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Department of Labor Issues Temporary Rule on the FFCRA

Over the past few weeks, Boardman Clark's Labor & Employment team has been following the implementation of the Families First Coronavirus Response Act (FFCRA) that went into effect on April 1, 2020. In our last updates, we provided a summary of the IRS's notice requirements and analyzed the DOL's responses to questions #38-59 in its FAQ page on the FFCRA.

Last week, the DOL's avalanche of FFCRA guidance continued when it released a temporary rule on the FFCRA and another round of FAQ guidance (questions #60-79) that can be found here.

In this article, we will discuss issues that were clarified by the temporary rule as well as issues that remain somewhat unclear. The topics will include the following:

- Employer-provided paid leave benefits and FFCRA leave;
- The use of intermittent leave under the FFCRA;
- Requirements for leave to care for a "son or daughter;"
- FFCRA implications of Wisconsin's "Safer at Home" order;
- Implications of the FFCRA on exempt employees under the FLSA;
- The small employer exemption; and
- Furloughed employees and calculating when an employer is subject to the FFCRA.

PTO AND THE FFCRA

The DOL's temporary rule clarifies that if an employee qualifies for emergency paid sick leave under the FFCRA, the employer must allow the employee to use that leave. The employer cannot require the use of any employer-provided accrued paid leave time in conjunction with emergency paid sick leave or require that any employer-provide accrued paid leave be used before the employee can take emergency paid sick leave.

The temporary rule is less clear about the use of PTO under the expanded FMLA leave. The first two weeks of expanded FMLA leave are unpaid. If an employee wishes to be paid during these two weeks, the temporary rule states that the employee may elect to concurrently use emergency paid sick leave to receive 2/3 of the employee's regular pay. If the employee elects to use emergency paid sick leave concurrently with the first two weeks of expanded FMLA leave, the employer cannot require the employee to use additional accrued employer-provided paid leave to "top off" the pay during this period.

If an employee has exhausted his/her emergency paid sick leave, the employee may choose to substitute accrued employer-provided paid leave in order to receive pay during the first two unpaid weeks of expanded FMLA leave. Additionally, the employer and employee may agree to allow the employee to "top off" the employee's expanded FMLA leave by using accrued paid leave.

While the DOL's commentary on the temporary rule and different sections of the temporary rule include language that appears to state that the employer *can require* the use of accrued employer-provided paid leave during portions of expanded FMLA leave, section 826.60(b) of the temporary rule clearly states that it is the *employee's* choice whether or not to use accrued paid leave. Until the DOL resolves these discrepancies, employers should not require the use of accrued PTO during any period of FFCRA leave. We anticipate the DOL may provide further guidance on this issue.

INTERMITTENT LEAVE

Section 826.50 of the temporary rule provides guidance on when emergency paid sick leave and expanded FMLA leave may be taken intermittently. The temporary rule distinguishes the use of intermittent leave based on whether the employee is teleworking or whether the employee is physically working at the employer's worksite.

Teleworking

If an employee is working from home ("teleworking"), the employer *may allow the employee, but is not required to allow the employee,* to use either emergency paid sick leave or expanded FMLA leave intermittently.

If the employer does allow the employee to use FFCRA leave intermittently, the leave may be taken in any time increment to which the employer agrees. The employer can choose to let an employee take FFCRA leave in whole day increments, half day increments, or smaller increments. Employers have broad flexibility to agree on a teleworking arrangement that works for the employer and for each employee.

Employers should ensure they are tracking FFCRA hours closely and monitor when the employee has used up the FFCRA leave. Any intermittent use arrangement should be documented in writing to ensure that both the employer and employee have a clear understanding of the employee's schedule and use of intermittent leave.

Working on Site

By contrast, there are more restrictions on the use of intermittent leave when the employee is physically reporting to work at the employer's worksite. This is because employees who are reporting to the worksite present a greater risk of contracting and spreading COVID-19.

Employers are *not required* to allow the use of intermittent leave for worksite employees. If the employer does not want to (or is unable to) let worksite employees use FFCRA leave intermittently, the employer can deny intermittent leave requests.

If the employer decides to allow the use of intermittent leave, the employees may only use leave intermittently and in any increment "where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite." The DOL interprets this to mean that worksite employees may only take intermittent leave if they are using FFCRA leave to care for their son or daughter whose school or place of care is closed because of reasons related to COVID-19.

