COLLAZO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

March 26, 2020

Department of Labor Issues Guidance on Emergency Paid Sick Leave and Emergency FMLA

On March 24, 2020 the Department of Labor issued guidance on the Families First Coronavirus Response Act ("FFCRA"), specifically concerning the Emergency Family and Medical Leave Act ("FMLA") and the Emergency Paid Sick Leave Act. The Department of Labor also noted that this is just the first installment of guidance regarding this legislation.

Effective Date Of These Provisions

The paid leave provisions of the FFCRA under both Emergency Paid Sick Leave and Emergency FMLA take effect on April 1, 2020 and apply to covered leave taken between April 1, 2020 and December 31, 2020. Employees will not be entitled to reimbursement for unused leave provided by these provisions upon termination, resignation, retirement, and or other separation from employment. Further, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave under Emergency FMLA. (The regulations do not appear to contemplate the employee using accruals to make up the difference between Emergency FMLA benefits and their usual pay.)

If leave is foreseeable, employees should provide notice to their employer as soon as is practicable. Following the first workday of paid sick time, an employer may require employees to abide by reasonable notice procedures to continue to receive paid sick time. For New York State employers, leave is likely to be deemed foreseeable because Governor Cuomo's most recent Executive Order has ordered all non-essential businesses to direct 100% of their workforces stay home.

Notice Requirements For Employers

Covered Employers must post a notice of the FFRCA requirements in a conspicuous place on its premises. The Department of Labor will be issuing a model notice in the coming days. We will notify clients when it becomes available.

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Guidance on Covered Employers

Whether an employer has fewer than 500 employees should be determined when the employee takes leave. When making this determination, employers should count as employees those who are:

(1) on leave;
(2) temporary employees who are jointly employed by the employer and another employer (regardless of whose payroll they are on); and
(3) day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship).

Employers should not count workers who are considered independent contractors under the Fair Labor Standards Act toward the 500-employee threshold.

Guidance on Employees Employed for 30 Calendar Days Under Emergency FMLA

Employees employed for at least 30 calendar days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19. Employees are considered to be employed for at least 30 calendar days under the Emergency FMLA if their employer has had them on the payroll for the 30 calendar days immediately prior to the day the employee's leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee would need to have been on the employer's payroll since March 2, 2020. Temporary employees whose employer subsequently hired them on a full-time basis may count any days they previously worked as temporary employees toward the 30-calendar-day requirement.

Next Steps for Employers Who Qualify for The Small Business Exemption

Employers who have fewer than 50 employees and for whom providing child care-related paid sick leave and Emergency FMLA would jeopardize the viability of their business may avail themselves of the small business exemption. Employers who wish to elect this exemption should document why their business meets the criteria set forth by this exemption, but this will be addressed in greater detail in forthcoming regulations.

Guidance on Counting Hours for Part-Time Employees

If a part-time employee's hours vary or their normal schedule is unknown, an employer may use a six-month average to calculate an employee's average daily hours under these provisions. If the employer cannot calculate the six-month average because the employee has not been employed for six months, the employer can rely on the number of hours agreed upon with the employee at the time of hire. Absent such an agreement, the employer can calculate the employee's hours from the average hours per day that the employee was scheduled to work over the entire period of their employment. A part-time employee eligible for Emergency Paid Sick Leave is entitled to paid sick leave for the resulting number of hours per day for up to a two week period and, if eligible, may take Emergency FMLA for the same number of hours per day up to ten weeks thereafter.

Guidance on Calculating Pay

For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of an employee's regular rate over a period of up to six months before the date on which the employee takes leave. If the employee has not worked for the employer for six months, the employer can use the employee's actual rate of pay over the period of employment as the basis for this calculation. Employers may also calculate an employee's "regular rate" by adding all forms of compensation that are part of the employee's regular rate over the six-month period described above, and dividing that sum by all hours actually worked in the same period.

Under the Emergency FMLA, employers are required to pay an employee for the hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. Overtime hours should therefore be included in the calculation. However, under the Emergency Paid Sick Leave Act, paid leave is required only up to 80 hours over a two week period. As a result, an employee who is scheduled to work 50 hours per week may receive 50 hours of paid sick leave in the first week, but then receives only 30 hours of paid sick leave in the second week. The 50-hour schedule, subject to dollar caps, would then be cited in the calculation of pay in any remaining weeks.

