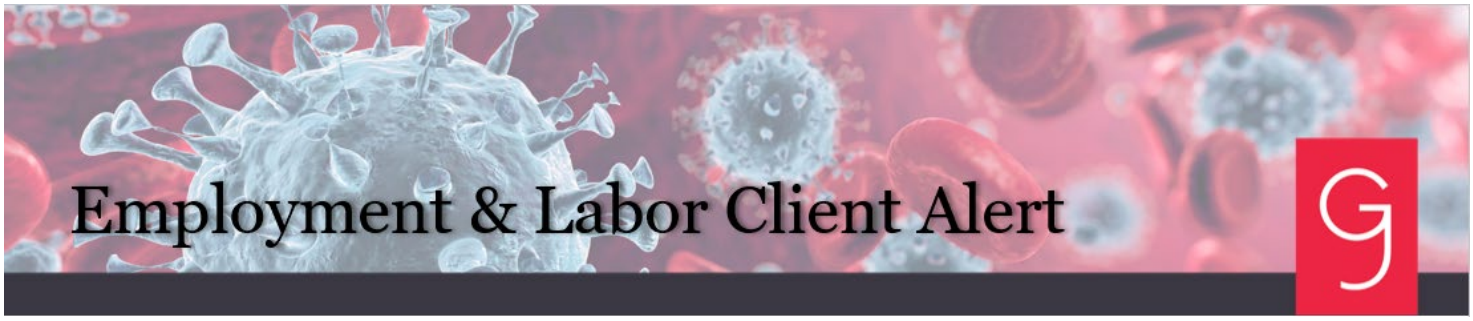

Department of Labor Issues New Rules and Additional COVID-19 Guidance for Employers

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On Wednesday, April 1, 2020, the Families First Coronavirus Response Act ("FFCRA") went into effect nationwide. For background information on the basics of the FFCRA, click here to view GableGotwals' comprehensive Client Alert, and click here to view our recent webinar.

That same afternoon, the Department of Labor ("DOL") issued a new "temporary rule," effective immediately, explaining and clarifying a host of issues raised by the FFCRA. This rule comes hot on the heels of a flurry of answers from the DOL to frequently asked questions. This cumulative guidance offers critical insight into and additional clarity on a range of key questions employers have asked since the FFCRA passed.

Some highlights from the DOL's guidance include:

The DOL Clarifies the FFCRA's Small Business Exemption

Language in the FFCRA raised the possibility that the DOL might exempt employers with fewer than 50 employees—*i.e.* "small businesses"—from certain expanded FMLA and emergency paid sick leave provisions. The DOL's guidance makes that possibility a reality. Under the new guidance, small businesses (those with fewer than 50 employees) are exempt from providing:

- paid sick leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons; and
- expanded FMLA leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons

if providing such leave would jeopardize the viability of the small business as a going concern. Importantly, the DOL's new rule makes clear that small businesses are ***not*** exempt from providing emergency paid sick leave for any other reasons enumerated in the FFCRA.

To claim this exemption, an ***authorized officer*** of a small business must determine that:

- providing emergency paid sick leave or expanded FMLA leave would result in "the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity";
- the absence of the employee(s) requesting emergency paid sick leave or expanded FMLA leave "would entail a substantial risk to the financial health or operational

capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities"; ***or***

- there are insufficient workers "who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided" by the employee(s) requesting emergency paid sick leave or expanded FMLA leave, and "these labor or services are needed for the small business to operate at a minimal capacity."

While small businesses need not submit material or documentation to DOL if they are claiming this exemption, they must nevertheless document that an authorized officer has made the determination outlined above and retain those documents in their own records.

