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CLIENT UPDATE: DEPARTMENT OF LABOR ISSUES REGULATIONS UNDER FAMILIES FIRST CORONAVIRUS RESPONSE ACT
April 3, 2020

On Wednesday the Families First Coronavirus Response Act ("FFCRA") went into effect, and the U.S. Department of Labor marked the effective date by issuing regulations that provide explanation and guidance for employers in implementing the law.

This update highlights some of the key issues addressed in the regulations, with a focus on those issues that are newly clarified or modified by the regulations. Brann & Isaacson issued an alert on the initial passage of FFCRA that can be accessed here; another alert when the USDOL issued its initial guidance on FFCRA on March 24, 2020, which can be accessed here, and another update when the USDOL added to its guidance which can be accessed here.

Because guidance and developments have been evolving, please review the most recent DOL guidance or contact us directly to verify that you are operating based on the most current information available as implementation of these benefits moves forward.

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Who is a "child care provider" under the FFCRA?

Employees are eligible for both paid sick leave and expanded FMLA benefits when they are unable to perform work due to a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. A child care provider includes: 1) someone who receives compensation for child care services on a regular basis, including licensed, regulated, or registered child care services; or 2) a family member or friend who regularly cares for the employee's child, even if they are not compensated or licensed.

Key takeaway:

- **"Child care provider" is broadly defined to include both compensated and licensed providers and relatives or friends who are neither compensated nor licensed**

What does it mean to be "subject to a quarantine or isolation order" for purposes of emergency paid sick leave?

Quarantine and isolation orders are broadly defined to not only include those orders specifically directed at an individual, but also more general shelter-in-place and stay-at-home orders that cause an employee to be unable to work. An employee is eligible for emergency paid sick leave if the employer has work that an employee could perform at the employee's normal work site, but the employee is unable to work because of a government order, or the employee is needed to care for an individual who is subject to a government order. If the employer does not have work for the employee, the employee is not eligible for paid sick leave, even if the employee or an individual under the employee's care is subject to a quarantine or isolation order.

Employees may also be eligible for emergency paid sick leave if they or a person under their care are in a specific category of citizens advised to stay home by federal, state or local order, such as age ranges and/or certain medical conditions, when those advisories make the employee unable to work.

In reviewing eligibility for leave on this basis, employers should carefully review the provisions of applicable federal, state and local orders and advisories and seek legal advice when necessary.

Key takeaways:

- **Quarantine and isolation orders need not be specific to an individual, and may include applicable shelter-in-place or stay-at-home orders**
- **It is important to consider any federal, state or local shelter-in-place or stay-at-home order or advisory that covers your workplace or where your employees live**
- **Employee is eligible for leave based on a federal, state or local order only if the employer has work for the employee and the order makes the employee unable to work**

What does "telework" mean under the FFCRA?

Telework includes any work the employer permits or allows an employee to perform at home, or at a location other than their normal workplace. Telework may be performed during normal work hours or at other times agreed to by the employer and employee. Employees who telework must be compensated for all hours actually worked, and for which the employer knew or should have known the employee worked.

Although existing DOL regulations generally require that non-exempt employees must be compensated for all time between performance of an employee's first and last principal work activities, the FFCRA regulations provide that an employer allowing an employee flexibility to

telework during the COVID-19 pandemic is not required to comply with this requirement. By way of example, a non-exempt employee may agree with an employer to perform telework for COVID-19 related reasons on the following schedule: 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays.

Key takeaways:

- **Employer may, but is not required, to allow telework**
- **For non-exempt employees, only those hours actually worked while teleworking must be compensated**

What does it mean to be "advised by a health care provider to self-quarantine"?

Employees may take paid sick leave when a health care provider advises them to self-quarantine, preventing them from being able to work or telework, because: 1) the employee has COVID-19, 2) the employee may have COVID-19, or 3) the employee is particularly vulnerable to COVID-19. An employee is eligible for leave on this basis only when following the health care provider's advice to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by telework.