Although the number of hours worked by an employee is taken into account in considering an employee's pay under the FFCRA, employees are not actually entitled to overtime premiums as part of these benefits. However, employees paid with

commissions, tips, or piece rates will have these wages incorporated into their pay calculation.

Double Counting Emergency Paid Sick Leave

Employees may not take 80 hours of paid sick leave under the Emergency Paid Sick Leave Act for their own quarantine due to COVID-19, and then expect another 80 hours of sick leave for another reason provided under the same statute. Emergency paid sick leave can be taken for any combination of qualifying reasons, but it is capped at 80 hours per employee regardless of the number of qualifying reasons an employee can offer for their inability to work.

Because the Emergency Paid Sick Leave Act takes effect on April 1, 2020, the Department of Labor has taken the position that any paid leave provided by the employer before that date, even for a purpose covered by the Act, will not offset the employee's eligibility for 80 hours of paid sick leave under the federal statute.

Emergency FMLA's Impact on Existing FMLA

The provisions of the Emergency FMLA do not convert any preexisting forms of leave under the FMLA into paid leave. The only type of FMLA leave that is paid is leave pursuant to Emergency FMLA, which only includes leave taken because an employee needs to care for their child whose school, place of care, or care provider is unavailable due to COVID-19.

Interaction of Emergency FMLA and Emergency Paid Sick Leave

Employees may be eligible for leave under both the Emergency FMLA and the Emergency Paid Sick Leave Act, but will be entitled to a total of no more than twelve weeks of paid leave under the two statutes. For example, an employee may use both paid sick leave under the Emergency Paid Sick Leave Act and Emergency FMLA to cover their loss of income when they must be absent from work to care for a child whose school, place of care, or care provider is unavailable due to COVID-19. In this case, the Emergency Paid Sick Leave Act covers the first ten work days, which are job-protected under Emergency FMLA but otherwise unpaid unless an employee elects to use existing vacation, personal, or sick leave under the employer's policy. After the first ten work days, a covered employee is entitled under Emergency FMLA to receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the

following ten weeks. It should be recalled that an employee is only eligible for this additional ten weeks of Emergency FMLA if they are unable to work (including telework) because their child's school or childcare provider is unavailable due to COVID-19.

Violations of FFCRA

For the first 30 days after the FFCRA takes effect, the Department of Labor will refrain from enforcement action as long as the employer acts reasonably and in good faith to comply with the FFCRA. A showing of good faith in this context means that violations are not willful, they are remedied and the employee is made whole as soon as practicable, and the Department receives a written commitment from the employer to comply with the Act in the future.

Employers who violate an employee's rights with respect to the first two weeks of Emergency FMLA or violate the unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. Employers who violate the provisions providing for up to ten additional weeks of Emergency FMLA are subject to the enforcement provisions under the existing FMLA.

Quarantine Order

The FFCRA does not define the term "quarantine order", but quarantine orders are legally authorized by Section 361 of the Public Health Service Act and federal regulations at 42 CFR § § 70.6, 71.32(a) and 71.33. An example of a quarantine order that meets these regulations is provided by the CDC in the link below under the heading Enforcement.

https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html

Coronavirus Aid, Relief, and Economic Security Act

Employers should also be aware that the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), a financial relief package, is expected to pass in the coming days. Of particular importance to our clients, Section 4003 of this Bill, titled "Emergency Relief and Taxpayer Protections," authorizes the Secretary of the Treasury to make loans, loan guarantees, and other investments to eligible businesses, States, and

municipalities in an amount not to exceed $500 billion, and to provide the subsidy amounts necessary for such loans, loan guarantees, and other investments in accordance with the Federal Credit Reform Act of 1990. The current version of the bill requires any eligible applicant for a loan under this program to remain neutral in any union organizing effort for the term of the loan.

As this bill has yet to become law, the details remain subject to change, and the firm will advise readers as the situation develops.

If you have any questions about these pieces of legislation or would like additional information, please contact John Keil at (212) 758-7862 or jkeil@collazokeil.com, or any other attorney at the firm.