MARCH 26, 2020

DOL RELEASES DOCUMENTS ON ENFORCEMENT MORATORIUM: FAMILIES FIRST CORONAVIRUS RESPONSE ACT NOW EFFECTIVE APRIL 1, 2020

The U.S. Department of Labor ("DOL") released several documents regarding the recently passed Families First Coronavirus Response Act ("FFCRA"). It includes fact sheets and two Questions and Answer documents. Our article from March 19, 2020, found here, outlines the key employee rights and employer responsibilities from two of the acts within the FFCRA – the Emergency Family and Medical Leave Act and the Emergency Paid Sick Leave Act ("EPSLA"). These two acts created paid leave for eligible employees for situations related to COVID-19.

Below is a brief summary of some of the key takeaways from the guidance. However, it is important to note that there are still many questions left unanswered and possibly even some confusion created from the guidance. Employers continue to wait for regulations from the Secretary of Labor to provide clarity, though such regulations are not expected until April 2020.

EFFECTIVE DATE IS NOW APRIL 1 (NOT APRIL 2)

The DOL has stated that the law will become effective on April 1, 2020. This was a change from the previously anticipated effective date of April 2, 2020.

QUESTIONS AND ANSWERS DOCUMENTS

One Questions and Answers document (found here) addressed several key issues, including such items as how an employer must count the number of its employees to determine coverage under the FFCRA and what employees are counted; how small businesses will be able to obtain an exemption; how to count hours for part-time employees; and how employers cannot take credit for any retroactive paid leave already provided before the effective date.

Of particular interest, the DOL states that a private employer will be covered by the FFCRA if it has fewer than 500 employees at the time the employee's leave is to be taken. Therefore, private employers whose employee count fluctuates around 500 will need to regularly consider whether they drop under the 500 threshold and become a covered entity. In addition, the Questions and Answers document provides guidance with respect to the need for employers to consider whether they are a joint employer or an integrated employer together with another entity, as that can increase employee count (which could lead to an employer having 500 or more employees).

For private small businesses with fewer than 50 employees to be considered exempt from the FFCRA, the Questions and Answers document states that such business must document why abiding by the FFCRA would jeopardize their viability and meet the criteria to be exempt. The DOL said that the process for obtaining the exemption will appear in forthcoming regulations.

A third interesting note is that the DOL stated that an employer may not deny paid sick leave under EPSLA even though the employer may have already provided employees with paid leave for reasons identified in EPSLA prior to the Act going into effect. Consider, however, the Field Assistance Bulletin, below.

The DOL also issued fact sheets, one for employees and one for employers, which can be found here and here.

FFCRA POSTER

The DOL has released a Questions and Answers document specific to this poster, including guidance and where it should be posted. That document is found here.

FIELD ASSISTANCE BULLETIN

Finally, on March 24, 2020, the DOL issued Field Assistance No. 2020-1 Bulletin (the "Bulletin") to its Regional Administrators, Deputy Regional, Administrators, Directors of Enforcement, and District Directors regarding the agency's temporary non-enforcement period applicable to the FFCRA. It confirmed that the Wage and Hour Division of the DOL will "observe a temporary period of non-enforcement of the FFCRA for the period of March 18 through April 17, 2020." While a 30-day moratorium was anticipated based on a previous DOL news release, it is unclear why the moratorium began on March 18, two weeks before the April 1 effective date. While the non-enforcement period seems to be at odds with the retroactivity statements in the Questions and Answers, we are hopeful for further guidance in the formal

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regulations.

To benefit from this enforcement moratorium, an employer must act "reasonably" and "in good faith" when all of the following facts are present (as outlined by the DOL):

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable;
2. The violations of the FFCRA were not "willful" (the Bulletin refers to a standard set forth in a prior court case, stating the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited…"); and
3. The DOL receives a written commitment from the employer to comply with the FFCRA in the future.

The Bulletin goes on to explain that if a public or private employer either (i) violates the FFCRA willfully; (ii) fails to provide a written commitment to future compliance with the FFCRA; or (iii) fails to remedy the violation upon notification by the DOL, the employee seeking payment, or a representative of that employee, including by making all affected employees whole as soon as practicable, the DOL reserves its right to exercise its enforcement authority. The Bulletin can be found here.

MORE TO COME

While the DOL has had a busy week with releasing the guidance, poster and Bulletin, employers anxiously await the regulations. There is no set date as to when those will be issued, but employers hope they provide clarity and answers around the FFCRA.

If you have any questions or require any assistance, please do not hesitate to contact:

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