Key takeaways:

- **Provider's advice to self-quarantine must be based on employee having COVID-19, possibly having COVID-19, or being particularly vulnerable to COVID-19**
- **The provider's advice to self-quarantine must prevent employee from being able to work**

What does it mean to be "seeking a medical diagnosis?"

Employees may take paid sick leave when they have symptoms of COVID-19 and are seeking a medical diagnosis. Symptoms may include fever, dry cough, shortness of breath; or any other COVID-19 symptoms identified by the CDC. Seeking a medical diagnosis includes taking affirmative steps such as making, waiting for, or attending an appointment for a test of COVID-19.

Key takeaway:

- **Employee must have symptoms and be taking affirmative steps to obtain a diagnosis**

What does it mean to be "caring for an individual" impacted by COVID-19?

An employee is able to take emergency paid sick leave if, but for the need to care for an individual who is unable to work due to a government order or a doctor's advice, the employee would be able to perform work and/or telework for the employer. In this context, an "individual" means an 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 such that the employee is expected to care for the individual under quarantine. The individual needing care must be subject to a quarantine or isolation order, or be advised to quarantine by their health care provider because 1) they have COVID-19, 2) were exposed to or have symptoms of COVID-19, or 3) are particularly vulnerable to COVID-19.

Key takeaway:

- **The individual who needs care from the employee need not be an immediate family member if the individual regularly resides with the employee or is person with a similar relationship by which the employee is expected to care for the individual**

What does it mean to be "caring for a son or daughter," and may more than one family member take emergency paid sick leave or expanded FMLA leave under this provision?

An employee may take emergency paid sick leave and/or expanded FMLA leave to care for their son or daughter whose school is closed, or whose child care provider is unavailable, for reasons related to COVID-19 *only if* there is no other suitable person to provide care during the period of leave. Like other types of leave discussed above, the employer must have work for the employee to do, and the employee must be otherwise able to work or telework.

Employers may ask their employee to provide a "representation that no other suitable person" will be caring for their son or daughter while on leave. This supports the conclusion that both parents would not be eligible for leave to care for a child.

Key takeaway:

- **Employer may ask employee to provide representation that there is no other suitable person available to care for a son or daughter whose school or day care is closed**

How should we calculate the amount of paid sick leave to which an employee is eligible?

In its regulations, the DOL clarify the metrics for calculating amounts of paid sick leave.

Full-time employees

Full-time employees are those normally scheduled to work at least 40 hours each workweek. Full-time employees are entitled to up to 80 hours of paid sick leave.

If an employee does not have a regular schedule, they are considered full-time if their average number of hours per workweek, including hours for which the employee took leave, is at least 40 hours per week. This is measured by the six-month period preceding the date the employee takes paid sick leave or by their entire period of their employment, whichever period is less.

Part-time employees

Part-time employees with normal weekly schedules are entitled to leave hours up to the number of hours they are normally scheduled over two workweeks.

If the part-time employee does not have a normal weekly schedule and has been on staff for at least six months, they employee is entitled to up to fourteen times the average number of hours the employee was scheduled to work each calendar day over the six-month period, measured from the date the employee takes leave. This calculation should include any hours the employee took any type of leave.

If the part-time employee does not have a normal weekly schedule and has been on staff for less than six months, the employee is entitled to up to fourteen times the number of hours the employee and employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, measure this calculation according to the entire period of employment, including any hours the employee took any type of leave.

Key takeaways:

- **Employees whose normal work schedule is, or average, 40 or more hours per week are entitled to up to 80 hours of paid sick leave**
- **Employees with a normal weekly work schedule of less than 40 hours are eligible for sick leave up to the number of hours that they are normally scheduled over two workweeks**
- **Employees with irregular work schedules who are normally scheduled for less than 40 hours a week must have their leave determined based on formulas that depend on whether they have been employed for at least 6 months**

How do paid sick leave benefits interact with expanded FMLA benefits when an employee is eligible for both?

Generally, when an employee qualifies for both the paid sick leave benefit and expanded FMLA, because they are caring for a child whose school or day care is closed, the employee may first use the two weeks of paid sick leave. This use runs concurrent with the first two weeks of unpaid leave under the expanded FMLA. Any remaining leave taken for this purpose is paid under the expanded FMLA.

