

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

MARCH 26, 2020

DOL Issues First Guidance on the Families First Coronavirus Response Act

On Tuesday, March 24, the Department of Labor (DOL) issued its first guidance documents related to the Families First Coronavirus Response Act (FFCRA). For our earlier article on this law, please see [here](#). The DOL's new guidance is in the form of a Questions and Answers document and is available [here](#).

Most importantly, the DOL's guidance states that the leave portions of the FFCRA will be effective on **April 1, 2020**, not April 2, 2020 as was previously anticipated.

The guidance also provides instructions to employers for calculating whether they have fewer than 500 employees (and thus are subject to the FFCRA).

Additionally, the guidance provides some information on calculating the amount of pay owed to employees under the FFCRA.

More guidance and formal regulations are still expected from the DOL. Additionally, the DOL might revise its existing guidance to provide further clarity. It appears that the DOL is continuously revising the websites containing the guidance documents related to the FFCRA without providing notice of the revisions or indicating the date on which the DOL made revisions. These revisions have created inconsistencies between the various guidance documents, and we recommend that employers consult with legal counsel to ensure that they are in compliance with the latest and most accurate DOL guidance related to the FFCRA.

One issue where DOL guidance is needed is with respect to whether FFCRA leave can be used intermittently. The FFCRA is silent on this issue, which means there is currently potential legal risk if an employer allows the use of such leave intermittently. For instance, if the DOL takes the position that FFCRA leave cannot be used intermittently, intermittent leave might not qualify for tax credits and employers might have to restore improperly taken intermittent leave to the employees' applicable FFCRA leave banks. Additionally, issues could arise under the Fair Labor Standards Act salary basis test if employers deduct less than a full-day's pay from the salary of certain types of exempt employees, if the FFCRA leave was not to be taken intermittently.

FACT SHEETS

The DOL has created a fact sheet on the FFCRA for employees [available here](#) and a fact sheet on the FFCRA for employers [available here](#).

In a footnote on these FFCRA fact sheets, the DOL states that the DOL's FFCRA regulations are "expected April 2020." These regulations are very important for businesses with fewer than 50 employees that may be seeking a small business exemption from this law. For now, the DOL merely instructs these small businesses to "document why your business with fewer than 50 employees meets the criteria set forth by the Department." Unfortunately, these businesses likely will not know the exemption criteria before the FFCRA goes into effect on April 1, 2020. Obviously, this poses a real challenge for small businesses seeking to rely on the exemption.

NOTICE FOR POSTING

The DOL has also created the notice of FFCRA requirements that employers must conspicuously post on their premises. The notice is [available here](#). Employers should post this notice where it posts other employment notices. The DOL has also posted a Frequently Asked Questions (FAQ) regarding the notice which is [available here](#). The DOL FAQ states that because most employees are working remotely, an employer may satisfy the posting requirement by emailing or direct mailing the notice to employees, or posting this notice on an internal or external website.

The DOL changed this notice on March 26, 2020 without indicating the change on the notice itself. The DOL recommends that employers sign up for “Key News Alerts” to ensure they remain current with all notice requirements or visit its website at www.dol.gov/agencies/whd. Employers who sent out the old version of the notice should post and distribute this new version of the notice in same manner as they did previously. This new notice still does not provide completely clear guidance to employees on all aspects of the FFCRA. Therefore, there is a chance the notice might be revised again by the DOL in the future. If that happens, employers will likely have to post and distribute the new notice in the same manner as they did previously.

TEMPORARY NON-ENFORCEMENT PERIOD

On March 24, 2020, the DOL published a Field Assistance Bulletin specifying that the DOL would observe a temporary period of non-enforcement of violations of the FFCRA occurring within 30 days of the enactment of the FFCRA, which is from March 18 through April 17, 2020 (non-enforcement period). The DOL is providing this non-enforcement period in order to enable employers covered by the FFCRA to come into compliance with the new paid leave benefits. The link to the field bulletin can be [found here](#).

This means the DOL will not bring enforcement actions against any employer for any FFCRA violations that occur through April 17, 2020 provided the employer has made reasonable, good faith efforts to comply with the FFCRA. Employers will be found to have acted “reasonably” and “in good faith” when all of the following are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practical if FFCRA payments were missed or paid incorrectly.
2. Violations of the FFCRA were not “willful,” which the DOL defines as the employer either knew or showed reckless disregard for the matter.
3. The DOL receives a written commitment from the employer that it will comply with the FFCRA in the future.

If the employer violates any of the three conditions above, the DOL is authorized to fully enforce the FFCRA during the non-enforcement period. This Field Assistance Bulletin does not restrict an employee’s right to file a private cause of action for violations during the non-enforcement period.

At this time, it does not appear there will be any “grace period” for unintentional FFCRA violations that occur after April 17, 2020.

The Boardman Clark Labor & Employment Team will continue to monitor the constantly changing legal landscape of Coronavirus legislation and assist clients with navigating these laws as they continue to develop.

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