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Alerts & Publications

Department of Labor Publishes Guidance Explaining Emergency FMLA and Paid Sick Leave Under the Families First Coronavirus Response Act

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Introduction

Last week, the United States Department of Labor's Wage and Hour Division (the "WHD") provided several rounds of published guidance to employees and employers regarding the Families First Coronavirus Response Act (the "Act"), which was signed into law on March 18 by President Trump and will be effective from April 1, 2020, through December 31, 2020. The guidance answers various questions about the Act, including how employers must count their employees to determine whether they reach the 500 employee threshold for exemption from the Act's requirements, how to count hours and calculate pay for both full- and part-time employees, whether employees may take leave intermittently, whether employees whose worksites have closed or employees who have been furloughed may be eligible for leave under the Act, and which employers may qualify for the small business exemption. The WHD also issued a model notice and enforcement bulletin last week and indicated that it will continue publishing fact sheets and FAQs related to the Act. All WHD materials related to the Act are available here.

Key Clarifications

A. **How Employers Should Calculate Number of Employees**

The expanded Family and Medical Leave Act (FMLA) and paid sick leave provisions of the Act only apply to employers with fewer than 500 employers. An employer's calculation should include all full- or part-time employees within the United States, the District of Columbia, or any United States Territory of possession. Foreign employees will not be counted. Employers should also include employees on leave, temporary employees jointly employed, and day laborers supplied by a temporary agency. *Bona fide* independent contractors are not considered for purposes of meeting the 500 employee threshold. An employer must determine whether it has fewer than 500 employees on the date an employee's leave is to be taken. Thus, an employer that has 525 employees on April, 1, 2020, is not then a covered employer under the Act, but it if lays off 50 employees on April 15, 2020, it will become a

covered employer at that time. This stands in contrast to the FMLA, which provides that FMLA leave is only available if the employer has 50 or more employees within a 75 mile radius of the employee requesting FMLA leave for at least 20 weeks in the current or prior calendar year.

A corporation, including its separate establishments or divisions, will be considered a single employer, and each of its employees will count towards the threshold. The joint employer test under the Fair Labor Standards Act (FLSA) and integrated employer test under the FMLA will apply to determine whether separate entities may be considered one employer.

B. **The Small Businesses Exemption**
The Act states that the Secretary of Labor may issue regulations exempting employers with less than fifty (50) employees from providing expanded FMLA or sick leave due to school or place of care closure or child care provider unavailability if doing so would jeopardize the business's viability. The WHD's guidance advises that employers document why their business meets the criteria for this exemption, which will be addressed in more detail in forthcoming regulations. A small business can claim this exemption if its authorized officer determines that one of the following three conditions is met:

   a. The provision of leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at minimal capacity;
   b. The absence of the employee requesting leave would entail a substantial risk to the financial health or operating capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
   c. There are not sufficient workers who are able, willing, and qualified, who will be available at the time and place needed, to perform the labor or services provided by the employee requesting leave, and these labor or services are needed for the small business to operate at minimal capacity.

C. **Which Employees Are Eligible?**
All employees of a covered employer are eligible for paid sick leave under the Act. All employees who have been employed for at least 30 days are eligible for the expanded FMLA under the Act.

D. **Reasons for Taking Paid Sick and Expanded FMLA Leave**
Under the Act, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine related to COVID-19; (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis; (4) is caring for an individual subject to an order described in (1) or self-quarantine as

described in (2); (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. For reasons (1), (2), and (3), employees are paid their regular rate of pay up to a daily cap of $511. For reasons (4), (5), and (6), they are paid two thirds of their regular rate up to a daily cap of $200.

Employees may only take expanded FMLA leave in circumstance (5) listed above.[1]

E. **Counting Hours for Part-Time Employees**
Employers must calculate the hours of leave for part-time employees based on the number of hours they are normally scheduled to work. If normal hours scheduled are unknown or if the part-time employee's schedule varies, the employer may use a six-month average. The part-time employee is entitled to paid sick leave for this number of hours up to a two-week period and expanded FMLA leave (for the purpose described in category 5) for the same number of hours up to ten weeks.

If an employee has been employed for less than six months, an employer can use the number of hours the employee agreed he or she would work upon hiring. If no such agreement exists, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the term of his or her employment.

F. **Calculating Pay Due to Full- and Part-Time Employees**
Employers must factor overtime hours into the calculation of how much pay is due to a non-exempt employee under the expanded FMLA provisions. However, the paid sick leave provisions only allow for 80 hours of leave over a two-week period so overtime is not counted in that calculation.

