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FFCRA Small Business Exemption Creates Opportunity and Confusion for Employers

On April 1, 2020—the same day the requirements of the Families First Coronavirus Response Act (“FFCRA” or “Act”) went into effect—the U.S. Department of Labor (“DOL”) issued its regulations (“Regulations”) implementing the FFCRA, along with a lengthy commentary explaining and expanding upon the DOL’s interpretation of the Act set forth in previously published informal guidance. The “final” Regulations arrived officially on Monday, April 6 and included explanations of the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”), all part of the FFCRA package.

Good News

First the good news: if you employ fewer than 50 employees, you may elect to invoke the “small business exemption” (“SBE”) provisions of the FFCRA and avoid some (but not all) of the leave and paid leave requirements of the Act. More good news: despite some highly publicized claims from government sources, which should know better, employers need NOT “file an application” or “obtain certification from DOL” before asserting and implementing their exemption status. Quite the contrary, the DOL guidance specifically says:

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

*You should **not** send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave. (emphasis added)*

Establishing the Small Business Exemption (“SBE”)

The Act and the DOL provide a remarkably straight forward process for employers to establish SBE status. Small businesses—i.e. businesses with fewer than 50 employees—may be exempt from the leave provisions of the FFCRA related to childcare (not the other qualifying reasons for leave) if an officer of the company determines that providing the required leave to an employee or employees would result in one of three effects (listed below) on the company’s ability to maintain minimal operations or financial health. The Regulations include a list of the factors,

which are similar to the ones the DOL previously published in its Q&As. As the DOL Regulations (issued as of April 6, 2020) explain it:

An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under [reason 5] the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern.

A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

(i) The leave requested . . . 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;

(ii) The absence of the Employee or Employees requesting leave . . . would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not sufficient 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 or Employees requesting leave . . . , and these labor or services are needed for the small business to operate at a minimal capacity. (emphasis added)

Limitations on the Exemption

Now for the bad news. Even if an employer qualifies for SBE status, emergency paid sick leave must still be provided for certain conditions. A small business can be exempt from providing public health emergency leave, but is **only** exempt from providing emergency paid sick leave for absences needed to care for a child if the child's school or place of care has closed or is unavailable due to COVID-19 related reasons. This means that a small business, whether the employee currently works in the office or teleworks, must still provide emergency paid sick leave (i.e., up to 80 hours of paid leave) for the following reasons, if they prevent the employee from working:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. [Note: At this point, we do not believe this includes a governmental stay at home order for an entire geographic area, such as now exists in Indiana and other states.]

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

One Final Bit of Good News

Under FFCRA, covered private employers qualify for reimbursement through refundable tax credits, as administered by the Department of the Treasury, for all qualifying emergency paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under FFCRA, up to per diem and aggregate caps, and for allocable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under FFCRA. So, if a small business does not meet the criteria for an exemption, it can take a tax credit for providing the leaves.

Recordkeeping and Poster

As mentioned above, the DOL Regulations also mandate careful recordkeeping of the reasons why business viability existed justifying the denial of the FFCRA leave. Again, those records should not be sent to the DOL, but kept in the employer's own files. The wise employer will document why a risk of closure existed if leave occurred. Also, regardless of whether a small employer chooses to exempt one or more employees from leave to care for a child whose school or child care provider is closed or unavailable, the employer still must post a notice (which can be the government issued poster or another notice containing, at a minimum, the same information).

We will continue to monitor future guidance from the DOL and other legislation that may affect employers during this challenging time. If you have questions, please contact David J. Carr, Angela Courtwright, or any other member of our Labor, Employment & Immigration Group.

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