In the absence of clearer guidance, employers should still be cautious about requiring an employee to substitute employer-provided paid leave *instead of* providing an employee with paid expanded FMLA leave during the last 10 weeks of the leave. This approach could create legal risk because it might be contrary to the statutory language of the FFCRA and might disqualify the employer from receiving tax credits. Additionally, this approach might have an unintended negative effect on the employer's workplace morale, particularly with respect to long-term employees who have large employer-provided paid leave accruals. Employers considering this approach are urged to consult with legal counsel to properly assess the risks involved.

As always, the Boardman Clark Labor & Employment team is here to assist employers as they continue to navigate the complexities of the FFCRA and related employment issues.

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