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EMPLOYER NEWSLETTER

INITIAL GUIDANCE ON THE NEW FAMILIES FIRST CORONAVIRUS RESPONSE ACT

March 25, 2020

As you know, the Families First Coronavirus Response Act (“FFCRA”) will provide emergency family and medical leave and paid sick leave for employees. The United States Department of Labor (“DOL”) provided preliminary guidance to some [frequently asked questions](#) on March 24, 2020.

After digesting the new law’s implications, employers have asked us many questions, including the following that the DOL has now clarified:

Q: When does the law become effective?

A: April 1, 2020. Initially, April 2, 2020 was the expected “go date.” But the DOL clarified it is April 1, 2020.

Q. Which employees are counted in calculating the 500-employee threshold?

A: You count full-time employees, part-time employees, temporary employees, and employees on leave. Temporary workers are counted even if they are jointly employed by you and another employer (such as through a temp agency). Independent contractors, who are properly classified, are not counted.

Q. How will the 500-employee threshold be calculated for businesses that operate more than one entity?

A: The FFCRA uses definitions and concepts from the Fair Labor Standards Act and the Family and Medical Leave Act (FMLA). Under those laws, in determining whether two (2) or more entities should be combined to determine coverage, the FLSA uses the “joint employer” test.¹ But the DOL has also suggested that if the FMLA’s “integrated employer” test applies, then all employees of that integrated company will be entitled to emergency family leave benefits.

Thus, for the time being, the DOL intends to use these standard definitions -- even though the result may be counter-intuitive: a large employer’s employees are currently guaranteed fewer federally required paid benefits to deal with the COVID-19 outbreak than employees of small companies.

¹ 29 CFR § 825.105 *et seq.*

Bottom Line: The “joint employer” analysis under the FLSA and the “integrated employer” analysis under the FMLA are complicated and involve analysis of specific facts. If you have questions about how these tests apply to your specific situation, please contact us.

Q: What if my employees take leave before the law’s effective date?

A: The law becomes effective on April 1, 2020. Any leave that begins prior to that date does not qualify under the new laws.

Q: Do the benefits offered under the new law run concurrently for leave related to school closures?

A: Yes – as explained below:

“You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the you elect to use existing vacation, personal, or medical or sick leave under your employer’s policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that you can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.”²

Please note that this is *initial guidance* from the DOL. We expect that the DOL will develop additional regulations and forms soon to help employers navigate through these new waters.

Please let us know if we can help answer your questions or help you implement appropriate policies and response plans. Mr. Clark’s contact information is (480) 844-0039 or etc@clarkfirm.com.

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² <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>