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CLIENT ALERT

Department of Labor Issues Further Guidance on The Families First Coronavirus Response Act

MARCH 31, 2020

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) has published its second and third rounds of guidance on the newly enacted Families First Coronavirus Response Act (FFCRA or the Act). The second round of guidance includes a revised Questions and Answers document with additional FAQs (Nos. 15–37), two new posters, one for federal workers and one for all other employees, and a Field Assistance Bulletin that implements the limited safe harbor introduced by the WHD in its earlier guidance. The third round of guidance further supplements the Questions and Answers document with new FAQs (Nos. 38–59) that address a variety of topics in advance of the Act's April 1, 2020 effective date. Our prior briefing on the WHD's original Questions and Answers document (FAQ Nos. 1–14) can be found here.

UPDATED QUESTIONS AND ANSWERS DOCUMENT (FAQ Nos. 15–59)

The updated Questions and Answers document provides answers to important questions left unaddressed in the WHD's previous first-round guidance, including (i) whether employees can take paid sick leave and expanded FMLA leave on an intermittent basis; (ii) whether employees can supplement their existing employer-provided paid leave with the Act's paid sick leave and expanded FMLA leave; (iii) whether any documentation requirements exist beyond those provided by the FMLA when an employee elects to take paid sick leave and/or expanded FMLA leave; and (iv) whether furloughed employees and employees who have reduced hours are entitled to paid sick leave and expanded FMLA leave for those hours they no longer work. The updated Questions and Answers also define the term "telework" under the Act, clarify an employee's right to return to work after taking leave, and provide eligibility requirements for the small business exemption.

Intermittent Leave

The WHD's guidance clarifies that an eligible employee can take paid sick leave or expanded FMLA leave intermittently in *any* increment while teleworking, but only with the employer's consent. The guidance notes that the DOL is supportive of employers and employees agreeing to voluntary arrangements that permit intermittent leave while teleworking.

The availability of intermittent leave is more limited for employees working at their usual worksite. Such an employee may, with the employer's permission, take expanded FMLA and paid sick leave intermittently while the employee's child's school or place of care is closed, or the child's childcare provider is unavailable for COVID-19-related reasons. But the DOL's guidance states that when an employee working at his/her usual worksite takes paid sick leave for any other qualifying reason, the leave *must* be taken in full-day increments. The guidance explains that this prohibition is necessary because employees taking paid sick leave for these non-child care qualifying reasons either have COVID-19 or have been exposed to the virus. Thus, allowing such employees to take paid sick leave on an intermittent basis would undermine the purpose of FFCRA, which is to keep infected employees from spreading the virus to others.

Use of Existing Leave

The Act prohibits employers from requiring employees to use existing leave before paid sick leave under FFCRA. The WHD's guidance now clarifies that, with an employer's consent, an employee may choose to use existing accrued leave (*e.g.*, vacation, personal, medical, or sick leave) *concurrently* with the Act's paid sick leave and expanded FMLA leave in order to supplement (*i.e.*, "top off") the statutory payments provided pursuant to FFCRA. Importantly, while employers cannot require their employees to use their accrued leave concurrently with paid sick leave and expanded FMLA leave under the Act, they may prohibit their employees from doing so. Employers should note that if they permit their employees to supplement their paid sick leave and expanded FMLA leave with existing accrued leave, they cannot claim, and will not receive, tax credit for these supplemental amounts.

Supporting Documentation

The guidance specifies that an employee *must* provide documentation to his or her employer in support of the employee's need for paid sick leave as specified in applicable IRS forms, instructions, and information. While the guidance does not require employees to provide documentation in support of their need to take expanded FMLA leave, it does allow employers to require such documentation, which could include a notice of closure from the employee's child's school, place of care, or child care, including a notice that may have been posted online, published in a newspaper, or emailed to the employee by an employee or official of the child's school, place of care, or child care.

