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DEPARTMENT OF LABOR ISSUES GUIDANCE ON FAMILIES FIRST CORONAVIRUS RESPONSE ACT

To Our Clients and Friends:

In an ongoing effort to address the challenges presented by the novel coronavirus ("COVID-19") pandemic, the federal government enacted the Families First Coronavirus Response Act (the "FFCRA") on March 18, 2020. Among other things, the FFCRA, which applies to private employers with fewer than 500 employees, expands paid leave for covered employees in certain circumstances related to COVID-19 and creates corresponding tax credits. On March 24, 2020, the Wage and Hour Division (the "Division") of the U.S. Department of Labor issued additional guidance for employers and employees relating to the two paid leave provisions of the FFCRA: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.[1] These provisions will become effective on April 1, 2020, and will apply to leave taken between April 1, 2020 and December 31, 2020. Leave provided before April 1, 2020 will not count toward the requirements.[2] Below, we provide an overview of the two leave provisions, along with a discussion of which employers they cover.

The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act requires that covered employers provide employees two weeks of paid sick leave at the employee's regular rate of pay (up to $511 per day and $5,110 in the aggregate) if the employee is unable to work (or telework) because:

> (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
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> (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
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> (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.[3]

The Act also entitles employees to two weeks of paid sick time at two-thirds of the employee's regular rate of pay (up to $200 per day and $2,000 in the aggregate) if the employee is unable to work (or telework) because:

> (1) the employee is caring for an individual who is subject to a Federal, State, or local quarantine order or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(2) the employee is caring for his or her child (under 18 years old) because the child's school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or

(3) the employee is experiencing any other condition "substantially similar" to those described above, as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.[4]

Full-time employees are entitled to up to 80 hours of paid leave, while part-time employees are eligible for leave equal to the number of hours that the employee works on average over a two-week period.[5] For hourly employees whose schedules vary, employers may use a six-month average of the employees' working hours to calculate the average daily hours. If the employee did not work in the preceding six-month period, e.g., if the employee just began working for the employer, employers may use the number of hours the employer and employee agreed the employee would work upon hiring.[6] If no such agreement exists, employers may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Paid sick time under the Emergency Paid Sick Leave Act must be granted in addition to any pre-existing paid leave benefits the employer provides, and must be made available for immediate use by employees, regardless of the length of the employees' employment.[7] Employers are also prohibited from requiring employees to exhaust other paid leave benefits before using the benefits available under Emergency Paid Sick Leave Act.[8] Benefits under the Emergency Paid Sick Leave Act are not retroactive, and employees may not carry over paid sick time under the Act from one year to the next.[9]

Employers may not discharge, discipline, or otherwise discriminate against any employee for taking leave under the Emergency Paid Sick Leave Act, or for filing a complaint related to the Act. Employers who violate any provision of the Emergency Paid Sick Leave Act will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act, 29 U.S.C. 216, 217, including payment of back wages, liquidated damages, and attorneys' fees and costs.[10]

The Emergency Family and Medical Leave Expansion Act (the "Emergency FMLA Expansion Act")

The Emergency FMLA Expansion Act amends the existing Family and Medical Leave Act (the "FMLA") to provide covered employees with the ability to take up to 12 weeks of job-protected leave if the employees have a "qualifying need related to a public health emergency."[11] A "qualifying need" is when an employee "is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable," due to an emergency related to COVID-19.[12] This provision applies only to the need to care for a minor child; employees cannot utilize leave under the Emergency FMLA Expansion Act to care for other family members who may be affected by COVID-19, such as spouses or parents. (Note, however, that regular FMLA leave may be available if the employee or his or her family member has COVID-19 symptoms that rise to the level of a serious health condition.)

The first 10 days of leave under the Emergency FMLA Expansion Act may consist of unpaid leave, but employees can choose to substitute any accrued vacation leave, personal leave, or sick leave (including paid sick leave provided by the Emergency Paid Sick Leave Act) for these 10 days of unpaid leave. The remainder of the 12 weeks of leave must be paid at a rate of two-thirds of the employee's regular rate of pay for 40 hours per week for full-time employees, or, for part-time employees, the number of hours the employee is normally scheduled to work over that period.[13] However, for both full-time and part-time employees, the amount is capped at $200 per day and $10,000 in the aggregate.

