COVID-19: DEPARTMENT OF LABOR PUBLISHES TEMPORARY RULES FOR THE IMPLEMENTATION OF THE FFCRA

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The Families First Coronavirus Response Act ("FFCRA" or "Act") was passed by the Senate and signed into law by President Trump on March 18, 2020. The FFCRA contains multiple provisions aimed at extending temporary relief through December 31, 2020, to eligible employees affected by the COVID-19 pandemic. The FFCRA in turn imposes various leave requirements on employers. In addition to emergency paid sick leave in various COVID-19 related situations, the FFCRA amends the Family and Medical Leave Act ("FMLA") to provide for paid leave for employees who need time off work for childcare purposes due to the COVID-19 outbreak.

Since the passage of the Act and with its requirements taking effect beginning on April 1, 2020, employers have been waiting for additional guidance from the United States Department of Labor ("DOL") to address key questions and concerns arising from the requirements of the new law, including, among many others:

- Who will be included in the definitions of health care provider and emergency responder?
- How will a determination be made as to whether the employees of parent companies, subsidiaries, and related entities should be counted together for purposes of determining the 500 employee threshold? How will employees of companies with a workforce outside of the United States be treated for purposes of the employee threshold count?
- How will a small business have to demonstrate that compliance with the law's requirements would jeopardize the viability of the business for purposes of the "under 50 employees" exemption?

The DOL first issued informal guidance in the form of a series of Questions and Answers addressing various requirements of the FFCRA. The long anticipated formal regulations on the FFCRA were issued on April 1, 2020, by the DOL's Wage and Hour Division in the form of a Temporary Rule[1] and further address issues of concern or ambiguity in the FFCRA.

DEFINITIONS OF HEALTHCARE WORKER AND EMERGENCY RESPONDER

While the FFCRA allows an employer to exclude health care providers and emergency responders from the paid sick leave and extended FMLA requirements of the FFCRA, the existing definition of health care providers in the FMLA is rather narrow and left open the question of whether any other personnel employed by hospitals and other health care facilities would also fall under the exclusion. Similarly, the statute does not provide any definition

of emergency responder. The Temporary Rule addresses these concerns by providing broad definitions of heath care provider and first responder for purposes of identifying those employees who employers may, in their discretion, exempt from the new paid leave requirements.[2]

A health care provider is defined in the Temporary Rule as "anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity." The definition further "includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions" and covers employees of entities that contract with such institutions.

The Temporary Rule also broadly defines emergency responder as "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility."

With these broad definitions, public and private entities that provide an array of services related to health care or emergency response have the option of excluding from the new federal paid leave laws employees whose services are crucial to the efforts to contain and respond to the COVID-19 crisis.

500 EMPLOYEE THRESHOLD REQUIREMENTS AND CONSIDERATIONS FOR MULTI-ENTITY EMPLOYER

With FFCRA applying to private employers with fewer than 500 employees and certain public agencies, the Act left somewhat open questions as to who should be counted as an employee and when affiliated entities might be considered to be a single employer for purposes of the Act. The Temporary Rule also addresses some of these concerns and questions.

For example, the Temporary Rule requires an employer to count all full-time and part-time employees employed in the United States in determining the employee threshold. The calculation is dependent on the number of employees at the time an employee would take leave.[3] The rule also provides that the number of employees to be counted includes "[e]mployees of temporary placement agencies who are jointly employed under the [Fair Labor Standards Act]" by the employer and another entity, regardless of which employer's payroll the employee appears on. Similarly, "day laborers supplied by a temporary placement agency" are also included in the count.

Additionally, the Temporary Rule provides that all common employees of "joint employers" or all employees of "integrated employers must be counted together." The rule further specifies that, "where one corporation has an ownership interest in another corporation," the two will be considered separate employers "unless they are joint employers under the [Fair Labor Standards Act]" with respect to certain employees entities and notes that, in general, two or more entities are separate employers "unless they meet the integrated employer test under the FMLA. That integrated employer test provides for the consideration of … [fill in]. Accordingly, while application of these standards will still present difficulties and uncertainties for certain employers and their affiliated entities in the effort to determine whether the Act applies, the Temporary Rule at least provides a more certain framework for the analysis.

For additional guidance on the employer leave and benefits requirements of the FFCRA, please see K&L Gates Alert "COVID-19: Analysis of the COVID-19 Pandemic Congressional Response: Employer Requirements Under the Families First Coronavirus Response Act (FFCRA)." For more specific questions about the application of the FFCRA requirements to your company, contact a K&L Gates lawyer for assistance. As federal, state, and local governments continue to address the evolving COVID-19 pandemic, K&L Gates will provide critical updates along with practical guidance to assist with compliance. Please visit our COVID-19 resource center here.

Notes

[1] In a press release from April 1, 2020, the DOL announced that it is promulgating regulations to implement public health emergency leave and has issued this temporary rule, which is effective from April 1, 2020, through December 31, 2020.

[2] The DOL recognized the need for a broader definition of health care provider for purposes of the FFCRA than that provided in the FMLA for puropses of indentifying who is authorized to ceritfy the existence of a "serious health condition."

[3] The DOL provides the following example for clarification of this rule: "For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020."