Under the Act's paid sick leave provisions:

a. Where the employee is unable to work because of categories (1), (2), or (3) described above, the employee is entitled to take up to ten days of paid sick leave at a daily rate equal to the lesser of (1) the regular rate of pay for the hours the employee would normally be scheduled to work (the "Regular Rate of Pay") and (2) $511.
b. Where the employee in unable to work because of categories (4), (5), or (6) as described above, the employee is entitled to take up to ten days of paid sick leave at a daily rate equal to the lesser of (1) two thirds of the employee's Regular Rate of Pay and (2) $200.

Under the Act's paid family and medical leave provisions, an employee may take paid sick leave for the first ten (10) days of that leave period or may substitute any accrued vacation leave, personal leave, or medical or sick leave the employee has under his or her employer's policy. For the following ten (10) weeks for expanded FMLA leave that may be taken under category (5), the employee will be eligible to receive paid family and medical leave at an amount equal to the lesser of (1) two thirds of the Regular Rate of Pay and (2) $200.

While an employer may elect to pay more than the stated caps identified above (i.e., $511 or $200, as applicable), the excess amount will not be subject to the tax credit that is available under the Act for employers.

G. **Timing of Employers' Obligations**
The Act is effective on April 1, 2020, and imposes new leave requirements. It is not retroactive. Therefore, an employer cannot deny an employee the additional emergency leave if the employer already provided paid leave related to COVID-19 prior to April 1.

H. **Tax Credits**
Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the Act. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. The guidance also explains that applicable tax credits extend to amounts paid or incurred to maintain health insurance coverage.

I. **Required Documentation for Employer Tax Credits**
Employers that provide paid sick leave and expanded FMLA leave are eligible for reimbursement of costs through refundable tax credits. If an employer intends to claim a tax credit, the employer should retain appropriate documentation. The guidance directs employers to consult Internal Revenue Service (IRS) applicable forms, instructions, and information. If an employee is requesting expanded FMLA leave because his or her child's school or place of care is closed, or a child care provider is unavailable, the employer may request documentation, including notice posted on a website or published in a newspaper of a closure or an email from a school official, place of care, or child care provider.

J. **Definition of "Unable to Work"**
An employee is unable to work or telework if an employer has work available and one of the COVID-19 qualifying reasons set forth in the Act prevents the employee from being able to perform that work.

K. **Taking Leave Intermittently**

If an employee is unable to *telework* for one of the reasons stated in the Act, the employee and employer may reach an agreement allowing the employee to take paid sick leave intermittently in any increment. Similarly, an employee who is unable to telework because they need to care for a child whose school or place of care is closed or child care provider is unavailable, because of COVID-19 related reasons can agree with their employer to take expanded FMLA leave intermittently while teleworking.

Employees working at their usual worksite (as opposed to teleworking) may not take paid sick leave intermittently. It must be taken in full-day increments. Once an employee begins taking paid sick leave under the Act, they must continue to take the paid sick leave each day until they have used the full amount or no longer have a qualifying reason to take the leave. This is because the goal of the Act is to provide paid sick leave as necessary to keep employees from spreading COVID-19 to others. The exception to this rule regarding paid sick leave is caring for a child whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19. In that case, an employee can take paid sick leave intermittently. For instance, an employee can take paid sick leave on Mondays, Wednesdays, and Fridays and be at their normal worksite on Tuesdays and Thursdays.

Finally, employees who are not teleworking may take expanded FMLA leave intermittently but only with an employer's express permission. The employee and employer must agree upon a schedule.

L. **Eligibility for Leave If An Employee's Worksite Is Closed or the Employee Is Furloughed**
If an employer closes a worksite before the employee is slated to take leave under the Act (even if the employee already requested leave before the closure), the employee will not be allowed to get paid sick leave or expanded FMLA leave. This is true even if the employer indicates the worksite will open again at some date in the future. If an employer closes a worksite while an employee is already on paid sick leave or expanded FMLA leave, the employer must pay for any leave used before the employer closed. However, the employee is then no longer entitled to further paid sick leave or FMLA leave. If an employer furloughs an employee because it does not have enough work or business, that employee is also not eligible for paid sick leave or expanded FMLA leave. In the above circumstances, however, an employee may apply for unemployment insurance benefits.

M. **Hours Reductions**
If an employer reduces employees' scheduled work hours, they cannot use paid sick leave or expanded FMLA leave for the hours they are no longer scheduled to work.

N. **Health Insurance Coverage**

If an employer reduces employees' scheduled work hours, they cannot use paid sick leave or expanded FMLA leave for the hours they are no longer scheduled to work.

O. **Using Leave Concurrently**

An employee may not use paid sick leave already provided under an existing policy and paid sick leave or expanded FMLA leave under the Act concurrently for the same hours. However, employers may allow employees to supplement an amount received from paid sick leave or expanded FMLA leave under the Act with preexisting paid leave benefits. For example, if an employee receives two thirds of their normal earnings under the Act, they may use preexisting employer-provided leave to get the additional one third of their normal earnings if the employer permits it. An employer may not require an employee to supplement leave under the Act with preexisting leave.