Eligible employees who take leave under the Emergency FMLA Expansion Act are entitled to be restored to the position they held when the leave commenced, or to an equivalent position, subject to certain exceptions outlined in the FMLA. However, employers with fewer than 25 employees may not need to return employees to their same or similar positions if (1) the position does not exist due to changes in the employer's economic or operating conditions caused by the COVID-19 emergency; (2) the employer makes reasonable efforts to restore the employee to an equivalent position; and (3) if those efforts fail, the employer makes a reasonable effort to contact the employee if an equivalent position becomes available within a one-year period after the employee's leave ends.[14]

Employees must have worked for the employer for at least 30 days to be eligible for benefits under the Emergency FMLA Expansion Act, which is significantly lower than the normal FMLA threshold. In addition, the FMLA's normal requirement that the employee must work at an employment site with at least 50 employees within a 75-mile radius does not apply.

Because the Emergency FMLA Expansion Act is an amendment to the FMLA, the language of the FMLA that is unchanged, including prohibitions on discrimination and retaliation against employees for taking FMLA leave, will apply to any leave taken under this provision.

Special Considerations when Employees Could Seek Multiple Types of Leave

In its guidance, the Division addresses the common question of whether an employee may take multiple types of FFCRA leave. For the types of leave covered by the Emergency Paid Sick Leave Act, an employee may take a total of 80 hours paid sick leave (or the part-time equivalent) "for any combination of qualifying reasons," but that does not increase the cap on leave.[15] Furthermore, parents who qualify for leave under both the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act "may be eligible for both types of leave, but only for a total of twelve weeks of paid leave." In other words, the employee may elect to use the Emergency Paid Sick Leave Act to cover the first ten days of leave that would otherwise be unpaid under the Emergency Family and Medical Leave Expansion Act.[16]

Employers Covered by the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act

The Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act apply only to private employers with fewer than 500 employees in the United States, to certain public employers, and to certain self-employed individuals. The Division's guidelines clarify that the number of employees is measured as of the time the leave is to be taken: "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 . . . ."[17] In counting employees to determine coverage under the Acts, employers should include full-time and part-time employees and employees who are on leave. Employers should also count day laborers supplied by a temporary agency. Independent contractors are not considered employees for purposes of the 500-employee threshold although, as self-employed individuals, they may be able to seek tax relief under the act.

Neither the Emergency Paid Sick Leave Act nor the Emergency FMLA Expansion Act specifies whether employees on furlough or layoff who have not been terminated should count toward the 500-employee threshold, or whether such employees would be entitled to leave. Unfortunately, the guidelines issued by the Division do not shed any light on this question. We expect the regulations that the Division anticipates issuing in April may provide additional guidance on this issue.

In considering whether they are covered by the Acts, employers should pay particular attention to whether they may be considered "joint employers" or "integrated employers," as this can have a significant impact on the number of employees that the employer must count. According to the Division guidance, "two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees," in which case all "common employees must be counted in determining whether sick leave must be provided . . . ."[18] Separately, "[i]f 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" under the FFCRA.[19]

Joint Employers: If an employer is a joint employer under the FLSA, all of the employees it holds in common with the other joint employer must be counted toward 500-employee threshold for purposes of the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act. This includes temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly-employed employees are maintained on another employer's payroll).

In January 2020, the Department of Labor announced a final rule revising its regulations interpreting joint employer status under the Fair Labor Standards Act (the "FLSA").[20] The final rule continued to recognize two scenarios where an employee may have two or more joint employers: (1) where one company or individual has an employment relationship with the worker, but another company or individual simultaneously benefits from that work (such as a company who uses a staffing agency); and (2) where one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek (for example, two restaurants with the same owner who employ the same line chef).

In the first scenario, joint employer status turns on whether the potential joint employer is directly or indirectly controlling the employee. This is evaluated using a four-factor balancing test that assesses whether the joint employer (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. No single factor is determinative, and joint employer status will depend on the facts of each particular case.

In the second scenario, joint employer status turns on how closely associated the two employers are. Employers will generally be sufficiently associated to establish a joint employment relationship if there is an arrangement between them to share the employee's services; the employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or they share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer. Again, no single factor is determinative in evaluating joint employer status under this second scenario.

Integrated Employers: Under the FMLA, companies can be considered so interrelated that they constitute a single employer. The factors generally considered in evaluating integrated employer status include (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership or financial control. No single factor is determinative; rather, the entire relationship between the entities is considered. As with joint employers, if two or more entities are considered an integrated employer under the FMLA, employees of each of the entities making up the integrated employer will be counted in determining employer coverage under the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act.

Employers may be weighing whether to rely on the joint employer theory or the integrated employer theory to argue they are not subject to the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act. Employers should carefully consider this option before invoking it, as relying on these theories could have ripple effects across a host of federal and state laws, including the FMLA, FLSA, ERISA, and state workers compensation and unemployment compensation rules. It may also affect eligibility for benefits under future COVID-19 relief legislation. Therefore, employers should conduct a detailed assessment of their operations and consult with counsel regarding any attendant risks before relying on these theories.

