DEPARTMENT OF LABOR CALLS AN AUDIBLE IN LATEST GUIDANCE, SUGGESTS MANY EMPLOYEES NOT ELIGIBLE FOR PAID LEAVE

By: R. Eddie Wayland

After many states, cities, and counties issued "safer-at-home" orders directing all businesses not deemed "essential" to close for 14 days, the Department of Labor ("DOL") updated its preliminary guidance on the implementation of the Families First Coronavirus Response Act ("FFCRA"), accessible here. An important takeaway from the updated guidance is that employers whose businesses are subject to a government shutdown are not required to pay the emergency sick leave or expanded family and medical leave, pursuant to the FFCRA, to their employees.

Shutdown Businesses Not Required to Provide Paid Leave

The DOL suggested that if an employer "closes [its] worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive" it is not required to pay its employees paid sick leave or expanded family and medical leave. The DOL went on to state that these employees "may be eligible for unemployment insurance benefits" and directed employees to their state workforce agency or unemployment insurance office for specific eligibility questions.

It does not matter whether the employer shuts down before or after the FFCRA's effective date of April 1, 2020. However, if an employer closes while an employee is on paid sick leave or expanded family and medical leave, it "must pay for any paid sick leave or expanded family and medical leave . . . used before the employer closed."

The DOL further elaborated that this same guidance applies if it is still open and furloughs certain employees because it does not have enough work or business for them. Additionally, if an employer reduces its employees' work hours because it does not have work for them to perform,

the employer is not required to pay the emergency sick leave or expanded family and medical leave for the hours the employee is no longer scheduled to work.

Clarification of the FMLA and the expanded FMLA

The DOL clarified that any paid leave taken pursuant to the expanded Family and Medical Leave Act ("FMLA") leave is dependent on how much FMLA leave an employee has "already taken during the 12-month period that [his or her] employer uses for FMLA leave." Because expanded family and medical leave is a type of FMLA leave, any expanded family and medical leave taken counts against the employee's entitlement to preexisting FMLA leave. For example, if an employee who was eligible for preexisting FMLA leave took six weeks of leave in January and February 2020 for the birth of a new child, he or she is only entitled to up to six weeks of expanded family and medical leave.

Documentation Confusion

The DOL instructed all employers to maintain detailed documentation, including documents provided by its employees, about any emergency paid sick leave or expanded FMLA taken by its employees in order to later prove eligibility for tax credit reimbursement. This documentation should comport with Internal Revenue Service ("IRS") applicable forms, instructions and information. To date, the IRS has yet to release any such certification forms. Importantly, employers are "not required to provide leave if materials sufficient to support the applicable tax credit have not been provided" by the employees requesting leave.

If an employee takes expanded family and medical leave to care for his or her child whose school or daycare is closed, or if a child care provider is unavailable, due to COVID-19 related reasons, the employee can be required to provide additional documentation in support of this leave including, for example, a notice that has been posted on a government, school, or daycare website,

published in a newspaper, or emailed from an official or employee of the school, daycare, or child care provider.

Small Business Exemption Clarification

As previously noted, employers with fewer than 50 employees (small businesses) can seek an exemption from providing paid sick leave and expanded family and medical leave due to the closure of a child's school or place of care when doing so would jeopardize the viability of the small business. Now the DOL has clarified this exemption by stating that a small business may claim this exemption if an authorized officer of the business has determined that one of the following three situations applies:

- The provision of paid sick leave or expanded family and medical 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 paid sick leave or expanded family and medical 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

- 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL has not further elaborated on how an employer can document this requested claim for an exemption. However, given the frequent updates coming through almost daily, it is anticipated that further guidance on this will be forthcoming.

Intermittent Leave

Employees may be able to take expanded family and medical leave and emergency paid sick leave intermittently while teleworking, if the employer agrees. If an employee is prevented

from teleworking, or unable to telework, their normal schedule of hours due to one of the qualifying reasons in the paid sick leave act or because of the need to care for a child whose school or place of care is closed, or their child care provider is unavailable because of COVID-19 related issues, an employer may allow the employee to take expanded family and medical leave or emergency paid sick leave intermittently while teleworking. Intermittent leave can be taken in increments throughout the day, provided that the employer and employee agree upon the increments. The DOL "encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the [DOL] is supportive of such voluntary arrangements that combine telework and intermittent leave."

However, intermittent leave for workers able to work at a job site is different and depends on the reason the employee is taking the leave, and again whether the employer agrees. Paid sick leave for employees who are in non-telework situations must take their leave in full-day increments. An employee who works at a job site may not take intermittent leave if the leave is being taken for one of the following reasons:

- the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Once an employee begins receiving paid sick leave for one or more of the qualifying reasons above, he or she must continue to take paid sick leave each day until (1) the full amount of paid sick leave has been used or (2) he or she no longer has a qualifying reason for taking paid sick leave. To permit an employee to take intermittent paid sick leave and continue to come to work when one of the above qualifying reasons applies contradicts the purpose of the FFCRA, given its intent is to prevent the further spreading of the virus.

Therefore, it is only permissible for an employee to take intermittent paid sick leave or expanded FMLA so long as it is to care for a child whose school or place of care is closed, or their child care provider is unavailable because of COVID-19 related issues, given the employer agrees.

Going Forward

While much confusion remains, and will continue to remain in the near future, the DOL will need to continue to provide further clarity on these and other issues impacting employers and employees in light of the FFCRA. Still, employers and employees should expect further revisions and guidance as the DOL begins the process of implementing this new and federally unprecedented law.

Fortunately, the DOL has stated that there is a temporary non-enforcement period and it will not bring enforcement actions against any employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020. This wise grant of a hiatus period should help employers review, refine, and fine tune their FFCRA policies going forward, while continued guidance from the DOL is still forthcoming. However, employers should still be prepared to implement the statute and comply with the statute when it goes into effect April 1, 2020.

Employers with additional questions about any of the topics discussed in this article or any

other issues regarding the requirements and implementation of the FFCRA should contact experienced legal counsel who is knowledgeable in these areas.

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