Most—But Not All—Employees Must Be Restored to Their Jobs After Taking Leave

Generally, employers are required to provide the same (or an equivalent) job to an employee who returns to work following FFCRA leave. Of course, businesses can terminate employees for legitimate business reasons, such as a worksite closure—they just cannot discriminate against employees because they took leave. But the DOL's guidance clarifies a potential carve-out for small employers with fewer than ***25*** employees. A small employer can avoid the restoration requirement for employees who take expanded FMLA leave if ***all*** of the following four conditions are met:

- the employee took leave to care for his or her son or daughter because of a school or place of care closure, or because of childcare unavailability, due to COVID-19 related reasons;
- the employee's former job no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by a COVID-19 public health emergency during the employee's leave;
- the employer makes reasonable efforts to restore the employee to the same or an equivalent position; ***and***
- where reasonable restoration efforts fail, the employer continues to make reasonable efforts to contact its former employer for one year, beginning either the date on which the employee's COVID-19 related leave ended or the date 12 weeks after the employee's leave began—whichever is earlier.

Employers may also deny restoration to an FMLA "key" employee (*i.e.* a salaried employee who is among the highest paid 10% of all the employer's employees within 75 miles of the employee's worksite) if such denial is "necessary to prevent substantial and grievous economic injury to the operations of" the employer.

The DOL Broadly Defines "Son or Daughter"

Drawing on prior FMLA guidance, the DOL specifies that a "son or daughter" under the FFCRA is an employee's own child, which includes the employee's biological, adopted, or foster child, stepchild, legal ward, or a child the employee has day-to-day responsibilities to care for or financially support. In an effort to "interpret definitions consistently," the DOL ***also*** clarifies that an FFCRA "son or daughter" includes an adult son or daughter (i.e., one who is 18 years of age or older), who is incapable of self-care because of a mental or physical disability.

While the DOL's effort to include adult children under the FFCRA's terms appears to comport with the language of the emergency sick leave provisions, it conflicts with the language in the statute's expanded FMLA provisions. The expanded FMLA provisions in the FFCRA allow leave to care for a son

or daughter "***under 18 years of age***," while the emergency paid sick leave provisions allow leave to care for a "son or daughter"—with no age restriction. The DOL recognized this discrepancy and addressed its decision to apply an expansive definition in its new rule:

> The Department considered interpreting the leave provision of the EFMLEA [expanded FMLA leave] to apply only when an employee is unable to work because of a need to care for a child under age 18 years of age, and not to apply when a child is 18 years of age or older and incapable of self-care because of a mental or physical disability. The Department also recognizes there could be other interpretations of the "under 18 years of age" phrase within the EFMLEA. However, the Department has decided not to employ these alternative interpretations because it sees significant disadvantages to having different rules under the EFMLEA and the EPSLA [emergency paid sick leave] for when an employee may take leave to care for his or her son or daughter. Having different rules would introduce unnecessary complexity and incongruity into the leave provisions and could improperly deny leave to employees with a need to care for a child age 18 or older who is incapable of caring for himself or herself because of a mental or physical disability. The Department is therefore treating the definitions as the same . . . and will issue regulations to ensure consistency between the EPSLA and the EFMLEA.

Accordingly, employers must allow employees to take ***either*** expanded FMLA leave or emergency paid sick leave to care for adult children who are incapable of self-care because of a disability.

Defining and Excluding "Health Care Providers" and "Emergency Responders"

Under the FFCRA, employers, at their election, may exclude "health care providers" from expanded FMLA leave and emergency paid sick leave coverage. The DOL's guidance specifies that "health care provider" is defined expansively, and includes ***anyone***

- "employed at any doctor's office, hospital, health care center, clinic, post-secondary 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," including "any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions";
- "employed by an entity that contracts" with any of the listed institutions, employers, or entities "to provide services or to maintain the operation of the facility";
- "employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments"; ***and***
- "the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19."

Employers similarly may elect to exempt "emergency responders" from the FFCRA's expanded FMLA and emergency paid sick leave provisions. The guidance specifies that an "emergency responder" is ***any employee***

> "necessary for the provision of transport, care, health care, comfort and nutrition of such patients," or whose services are otherwise "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."

As with "health care provider," the highest official in a state, a territory, or the District of Columbia may designate any individual an "emergency responder" necessary to that state's, territory's, or District of Columbia's response to COVID-19.