Key takeaway:

- **Employees who use leave to care for a child whose school or day care is closed may be eligible for up to 12 weeks of paid leave under FFCRA**

What if an employee has already taken FMLA leave for other reasons?

When an employee has already taken some FMLA leave during the current twelve-month leave year that the employer has adopted under FMLA rules, the maximum twelve weeks of expanded FMLA leave is reduced by the amount of the FMLA leave entitlement already taken.

Key takeaway:

- **Before approving expanded FMLA, employers should determine whether the employee has used FMLA leave for other reasons during their established FMLA leave year**

May PTO be used to supplement an employee's income while on expanded FMLA leave?

The first two weeks of the 12 weeks of expanded FMLA may be unpaid, and the employee may substitute available FFCRA paid sick leave benefits or accrued paid leave available under the employer's policies during this period.

After the first two weeks of expanded FMLA leave, expanded FMLA leave is paid at two-thirds the employee's regular rate of pay, up to $200 per day. Because this period of expanded FMLA is not unpaid, the general FMLA provisions for substitution of an employee's accrued paid leave are inapplicable, and neither the employee nor the employer may require the substitution of accrued paid leave benefits available under the employer's policies. But the employer and employee may agree, to the extent that federal and state law permit, to allow accrued paid leave to supplement pay under the expanded FMLA so that the employee receives the full amount of his or her normal pay. For example, an employee and employer may agree to supplement the expanded FMLA leave by substituting one-third hour of accrued vacation leave for each hour of

expanded FMLA. If there is no agreement, the employee will; retain accrued leave benefits to be used later in accordance with the employer's established policies.

Key takeaway:

- **Employers cannot require employees to use accrued leave benefits to supplement expanded FMLA, but accrued leave can be used to supplement expanded FMLA by mutual agreement**

For purposes of expanded FMLA leave eligibility, how do we calculate if an employee has been on staff for 30 days?

An employee is considered to be on an employer's payroll for at least 30 calendar days if: 1) the employer had the employee on its payroll for 30 calendar days immediately prior to the day the employee's leave will begin, or 2) the employee was laid off or terminated on or after March 1, 2020, and rehired or reemployed by the same employer on or before December 31, 2020, provided the employee was on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or terminated.

If an employee began as a temporary hire, and was subsequently hired, their time as a temporary employee counts towards the 30-day eligibility period.

An employee who has been employed for at least thirty calendar days is eligible for expanded FMLA regardless of whether the employee would otherwise be eligible for leave under the FMLA. For example, to be eligible for the expanded FMLA benefit an employee is not required to have been employed for 1,250 hours of service and twelve months of employment as otherwise required under the FMLA.

Key takeaway:

- **In determining eligibility for expanded FMLA coverage, employers should consider whether an employee has been employed for at least 30 calendar days, and should remember that special rules apply if an employee was laid off or terminated after March 1, 2020 and then rehired**

Do we consider joint employees and employees employed by other entities who are integrated with the employing entity in determining whether FFCRA applies?

Yes. Employers with fewer than 500 employees are subject to the FFCRA. When one corporation has ownership interest in another corporation, they are usually considered separate employers, but all common employees of joint employers and all employees of integrated employers must be included.

Key takeaway:

- **The joint employment and integrated employer tests are technical and fact-specific, so further analysis and legal review should be undertaken if there is a question whether FFCRA applies based on the number of employees**

<u>If I have less than 50 employees can I qualify for the small business exemption?</u>

Employers with 50 or fewer employees may be exempted from the FFCRA as to all or some of their employees if they determine compliance would jeopardize the viability of the business. When using the exemption, small businesses must be able to prove: 1) FFCRA leave would result in the business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity, 2) the absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capacities of the business because of their specialized skills, knowledge of the business, or responsibilities, or 3) there are not sufficient workers able, willing, qualified, and available at the time and place needed to perform the labor or services being performed by the employee or employees seeking leave for the small business to operate at a minimal capacity.

