New COVID-19 Paid Leave Effective April 1st - Labor Dept. Issues New Guidance

by Grant T. Collins - Wednesday, March 25, 2020

As we previously reported, Congress moved quickly last week to pass the new COVID-19 paid leave law. Remember, the law creates two new types of leave: (1) Public Health Emergency Leave ("Emergency FMLA") and (2) Emergency Paid Sick Leave ("Emergency PSL"). Our FAQs on the new bill are available in our article entitled COVID-19 Paid Leave Law is Final and Effective.

Yesterday, the DOL released its first guidance with respect to the new law:

Employer Expanded Family and Medical Leave Requirements

Employee Family and Medical Leave Requirements

FFCRA FAQ's

Provided below is a quick summary of the DOL's guidance. While the guidance still leaves much to be desired, any guidance is better than none.

Effective from April 1, 2020 to December 31, 2020

While most of the DOL's guidance is noncontroversial, it does make clear that the law will take effect on April 1, 2020. The law stated that it would go into effect "within 15 days of enactment," so the DOL appears to have decided that 14 days (instead of 15 days) is sufficient. They said:

What is the effective date of the Families First Coronavirus Response Act (FFCRA),

which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?

The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

Counting to 500 Employees

As we previously reported, both leave provisions apply only to employers with "500 or fewer employees." The DOL's guidance confirms that employers are to count all employees – including part-time employees and employees on leave (but not independent contractors) – in determining whether the law applies to them.

In addition, the DOL guidance confirms that it may be possible to aggregate employees of separate or related organizations under one of the following legal theories: (1) the separate organizations are actually "integrated employers," which means that they are effectively a single employer; or (2) the separate organizations are "joint employers," which means that separate entities both count the employees. With respect to the former, the DOL guidance cites the FMLA regulations regarding "integrated employers" and, as to the latter, the DOL cites its recently-issued new regulations on "joint employment."

As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an

integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

As the guidance makes clear, employers are required to make this determination “at the time your employee’s leave is to be taken.” Thus, if an employee makes a request for Emergency FMLA or Emergency PSL between April 1, 2020 and December 31, 2020, the employer must determine whether, at the time the leave is to be taken, the employer has “fewer than 500 employees” and therefore needs to provide the leave.

How Much Is Paid to Employees on Leave

The pay rate for both Emergency FMLA and Emergency PSL is based on the employee’s “regular rate.” For Emergency FMLA, it is two-thirds of the employee’s “regular rate” up to a maximum of $200 per day and ($10,000 total for each employee). As to Emergency PSL, an employer’s payment is capped at $511 per day ($5,110 in the aggregate) if the leave is taken for an employee’s own illness or quarantine and $200 per day ($2,000 in the aggregate) if the leave is taken for the care for others or school closures.

The “regular rate” is not defined in the new law, but the DOL’s guidance makes clear that employers should look to the definition in the FLSA:

As an employee, how much will I be paid while taking paid sick leave or expanded family and medical leave under the FFCRA?

It depends on your normal schedule as well as why you are taking leave.

If you are taking paid sick leave because you are unable to work or telework due to a need for leave because you (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, you will receive for each applicable hour the greater of:

> your regular rate of pay,
> the federal minimum wage in effect under the FLSA, or
> the applicable State or local minimum wage.

In these circumstances, you are entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If you are taking paid sick leave because you are: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and

Human Services, you are entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, you are subject to a maximum of $200 per day, or $2,000 over the entire two week period.

If you are taking expanded family and medical leave, you may take paid sick leave for the first ten days of that leave period, or you may substitute any accrued vacation leave, personal leave, or medical or sick leave you have under your employer's policy. For the following ten weeks, you will be paid for your leave at an amount no less than 2/3 of your regular rate of pay for the hours you would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, you will not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when you are on 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.

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What is my regular rate of pay for purposes of the FFCRA?

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave. If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

If you are paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

The DOL's guidance does not address the issue of fringe benefits or the amounts to be paid by a contractor subject to a multiemployer collective bargaining agreement. However, the DOL's guidance also includes a link to DOL Fact Sheet #56A which describes how to calculate an employee's "regular rate."

As we discussed before, the definition of "regular rate" under the FLSA specifically excludes several amounts, including: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."

DOL Fact Sheet #56A confirms this analysis:

Employer Contributions to Benefit Plans

Employers may exclude from the regular rate contributions irrevocably made by an employer to a trustee or third person as part of a bona fide plan for death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense.

This again seems to suggest that fringe benefit payments need not be made.

Small Employer (1-49 Employees) Potential Exemption

As we previously reported, the FFCRA provides the DOL with the regulatory authority to exempt businesses with "fewer than 50 employees" from providing the Emergency FMLA and Emergency PSL if the DOL determines that "the imposition of such requirements would jeopardize the viability of the business as a going concern."

While the DOL's guidance states that additional guidance will be forthcoming, the DOL suggests that employers start marshalling documentation as to why the requirements would harm their business:

If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

Bottom Line

We are still digesting the most-recent guidance from the DOL and will continue to provide updates as they are available.

For all of the latest critical COVID-19 information for employers, check our continually updated FAQ's by clicking on the banner headline at the top of the Felhaber Larson web page.

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220 South 6th St, Suite 2200, Minneapolis, Minnesota 55402 | info@felhaber.com | 612-339-6321 | 800-989-6321