Stay-At-Home Orders, Shelter-in-Place, and Business Closures Don't Support Leave

The DOL guidance clarifies the range of circumstances under which eligible employees are entitled to expanded FMLA leave and/or emergency paid sick leave—and, critically, when they ***are not*** entitled to such leave. On this latter point, the guidance specifies that employees ***are not*** eligible for expanded FMLA leave or emergency paid sick leave where their employer closes because of a lack of work *or* pursuant to a federal, state, or local directive. Similarly, employees are not eligible for expanded FMLA leave or emergency paid sick leave where their employer furloughs them or reduces their hours.

Thus, where an employer closes, either voluntarily or because of a federal, state, or local directive, employees may not take expanded FMLA leave or emergency paid sick leave, regardless of whether the closure took place before, on, or after April 1, or while an employee was on leave. Likewise, temporary closures or employee furloughs also do not support expanded FMLA leave or emergency paid sick leave. In these circumstances, employees should look to unemployment benefits for compensation, not the FFCRA.

What Documents Do Employers Need to Retain for Tax Credits for Paid Leave?

Under the FFCRA, employers providing expanded FMLA leave and emergency paid sick leave are eligible for reimbursement of the costs of that leave through refundable tax credits. The DOL's guidance advises employers to require that their employees present "appropriate documentation" justifying their need for leave and retain these documents to support their claim to tax credits.

According to the DOL's new rule, employees are required to provide to their employers documentation supporting their requests for expanded FMLA leave or emergency paid sick leave. Such documentation "must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is request; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Additionally, employees must provide supplemental documentation depending on the reason for their leave request:

- If an employee requests emergency paid sick leave because of a Federal, state, or local COVID-19-related quarantine or isolation order, he or she must additionally provide the employer with "the name of the government entity" that issued the order;
- If an employee requests emergency paid sick leave because he or she "has been advised by a health care provider to self-quarantine due to concerns related to

COVID-19," he or she must additionally provide the employer with the name of the advising health care provider;

- If an employee requests emergency paid sick leave because he or she "is caring for an individual" subject to a quarantine or isolation order, or self-quarantining on the advice of a health care provider, that employer must additionally provide the employer with ***either*** (1) the name of the government entity that issued the order *or* (2) the name of the advising health care provider;
- If an employee requests expanded FMLA leave or emergency paid sick leave to care for a son or daughter due to COVID-19-related school or place of care closures, or child care unavailability, that employee must additionally provide the employer (1) the name of his or her son or daughter being cared for; (2) the name of the school, place of care, or child care provider that has closed or become unavailable; *and* (3) "a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes [emergency] Paid Sick Leave or Expanded [FMLA] leave."

The rule also authorizes employers to request additional material as needed to support their requests for tax credits. And, perhaps most importantly, the DOL's guidance is explicit: **employers are "not required to provide leave if materials sufficient to support the applicable tax credit have not been provided."**

The DOL's new rule mandates that employers retain the documentation listed above for four years, "regardless of whether leave was granted or denied." This retention and recordkeeping requirement also applies to any small business exemption determination; where employers deny a leave request based on the small business exemption, they must document their authorized officer's determination and retain that record for four years. Finally, the DOL's rule lists out the documents employers should retain to claim tax credits under the FFCRA—the details of which can be found here and additional general compliance assistance here.

How Much Leave Can an Employee Take?

The DOL clarified that employees are ***only*** entitled to 12 weeks of FMLA-type leave. In other words, expanded FMLA leave under the FFCRA is not in ***addition*** to the 12 weeks of unpaid leave available under the "traditional" FMLA. Employees' eligibility for expanded FMLA leave depends on whether they have already taken "traditional" FMLA leave in an employer-determined 12-month period—and, if so, how much leave they took. If an employee has already exhausted his or her 12 weeks of "traditional" FMLA leave during the relevant 12 month period, that employee ***is not eligible for additional expanded FMLA leave.*** Similarly, if an employee has already taken two weeks of "traditional" FMLA leave, he or she is only entitled to a ***maximum*** of 10 weeks of expanded FMLA leave.