The WHD's guidance also clarifies that existing certification requirements under the FMLA remain in effect. Thus, if an employee exhausts his or her paid sick leave and qualifies for traditional FMLA leave because the employee's COVID-19 medical condition rises to the level of a serious health condition, the employee must satisfy the FMLA's existing certification requirements.

Furloughs

The guidance also addresses whether furloughed employees are eligible for paid sick leave or expanded FMLA leave under FFCRA. Answering this question in the negative, the guidance provides that furloughed employees may not receive paid benefits under the Act, regardless of whether their employer remains open for business. Nor may employees whose worksite is closed (including a temporary closure) receive paid sick leave or expanded FMLA leave. This is true whether the employer closes the worksite for lack of business or pursuant to a federal, state, or local directive. Further, the closure of a business while employees are on paid sick leave or expanded FMLA leave requires only that the employer pay such employees for any paid sick leave or expanded FMLA leave the employees used before the closure. As of the date of the closure, however, employees are no longer entitled to paid benefits under the Act.

Reduction in Hours

The guidance states that if an *employer* reduces an employee's work hours *due to a lack of work* for the employee, then the employee is not entitled to paid sick leave or expanded FMLA leave for those hours the employee is no longer scheduled to work. This is because the reduction of hours was not caused by a "qualifying reason" under FFCRA, but, rather, due to a lack of work for the employee to perform.

By contrast, if the *employee* needs to reduce his or her own schedule due to a "qualifying reason" in the Act, then the employee is entitled to statutory leave and the amount of leave is based on the employee's schedule before the employee reduced his or her hours (*i.e.*, the employee's schedule before the need for leave arose).

Telework and Work Outside of Regularly Scheduled Hours

The Act provides that an employee may take paid sick leave if the employee is "unable to work (or telework) due to a need for leave" for a qualifying reason. The WHD's updated guidance defines "telework" as work that an employer allows its employees to perform while they are at home or at a location other than their normal workplace. The guidance clarifies that telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the Act. The WHD's guidance also explains that if an employer and employee agree that the employee will work his or her normal number of hours, but outside of the employee's regularly scheduled hours (*e.g.*, early in the morning or late at night), then the employee is able to work and is not eligible for paid sick leave. Rather, the employee would only be eligible for paid sick leave if he or she was unable to work the new schedule because of a qualifying reason under the Act.

Right to Return to Work

The WHD's guidance reiterates that employees who take paid sick leave or expanded FMLA leave must be restored to the same (or an equivalent) job when they return from leave, unless the employer has taken an employment action (*e.g.*, layoffs) that would have affected the employees regardless of whether they took leave. The WHD's guidance further explains that an employer may refuse to return an employee to work in his or her same position if (i) the employee qualifies as a highly compensated "key" employee as defined by the FMLA; or (ii) if the employer has fewer than 25 employees, and the employee took leave to care for his or her own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, and certain enumerated hardship conditions exist.

The WHD's guidance also clarifies that if an employer was covered by the FMLA prior to the Act's effective date (April 1, 2020), then an employee's eligibility for expanded FMLA leave depends on how much FMLA leave the employee has already taken during the 12-month period used by the employer to calculate FMLA leave. In other words, if an employee has already taken 12 workweeks of FMLA during the relevant 12-month period, the employee may not take additional expanded FMLA leave under the Act.

Small Business Exception

The FFCRA provides an exemption from expanded FMLA requirements and paid sick leave based on the need to care for a child out of school or without a caregiver due to COVID-19 for employers with fewer than 50 employees (*i.e.*, a "small business") whose compliance with these requirements would jeopardize the viability of the business as a going concern. The WHD's guidance provides that a small business may claim this exemption if an "authorized officer" of the small business has determined that:

- The provision of 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 or employees requesting 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 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 paid sick leave or expanded FMLA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

LOOKING AHEAD

The WHD has stated that more guidance is forthcoming, so employers should be prepared for such additional guidance, particularly with respect to the Questions and Answers document, which the WHD continues to update and revise on an ongoing basis.

If you have additional questions or need further assistance, please reach out to the authors, or your Winston relationship attorney.

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