The regulations direct small businesses who fall under this exemption to document their determinations and retain these records. An authorized officer of the business must determine that one of the criteria exists. Employers should not send any paperwork to the Department of Labor. Even if a small business chooses to exempt one or more employees, the employer should post appropriate FFCRA notices in the workplace.

Key takeaways:

- **Employers with less than 50 employees may determine that they need an exemption from FFCRA as to one or more employees because granting the leave would jeopardize their viability**
- **Employers taking advantage of this exemption should document the reasons based on the above criteria so that they are prepared if there is a future claim or audit, but should not send documentation to the Department of Labor unless asked to do so**
- **There is no application process and you should designate an authorized officer of the business to make the decision**

Are employees who take paid sick leave or expanded FMLA leave entitled to be restored to their position when the leave ends?

Maybe. Employees returning from emergency paid sick leave or expanded FMLA leave generally have a right to be restored to the same or an equivalent position. However, employees are not protected from layoffs that would have affected them regardless of their having taken the leave. Additionally, employers may deny employees on expanded FMLA job restoration if the denial is necessary to prevent substantial and grievous economic injury to the employer's operations.

Employers with fewer than 25 employees may not need to restore employees on expanded FMLA leave to their prior positions. We explained this exception in a previous client alert, available here: https://www.brannlaw.com/wp-content/uploads/2020/03/B-I-Update-on-Families-First-Coronavirus-Response-Act.pdf

Key takeaways:

- **Employers should carefully evaluate whether employees who have taken FFCRA leave are eligible for reinstatement, and if employees are laid off for other reasons those reasons should be documented**

How long should we retain FFCRA-related records?

Employers are required to retain all FFCRA documentation for four years, regardless of whether leave was granted or denied. If an employee supports their need to take leave with oral statements, the employer must document and maintain this information in their records for four years.

Key takeaway:

- **Employers should document employees' eligibility for FFCRA and should keep this documentation for at least 4 years**

What documents are necessary for the employee to provide to show the need for leave?

An employee must give their name, dates for leave requested, the qualifying reason for the leave, and an oral or written statement that they are unable to work for a qualifying reason. For leave requested because of an isolation or quarantine order they must give the name of the government entity who issued the order. If they have been advised to self-quarantine they must provide the medical provider's name who gave the advice. In the case of leave for child care, give the child's name, school or child care provider and a representation that no other suitable person will be caring for the child.

Key takeaway:

The burden is on the employee to provide this information. There are no mandated forms yet and the employer could prepare simple forms or letters indicating what the employee must provide.

What documents are necessary to obtain the FFCRA tax credits?

Employers should maintain the following documentation to justify the FFCRA tax credits:

1. Documentation showing how the employer determined the amount of paid sick leave and expanded FMLA paid to employees that are eligible for the credit, including records of work, telework, and paid sick leave and expanded FMLA;
2. Documentation showing how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
3. Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
4. Copies of the completed IRS Forms 941 that the employee submitted to the IRS, or, for employers who use third party payers to meet their tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941, and
5. Other documents needed to support the employer's request for tax credits pursuant to IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Key takeaways:

- **Employers who take advantage of the tax credits should maintain the above documentation for at least 4 years**

What happens to an employee's FFCRA benefits upon the end of their employment?

Under the FFCRA, when an employee ends employment the employer has no obligation to provide financial compensation or other reimbursement for unused paid sick leave or expanded FMLA. This applies upon termination, resignation, retirement, or any other separation from employment.

Key takeaway:

- **There is no obligation to compensate employees for unused paid sick leave or expanded FMLA leave when they leave employment**

May employees use their emergency paid sick leave again if they change employers?

Not if they have used it up. An employee is entitled to a maximum of 80 hours of paid sick leave. An employee who has used all 80 hours and then changes employers is not entitled to additional paid sick leave provided by the FFCRA. If an employee has used some of their paid sick leave, but not all, they may only use what is left of their entitlement. To use remaining paid sick leave, the employee's new employer must be covered by the FFCRA.

Key takeaways:

- **In determining eligibility for FFCRA benefits for employees hired after April 1, 2020, there should be a review of whether an employee received any FFCRA leave benefits from a prior employer**