For example: if an employee who works on site takes leave to get tested for COVID-19, the employee must take all of her FFCRA leave in full-day increments each day until the employee has exhausted her FFCRA leave or until she is medically cleared to return to work. If the employee still has FFCRA leave left when she returns to work, the employee may use the remaining hours if she has another qualifying FFCRA event.

CARE OF A "SON OR DAUGHTER"

In the previous guidance, there was a lack of clarity as to when an employee could qualify for FFCRA leave to care for a son or daughter. With respect to expanded FMLA leave, the FFCRA provides time off in circumstances where an employee is unable to work or telework due to a need for leave to care for a son or daughter "under 18 years of age

of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable," due to the COVID-19 emergency.

The temporary rule defines "son or daughter" for both emergency paid sick leave and expanded FMLA leave consistent with the "regular" FMLA as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age." The DOL has clarified that both types of FFCRA leave also apply to the need for leave to care for a "son or daughter" who is "18 years of age or older who is incapable of self-care because of a mental or physical disability."

In addition, an employee likely needs to state that "special circumstances" exist that justify the need to stay at home during the day to care for a child over the age of 14. Under the FFCRA, private employers are entitled to certain tax credits for FFCRA paid leave. The temporary rule provides that an employer must maintain required documentation in order to qualify for those tax credits. The IRS (which issued guidance on the documentation needed to support the employer's tax credits) has taken the position that, with respect to an employee's inability to work or telework because of the need to care for a child older than 14 during daylight hours, employers must require documentation of a statement from the employee *that special circumstances exist* requiring the employee to provide care. It is unclear whether the employee must provide documentation *explaining* the special circumstances or must simply state that special circumstances exist. In any event, it appears that, in regard to a child over the age of 14, an employee will only be entitled to child care FFCRA paid leave if special circumstances exist that require the employee to care for the child.

The temporary rule also limits coverage under the FFCRA to those circumstances in which an employee is caring for a son or daughter because no other suitable person is available for such care. In other words, an employee is not entitled to such leave if another person, such as a spouse, co-parent, co-guardian, or the usual child care provider, is available to provide child care.

The temporary rule also clarifies the definitions of "Child Care Provider" and "Place of Care." Employees are eligible for FFCRA paid leave if a child's school, "Place of Care," or "Child Care Provider" is unavailable due to COVID-19.

The DOL has defined "Place of Care" broadly to include a physical location in which care is provided for the child, but does not have to be a location that is solely dedicated to such care. This could include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

Similarly, the DOL has defined "Child Care Provider" broadly to mean anyone who receives compensation for providing child care services on a regular basis and provides as examples a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under state law. However, the DOL stressed that a "Child Care Provider" can also include someone who is not compensated or licensed, including grandparents, aunts, uncles, neighbors, and friends who regularly care for the child.

The temporary rule also interprets the emergency paid leave provisions broadly with respect to which employees may be eligible for leave to "Care for an Individual" who is subject to a quarantine or isolation order. The temporary rule requires that the individual be:

- someone in the employee's immediate family member;
- a person who regularly resides in the employee's home; or
- a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined.

It does not include persons with whom the employee has no personal relationship.

WISCONSIN'S "SAFER AT HOME" ORDER (EMERGENCY ORDER #12)

One issue that has been unclear is whether the Wisconsin "Safer at Home" Order ("Order") issued by Governor Evers on March 25, 2020 qualifies as a state quarantine or isolation order which would qualify an employee for

FFCRA leave. Based upon the temporary rule and attached commentary, we believe that there will be very limited circumstances in which the Order will constitute a quarantine or isolation order that would entitle employees to FFCRA paid leave. This is the case regardless of whether a business is deemed essential or non-essential under the Order.

Under the temporary rule, an employee is only eligible for FFCRA leave if he is prevented from working or teleworking *due to the* state quarantine or isolation order. This analysis focuses on the specific impact of the order on individual employees rather than the business. The relevant inquiry is whether "but for" being required to comply with the order, an employee would be able to work or telework. Therefore, if an employer does not have work available for an employee, the employee is not eligible for FFCRA leave because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.

For example, if a business closes temporarily due to a downturn in business related to COVID-19, it would no longer have work available for its employees. An employee of that business who is subject to the Order would not be able to work even if he or she were not required to stay at home. As such, that employee is not eligible for FFCRA leave because his or her inability to work is not due to the need to comply with the Order, but rather is due to the closure of his or her place of employment. The commentary to the temporary rule notes that this would be true even if the Order required the business to shut down or if the business's customers were not patronizing the business because they were subject to the Order. In either case, the reason for the employee's inability to work was not because the employee was subject to the Order.