Exemptions

Both the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act give the Secretary of Labor the ability to exclude certain health care providers and emergency responders from being eligible for benefits under the Acts.[21] The Acts also allow employers of health care providers or emergency responders to elect to exclude such employees from the paid leave provisions. The guidelines issued by the Division do not provide additional parameters for how or when employers of health care providers or emergency responders may avail themselves of this exclusion.

The Secretary is also empowered to exempt small businesses with fewer than 50 employees from the paid leave requirements if compliance would jeopardize the viability of the business as a going concern.[22] The guidance issued by the Division directs businesses wishing to utilize this small business exemption to document why the business "meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations."[23] However, businesses are not supposed to send any of this documentation to the Division at the current time.[24]

Tax Credits

Covered employers will qualify for a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Employers may also take a tax credit for the amount of the employers' qualified health plan expenses that may be properly allocated to employees' COVID-19-related leaves. In its recently-issued guidance, the Division noted that "every dollar of expanded family and medical leave (plus the cost of the employer's health insurance premiums during leave) will be 100% covered by a dollar-for-dollar refundable tax credit available to the employer."[25]

Notice

Each covered employer must post in a conspicuous place on its premises a notice of the requirements of the FFCRA, including the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act. A model notice issued by the Department of Labor is available here. In separate guidance regarding the notice, the Department has stated that, "[a]n employer may satisfy th[e notice-posting] requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website."[26]

Stakeholders Dialogue

The Division is hosting a "national online dialogue" to provide an opportunity for employers and workers to "play a key role in shaping the development of the Department of Labor's compliance assistance materials and outreach strategies related to the implementation of the FFCRA."[27] The Division stated that it will use the comments gathered from this dialogue to "develop compliance assistance guidance, resources and tools" and to help employers and workers understand their responsibilities and rights under the paid leave provisions of the FFCRA.[28] The public can participate in this national online dialogue through Sunday, March 29, 2020. Those wishing to participate in the online dialogue can register here.

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[1] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions; *Families First Coronavirus Response Act: Employer Expanded Family and Medical Leave Requirements*, https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave; *Families First Coronavirus Response Act: Employee Expanded Family and Medical Leave Rights*, https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave.

[2] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[3] H.R. 6201, Division E, §§ 5102, 5110(5).

[4] *Id.* § 5102. The Division's current guidance does not elaborate on what circumstances would qualify as "substantially similar" to those described in the Emergency Paid Sick Leave Act. As the

pandemic develops, there may be joint guidance on this topic from Departments of Health and Human Services, Labor, and Treasury.

[5] *Id.*

[6] *Id.* § 5110(5)(C).

[7] *Id.* § 5102(e).

[8] *Id.*

[9] *Id.* § 5102(b).

[10] *Id.* §§ 5104, 5105.

[11] H.R. 6201, Division C, §3102.

[12] *Id.*

[13] *Id.* If an employee's schedule varies from week to week, employers may calculate an employee's average number of hours using the same methods as those used to calculate average employee hours under the Emergency Paid Sick Leave Act.

[14] *Id.*

[15] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 85 Fed. Reg. 2858 (Jan. 16, 2020).

[21] H.R. 6201, Division C, §§ 3102, 3105, Division E, §§ 5102, 5111.

[22] *Id.* Division C, § 3102, Division E, § 5111.

[23] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[24] *Id.*

[25] *See* Department of Labor, *Families First Coronavirus Response Act: Employer Expanded Family and Medical Leave Requirements*, https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave. The Department of Treasury, IRS, and the Department of Labor have also issued joint guidance regarding the tax credit component of FFCRA, and further guidance is expected this week from the Department of Treasury. *See U.S. Department of the Treasury, IRS and the U.S. Department of Labor Announce Plan to Implement Coronavirus-Related Paid Leave for Workers and Tax Credits for Small and Midsize Businesses to Swiftly Recover the Cost of Providing Coronavirus-Related Leave*, https://www.dol.gov/newsroom/releases/osec/osec20200320.

[26] *See* Department of Labor, *Families First Coronavirus Response Act Notice – Frequently Asked Questions*, https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions.

[27] *See* Department of Labor, *Updated: U.S. Department of Labor Invites Stakeholders to a National Online Dialogue on Paid Family and Medical Leave and Paid Sick Leave Under the Families First Coronavirus Response Act*, https://www.dol.gov/newsroom/releases/whd/whd20200325..

[28] *Id.*

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's ***Coronavirus (COVID-19) Response Team****.*

Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn attorney with whom you work in the ***Labor and Employment Group****, or the following authors:*

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