THE LATEST FROM

BASSFORD REMELE

LEGAL UPDATE

March 27, 2020

Guidance on the Department of Labor Interpretations Regarding the Family and Medical Leave and Sick Leave Act Related to COVID-19

By: Jonathan P. Norrie, Daniel R. Olson and Uzodima Franklin Aba-Onu

Bassford Remele has circulated updates and amendments to the Families First Coronavirus Response Act ("FFCRA"), which will take effect on April 1, 2020, and will sunset on December 31, 2020, unless extended by Congress.

The FFCRA provides requirements to employers with less than 500 employees relating to paid sick leave under the Emergency Paid Sick Leave Act ("EPSLA") and extended family and medical leave under the Emergency Family and Medical Leave Expansion Act ("FMLA+").

On March 24, 2020, the U.S. Department of Labor released an initial set of questions and answers (Q&As) regarding the FFCRA, to allow employers to better understand and interpret the provisions of the EPSLA and the FMLA+. Though many questions are yet unanswered and we anticipate further guidance from the Department, we wanted to provide you with a summary of the relevant portions of the Q&As to assist with your impending implementation of the FFCRA.

Summary of the Q&As

1. **Calculating whether a business is under the 500-employee thresholds.**

Whether an employer employs fewer than 500 employees is determined at the time the employee's leave is to be taken. The Department classifies employees to include:

- Both full-time and part-time employees within the United States, including the District of Columbia or any Territory or possession of the United States;
- 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.

Individuals considered to be independent contractors under the Fair Labor Standards Act ("FLSA") are not considered employees for purposes of the 500-employee threshold.

In applying the calculation to a corporation (including its separate establishments or divisions), the Department indicated that a corporation is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Moreover, corporations that share an ownership interest with each other are generally considered separate employers unless they are considered 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 the EPSLA and the FMLA+ leave must be provided.

In addition, the Department adopted the integrated employer test under the Family and Medical Leave Act of 1993 ("FMLA") to determine whether two or more entities are separate, or combined, for FMLA+ purposes. The factors under the FMLA include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership or control. *See* 29 CFR 825.104(c)(2). Note that each factor must be present to qualify as an integrated employer.

2. Calculating whether an employee has been employed for 30 days under FMLA+.

This requirement is met if at the time the employee's leave would begin, the employee has been on the employer's payroll for at least 30 calendar days. For example, the Department noted that if an employee requested to take leave on April 1, 2020, the employee would need to be on the payroll as of March 2, 2020. Full-time employees may count any time worked as a temporary employee towards the 30-day eligibility period.

3. Small business (fewer than 50 employees) exemption.

Under the Acts, businesses with fewer than 50 employees may be able to obtain an exemption when offering leave benefits under the FFCRA would jeopardize the viability of the business as a going concern.

Indicating that a more detailed explanation is forthcoming, the Department stated that an employer should document why the business meets the relevant criteria; however, the Department noted that employers should not send any materials to it when seeking a small business exemption. We will continue to monitor this issue for our clients when the Department releases further guidance.

4. How employers calculate hours.

Part-time employees

Part-time employees are entitled to leave for their average number of work hours in a two-week period. In determining this number, the Department requires employers to calculate hours of leave based on the number of hours the employee is normally scheduled to work.

If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, employers should use a six-month average to calculate the average daily hours. If the employee has not been employed for at least six months, employers should use the number of hours that the company and employee agreed that the employee would work upon hiring. If no agreement was reached, then the employer 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 employment.

Overtime considerations

Employers are required to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

However, EPSLA benefits are capped at 80 hours total over a two-week period. For example, an employee who is scheduled to work 50 hours a week (100 hours over two weeks) may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week, but in any event, the total number of hours paid is capped at 80. Arguably, not only would the employee be entitled to overtime payment (a time and a half) for the additional hours worked over 40 during a single workweek, but the employer should be able to receive tax credits for the overtime payment. We will continue to monitor to see if the Department provides any additional guidance on this issue.

5. Calculating an employee's regular rate of pay.

An employer must pay employees at their regular rate of pay (or 2/3 that regular rate, depending on the reason for which leave is taken). Under the FFCRA, an employee's regular rate of pay is calculated by taking the average of the employee's regular rate over a period of up to six months prior to the date on which leave s/he takes leave. Commissions, tips, or piece rates are included in this calculation.

Alternately, an employer can calculate an employee's regular rate by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

6. An employee's election of sick leave benefits to take care of a child because his/her school or place of care is closed or the childcare provider is unavailable.

Under the above-listed circumstances, an employee may be eligible for both the EPSLA and the FMLA+, but only for a total of twelve weeks of paid leave.

For example, the EPSLA provides for an initial two weeks of paid leave, which covers the first ten workdays under the FMLA+ that would otherwise be unpaid unless the employee elected to use existing vacation, personal, or medical or sick leave under the employer's policy. After the first ten workdays have passed, the employee will be eligible to receive 2/3 of his/her regular rate of pay for

the hours the employee would have been scheduled to work in the subsequent ten weeks under the FMLA+ to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

7. **No retroactivity or denial of benefits for leave taken prior to the Acts going into effect.**

Benefits under the EPSLA and the FMLA+ are not retroactive and the full benefits must be provided to employees as of the effective date of April 1, 2020.

This is an especially significant clarification of the EPSLA. If an employer has provided emergency PTO prior to the effective date of April 1, 2020, employees are still entitled to use the full 80 hours under the EPSLA. Additionally, employers are not entitled to tax credits for any emergency paid leave provided before April 1, 2020.

Please note that the FFCRA requires employers to post notice of these new laws in the same area where the employer posts required notice of other HR-related laws. The Department is expected to publish additional guidance and regulations relating to the FFCRA. We will continue to monitor and will provide further updates as the Department publishes additional guidance and regulations.