To provide further clarification, consider this hypothetical example under which a shelter at home order could result in an employee qualifying for FFCRA leave. Say the employee's employer is operating and has work available for the employee that can only be done on site. Now imagine that a governmental body issues a shelter at home order preventing anyone from leaving his/her house for work if he/she is living with a medical care provider who is treating COVID-19 patients (again, completely hypothetical). If the employee lives with such a medical care provider and must now shelter at home, the employee might then qualify for FFCRA leave because the more restrictive shelter at home order prevents the employee from working on site, and the employer does not have work for the employee to do through teleworking.

EXEMPT EMPLOYEES' FLSA STATUS

The Fair Labor Standards Act ("FLSA") requires certain employees who are treated as exempt from overtime pay requirements to be paid on a "salary basis." The salary basis test generally requires that exempt employees be paid a predetermined salary each week regardless of the quantity or quality of work performed. Certain deductions in the pay of an exempt employee can cause the loss of exempt status. The salary basis test comes into play under the FFCRA because the FFCRA establishes caps on the amount of pay an employee can receive, which might be less than the exempt employee's regular salary. Therefore, if an employer pays an exempt employee $200 per day for expanded FMLA leave and that amount is less than the employee's regular salary, is the employer violating the salary basis test? The temporary rule clarifies that application of the statutory limits of the FFCRA will not impact an employee's FLSA exempt status. In particular, an employee's use of intermittent leave combined with FFCRA leave should not be construed as undermining the employee's exempt status under the FLSA salary basis test.

SMALL EMPLOYER EXCLUSION

The FFCRA provides a potential exemption from the FFCRA for small private employers. A small employer is one with fewer than 50 employees. The test is whether complying with the FFCRA would jeopardize the viability of the business as a going concern. Under the temporary rule, an authorized officer of the business with fewer than 50 employees needs to make a determination that one of the following conditions exist:

- The 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;
- The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

- 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 leave and these labor or services are needed for the small business to operate at a minimal capacity.

Significantly, the exemption only applies to child care FFCRA paid leave. Even small employers cannot be exempt from providing paid leave for qualifying reasons other than for the care of a child. In addition, the commentary requires the "hardship exemption" determination to be made with respect to each employee seeking the leave; an employer may only deny leave under the FFCRA to those employees who actually would cause at least one of the qualifying conditions listed above to occur.

Employers are only required to document that they have made the determination pursuant to these criteria and are not obligated to send documentation to the DOL. Employers must retain the determination and the records supporting the exemption for four years pursuant to IRS guidance.

FURLOUGHED EMPLOYEES

The FFCRA only applies to private employers with fewer than 500 employees. Whether an employer has fewer than 500 employees is determined each time an employee needs to take FFCRA leave. Therefore, the employee count may be fluid through the months that the FFCRA is in effect. To determine the number of employees at any one time, an employer must count all full time and part-time employees. Part-time employees are counted as if they were full-time employees. The question is whether furloughed or laid off employees who remain on an employer's books, or are otherwise considered still "employed," but are not scheduled to work are counted in assessing the 500-employee threshold for being exempt from the FFCRA.

The temporary rule states that in counting the number of employees, the employer does not count "workers who have been laid off or furloughed and have not subsequently been reemployed." Unfortunately, there is not complete clarity as to what laid off, furloughed or reemployed mean. However, based on the totality of the DOL's guidance and how these terms are used elsewhere in that guidance, we believe the terms laid off and furloughed describe the situation where an individual remains an employee of the organization but he/she is not being scheduled for work due to lack of work, operational inability to work, or a downturn in business. This issue is further complicated because the temporary rule states that employees "on a leave" *are counted* in determining whether an employer has 500 employees. Again, based on the totality of the DOL's guidance, we believe that "on a leave" in this context means that the employee is on an FMLA leave, an ADA accommodation leave, an approved personal leave, etc., as opposed to not being scheduled to work due to lack of work.

This is an important clarification for larger employers to note because if an employer with 800 employees has temporarily furloughed 500 of those employees, the employer now has 300 employees for purposes of the FFCRA and must comply with the law.

This is consistent with the provisions that detail which employees are eligible for FFCRA benefits. The DOL provides that if an employee is temporarily laid off or furloughed from work, the employee is not entitled to FFCRA paid leave.

CONCLUSION

The FFCRA continues to pose challenges to employers, and the legal landscape is constantly changing. The Boardman Clark Labor & Employment team is here to help employers understand the FFCRA and assist them as they navigate this challenging new law.

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