The paid sick leave provided by the Act is in addition to any leave already provided by the employer under current policies. Employees have the option to take these other types of preexisting leave before taking leaving under the Act. Employees may also use other leave provided under an employer's current policies to cover the first ten days of unpaid expanded FMLA leave.

P. **Who Are Eligible Employees?**

All employees are eligible for paid sick leave, regardless of length of employment. However, an employee must have been employed for 30 calendar days in order to qualify for expanded FMLA leave.

Q. **Who Is a "Son or Daughter"?**

Emergency FMLA leave is available to employees whose son's or daughter's school or place of care is closed, or child care provider is unavailable, due to COVID-19. A son or daughter may be biological, adopted, foster, step, a legal ward, or a child for whom an employee is standing *in loco parentis*. The definition also includes an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability.

R. **Returning to Work After Leave**

The Act generally requires employers to provide the same (or nearly equivalent) job to an employee who returns to work following leave. However, employees are not protected from employer actions like layoffs that would have affected them regardless of whether they took leave. Employers can still lay off employees for reasons like closure of worksites.

Employers may also refuse to return employees who took emergency FMLA leave to the same position if they are a highly compensated "key" employee as defined under the FMLA or if the employer has fewer than 25 employees and all four of the following conditions are met:

a. The position no longer exists due to economic and operating conditions;
b. The employer made reasonable efforts to restore the employee to the same or equivalent position;
c. The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
d. The employer continues to make reasonable efforts to contact the employee for one year beginning on the date the leave concludes or the date 12 weeks after leave began, whichever is earlier.

S. **Use of Emergency FMLA Leave**
Because the emergency FMLA leave under the Act is a type of FMLA leave, an employee who has already used FMLA leave in the past 12-month period will not be entitled to the full 12 weeks. Total FMLA leave, whether emergency or traditional, must not exceed 12 weeks. For instance, an employee who used two weeks of FMLA leave to recover from a surgical procedure in January 2020 will only be eligible for ten weeks of emergency FMLA leave. Similarly, if an employee takes four weeks of expanded FMLA leave in April 2020, he or she will only be entitled to take up to eight weeks of traditional FMLA leave later in the year.

T. **Definition of "Health Care Provider" and "Emergency Responder"**
Employees who are "health care providers" or "emergency responders" are exempted from the Act. 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." An "emergency responder" includes military, national guard, and law enforcement officers, physicians, nurses, public health personnel, paramedics, 911 operators, and "persons with skill 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."

U. **Employer Notice**
On March 25, the WHD issued a model notice for employers to post in a "conspicuous place" on their premises to satisfy the Act's posting requirements. Employers are not required to post the notice in multiple languages. The notice also does not need to be shared with recently laid-off individuals because the Act's requirements only apply to current employees.

V. **Enforcement Guidance**

The Department of Labor will not bring enforcement actions against any employer for violations of the Act between March 18 and April 17 if the employer made "reasonable, good faith efforts to comply." The following facts must all be present:

a. The employer remedies any violations, including making all affected employees whole "as soon as practicable."
b. The violations of the Act were not "willful", meaning the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited."
c. The Department of Labor receives a written commitment from the employer to comply with the Act in the future.

Takeaways

Employers should keep the following in mind:

- All employees located in the United States, including employees on leave, temporary employees jointly employed, and day laborers supplied by a temporary agency, will count towards the 500 employee threshold to be exempt from the Act's requirements. Employees outside the United States and independent contractors will not be counted.
- Overtime hours count towards the amount paid for FMLA leave but not for paid sick leave.
- Employers must provide employees with emergency FMLA and paid sick leave starting April 1, 2020, even if the employer has already permitted an employee to take paid leave for reasons relating to COVID-19.
- Employees whose worksites have been closed and employees who have been furloughed are not entitled to paid sick leave or expanded FMLA leave under the Act.
- Employees who are unable to telework for a COVID-19 related reason may take leave intermittently. Employees still required to report to a worksite may not take paid sick leave intermittently unless they are using the leave to care for a child whose school or place of care is closed. Employees still required to report to a worksite may take expanded FMLA leave but only with the employer's express permission.
- There will be a temporary period of non-enforcement of the Act from March 18 until April 17 for employers who make reasonable, good faith efforts to comply.
- The WHD is planning to issue further guidance regarding the Act. Employers should continue checking the WHD's COVID-19 webpage.
- Employers should consider using the model notice to employees issued by the WHD to comply with the Act's posting requirements. The model notice is available here.

If you have any questions regarding the WHD's guidance or how it may impact your company's policies or practices, please contact the authors of this alert or your O'Melveny advisor.

[1] An employee whose response to COVID-19 meets the definition of a serious medical condition or who needs to care for a covered family member whose response to COVID-19 meets the definition of a serious medical condition may be eligible for traditional unpaid FMLA leave.

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