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CLIENT ALERT

Potential Impacts on Private Equity Funds and their Portfolio Companies from the Department of Labor's Preliminary Guidance on the Families First Coronavirus Response Act

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On March 24, 2020, the U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD") published its "first round" of guidance on the newly enacted Families First Coronavirus Response Act ("FFCRA" or the "Act"). The Act takes effect on April 1, 2020. The Act, which includes the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, requires private employers who employ fewer than 500 employees (as detailed below) ("covered employers") to provide paid sick time ("Paid Sick Leave") and expanded FMLA leave ("Expanded FMLA Leave") to eligible employees. A key issue for private equity funds and their portfolio companies will be whether they can or should aggregate employees across all portfolio companies to exceed 500 employees and avoid being classified as a covered employer. Our prior briefing on the final version of the Act, which was signed into law by President Trump on March 18, 2020, can be found here.

The WHD's guidance currently consists of a Fact Sheet for Employees, a Fact Sheet for Employers, and a Questions and Answers (Q&A) document. While the guidance addresses a variety of questions, several critical issues remain unanswered.

Covered Employers

The Act defines covered employers as those private employers who employ fewer than 500 employees. The WHD's guidance instructs employers on the method for determining whether an employer falls under this 500-employee threshold.

For purposes of calculating the number of employees, the guidance states that employers must count both full-time and part-time employees, including (i) employees on leave, (ii) temporary employees who are jointly employed (regardless of which employer administers the employees' payroll), and (iii) day laborers supplied by a temp agency (regardless of whether the employer is the temp agency or merely a client with a continuing employment relationship with the temp agency). The WHD's guidance further provides that independent contractors, as defined by the Fair Labor Standards Act ("FLSA"), are not considered employees for purposes of meeting the 500-employee threshold.

The WHD's guidance also addresses the test an employer should use to determine whether it should be aggregated with another entity for purposes of the 500-employee limit. Typically, an entity (including its separate establishments or divisions) is considered a single employer for purposes of the Act. Where an entity has an ownership interest in another entity, the two entities are separate employers unless they are found to be joint employers under the FLSA pursuant to the Final Rule on Joint Employer Status published by the DOL in January 2020 (see our prior briefing here). The guidance further states that if the two entities are found to be joint employers, then all of their common employees must be counted when determining whether an employer falls under the 500-employee threshold. If an employer has the requisite number of employees, employers must provide *both* Paid Sick Leave and Expanded FMLA Leave to eligible employees.

The four factors discussed in the prior briefing on the Final Rule on Joint Employer Status published by the DOL in January 2020 generally focus on control (hiring and firing authority, supervising and controlling work schedules and conditions, determining pay rates, and maintaining employment records). As such, a private equity fund seeking to avoid being classified as a covered employer may be able to highlight its control over these areas for purposes of being deemed a single employer and aggregating employees across portfolio companies to avoid being classified as a covered employer and the impact of the new rules. That said, private equity funds should not take this decision lightly and should consult with counsel before doing so, because taking the joint control position in this context may be used against the same private equity fund and portfolio companies in other contexts where the fund and companies desire to take the position that they are separate entities. For example, if any portfolio company has pension liability, a finding that all portfolio companies are really just one employer may lead each portfolio company to have joint and several liability for that pension liability.

The guidance goes on to state that the other situation in which an employer could be deemed to employ the employees of another legal entity for purposes of the 500-employee threshold is under the FMLA's integrated employer test (found at 29 C.F.R. § 825.104), which is generally considered a broader test than the FLSA joint-employer test. The guidance concludes that if two entities meet the integrated employer test under FMLA rules, then employees of all entities making up the integrated employer will be counted in assessing whether the employer meets the 500-employee threshold, *for purposes of the Expanded FMLA Leave only*.

In other words, as written, this guidance may create the unusual result that some employers will be subject to the Act's Paid Sick Leave requirements, but not subject to its Expanded FMLA Leave requirement. It is unclear whether this result was intended by Congress.

Covered Employees

An employee must be employed for at least 30 calendar days by the covered employer in order to receive Expanded FMLA Leave. The 30-day employment requirement does not apply with respect to Paid Sick Leave. The WHD's guidance clarifies that the 30-calendar-day period begins on the day the employer puts the employee on its payroll. For those employees who had been working for an employer as a temporary employee but were recently hired by the employer on a full-time basis, the WHD permits the employee to count any days he or she previously worked as a temporary employee toward this 30-day eligibility period.

Small Business Exemption

The Act provides that the Secretary of Labor may issue regulations exempting small businesses with fewer than 50 employees from the Paid Sick Leave and Expanded FMLA Leave requirements, where such requirements would jeopardize the viability of the business as a going concern. The WHD's guidance explains that in order to elect the small business exemption, employers must document why their businesses meet the criteria set forth by the DOL, which will be delineated in forthcoming regulations. Employers seeking the small business exemption are instructed not to submit to the DOL any materials relating to their eligibility for the exemption at this time.