That said, the FFCRA's emergency paid sick leave provisions ***may*** tack on an additional two weeks of leave for an eligible employee. The DOL notes that an employee is entitled to emergency paid sick leave regardless of how much FMLA-type leave that employee has taken. This is because emergency paid sick leave is not a type of FMLA leave. However, if an employee takes his or her two weeks of emergency paid sick leave in lieu of his or her first two weeks of expanded FMLA leave (which are unpaid), those paid sick leave weeks ***would count*** toward the employee's overall 12 weeks of FMLA-type leave.

Thus, employees may be able to use 14 weeks of FFCRA leave—that is, both expanded FMLA leave ***and*** emergency paid sick leave—where they (1) first take two weeks (*i.e. 80* hours) of emergency paid

sick leave ***for non-childcare-related purposes*** and (2) then, ***assuming they have taken no FMLA leave during the applicable 12 month period***, take up to 12 weeks of expanded FMLA leave.

Somewhat analogously, the DOL's guidance also clarifies how an employee's accrued paid leave under an employer's policies interacts with FFCRA. Under the guidance, employees must choose between paid leave provided by their employers ***or*** leave under the FFCRA. However, an employer may agree to allow an employee to supplement his or her FFCRA leave with pre-existing leave where the FFCRA leave does not fully compensate the employee. More specifically, where the employee is receiving two-thirds his or her normal earnings from FFCRA leave, an employer may permit that employee to use pre-existing employer-provided paid leave to get an additional one-third of his or her normal earnings to reach full compensation.

The DOL Adds Specifics to Telework and Intermittent Leave

The DOL's guidance makes clear that teleworking arrangements are within the employer's discretion. The guidance also makes clear that an employee may be entitled to FFCRA leave if he or she is unable to telework—the same as if that employee was unable to work under normal circumstances at a normal worksite. That said, if an employee and employer agree that the employee will work an alternate schedule that still meets the employee's normal number of hours, the employee ***is able to work***, and the alternative scheduling is not grounds for leave.

Teleworking arrangements may also impact whether an employee can take FFCRA leave intermittently. The DOL's default position is that emergency paid sick leave under the FFCRA must be taken in full-day increments. Moreover, once initiated, the employee must continue to take such leave until either (1) he or she exhausts applicable leave or (2) the qualifying reason for taking leave terminates. However, an employee who is teleworking may take ***either*** expanded FMLA leave or emergency paid sick leave intermittently if his or her employer agrees to it. That said, an employee working onsite—*i.e.* not teleworking—may take intermittent emergency paid sick leave ***only*** where the leave is due to school closure or childcare unavailability—and, again, only if the employer agrees. If the emergency paid sick leave is for any of the remaining five reasons outlined in the FFCRA, it must be taken in full-day increments. More broadly, an employee may take expanded FMLA leave intermittently ***regardless of whether he or she is teleworking*** if his or her employer agrees.

Additional Guidance on Group Health Benefits

The DOL's guidance stipulates that, if an employer provides group health coverage that an employee has elected, that employee is entitled to continued group health coverage during his or her expanded FMLA leave as if the employee had continued working. If the employee is enrolled in family coverage, the employer must maintain coverage during that employee's expanded FMLA leave. Employees generally must continue making normal contributions toward their health coverage.

This is also true for employees taking emergency paid sick leave. The DOL notes that the Health Insurance Portability and Accountability Act (HIPAA) prohibits employers from "establish[ing] an eligibility rule or set[ting] an individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work."

The DOL's guidance contains more information on a host of additional topics. Click here to view the DOL's new rule.

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GableGotwals remains on the cutting edge of COVID-19-related legal developments. Our Employment & Labor team is committed to helping employers navigate the nuances of the changing legal landscape and address emerging issues that accompany COVID-19 in the workplace. Please contact any member of the team for further assistance.

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