Health Care Providers or Emergency Responders Exemption

The Act gave the Secretary of Labor authority to exclude certain health care providers or emergency responders from the definition of eligible employees if compliance with the Act would jeopardize the viability of the business as a going concern. No further guidance was provided as to which health care providers may qualify for this exclusion.

Method for Calculating Hours Worked

Part-Time Employees: The Act entitles eligible part-time employees to Paid Sick Leave and Expanded FMLA Leave for a number of hours equal to the number of hours that such employee works, on average, in a two-week period. The WHD's guidance directs employers to calculate the hours of leave based on the number of hours the part-time employee is normally scheduled to work. If the part-time employee's normal hours are unknown, or if the part-time employee's schedule varies, employers may use a six-month average to calculate the average daily hours. However, if an employer cannot make this calculation because the part-time employee has been employed for less than six months, the WHD's guidance instructs employers to use the number of hours that the employer and part-time employee agreed the employee would work upon hiring. In the absence of such agreement, employers may calculate the appropriate number of hours of Paid Sick Leave and Expanded FMLA Leave based on the average hours per day the part-time employee was scheduled to work over the entire term of his or her employment.

Full-Time Employees: If a full-time employee's schedule varies from week to week, the WHD directs covered employers to use the same calculation that it would use for a part-time employee with a varying schedule, as described above.

Overtime Hours: The WHD's guidance clarifies that the Emergency Family and Medical Leave Expansion Act requires covered employers to pay eligible employees for the hours the employee would have normally been scheduled to work even if the employee is normally scheduled to work more than 40 hours per week. Covered employers are not required to include a premium for these overtime hours. The WHD's guidance cautions, however, that the Emergency Paid Sick Leave Act caps the hours of Paid Sick Leave an eligible employee may receive at 80 hours over a two-week period. Therefore, while an eligible employee who is scheduled to work 50 hours per week may take 50 hours of Paid Sick Leave in the first week, the eligible employee may only take a maximum of 30 hours of Paid Sick Leave in the second week, regardless of how many hours the eligible employee works that week, because the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

Method for Calculating Wages

When eligible employees take Paid Sick Leave for certain permissible reasons enumerated by the Act, the Act requires covered employers to pay these employees for each applicable hour of Paid Sick Leave, which is defined as the greater of:

- The employee's regular rate of pay;
- The federal minimum wage in effect under the FLSA; or
- The applicable state or local minimum wage.

If eligible employees take Paid Sick Leave for any remaining permissible reason under the Act, these employees are entitled to two-thirds of the greater of the amounts above. All of these amounts are subject to daily and aggregate caps ($511/day, or $5,110 over the paid sick leave period, for certain qualifying reasons; $200/day, or $2,000 over the paid sick leave period, for the remaining enumerated reasons).

Likewise, when eligible employees take Expanded FMLA Leave, they may take Paid Sick Leave for the first 10 days of that leave period, or they may substitute any accrued vacation leave, personal leave, or medical or sick leave they have under their employer's policy. After the first 10 days, the employee is entitled to two-thirds of the greater of the amounts above for the following 10 weeks, subject to the Act's cap of $200/day per employee (or $10,000 for 10 weeks of Expanded FMLA Leave per employee).

The WHD's guidance specifies that an employee's regular rate of pay equals the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has worked for less than six months, the employee's regular rate of pay is the average of the employee's regular rate of pay for each week the employee has worked for that employer. Commissions, tips, and/or piece rates are counted in this calculation. The guidance further provides that employers can also compute an employee's rate of pay by adding all compensation that comprises the employee's regular rate over the above-specified period and dividing that sum by all hours actually worked in the same period.

Prospective Application of the Act and Effect on Other Paid Leave

The WHD's guidance states that a covered employer may not deny an eligible employee Paid Sick Leave on the basis that the employer already provided the employee with paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act's effective date of April 1, 2020. The guidance is silent as to whether this rule applies with respect to the Expanded FMLA Leave. Nor does the guidance provide clarity regarding questions many employers have had regarding the ability to have existing paid leave run concurrently with leave provided for by the Act.

Limited Safe Harbor

The guidance provides that the DOL will not enforce the Act during the month of April, "so long as the employer has acted reasonably and in good faith to comply with the Act." The guidance defines "good faith" to exist when: (i) violations are remedied and the employee is made whole as soon as practicable by the employer, (ii) the violations were not willful, and (iii) the DOL receives a written commitment from the employer to comply with the Act in the future.

Next Steps

Employers should be on the lookout for additional guidance and proposed regulations over the coming weeks, as this is just the WHD's "first round" of guidance. The WHD also plans to publish a workplace poster required for "most employers" this week, along with new fact sheets and additional Q&As.

View all of our COVID-19 perspectives here. Contact a member of our COVID-19 Legal Task Force here.
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