Families First and Coronavirus Response Act - Update

Families First and Coronavirus Response Act
Emergency FMLA (E-FMLA) and Paid Sick Leave
Updated Clarifications and Information Sources

The U.S. Department of Labor, USDOL, and the Treasury Department, IRS, and other agencies are publishing guidance daily. The FFCRA written, passed, and amended so quickly without timely examination and correction by the Senate, has resulted in varying interpretations. The Senate, instead of following the traditional practice of developing a similar bill to correct and develop an improved final conference committee agreed version, opted to just pass the House bill, H.R. 6201 as it was written. However there were a few last-minute amendments that were not published until after President Trump signed it. Thus, there were two versions of H.R. 6201 published. Complicating the details and guidance, the Act itself is a merger of several acts. Some wanted more FMLA leave with some paid FMLA. (There has been a bill in the House for several sessions to make all FMLA paid leave.) Some wanted guaranteed emergency paid leave. That resulted in the question of overlap of the two paid sick leaves and tax credits that still remain. I read no less than four explanations and interpretations published by national leading labor law firms and all were different. In my opinion, the guidance published by the USDOL on Friday does not agree with the Act. The Act is effective April 2, 2020.

The amendments changed some of the paid leave and the E-FMLA paid leave provisions that were in the published “final” text of the H.R. 6201.

The Secretary of Labor, SOL, must revise the existing FMLA regulations, 29 CFR Part 825, to codify the new E-FMLA before we will know those compliance details. The SOL must publish new regulations to provide the compliance details with the required emergency sick leave pay that is in addition to the E-FMLA.

Late Friday, the USDOL, issued its first nontechnical (subject to change) guidance for the emergency paid sick leave.

Emergency Paid Sick Leave

Employers must provide up to two-weeks, 80 hours, of special emergency paid leave for the specific circumstances below. This leave is in addition to and used before the employees uses any other paid leave provided by the employer. A tax credit is available for 100% of the paid emergency leave plus the cost of employer provided health insurance.

(1) Unable to work because the employee is quarantined.
(2) Unable to work because the employee has COVID-19 symptoms and seeking a medical diagnosis.
(3) Unable to work because they are caring for an “individual” who is quarantined.
(4) Unable to work because they are caring for a child whose child care service is closed, or elementary or secondary school is closed.
(5) Unable to work because the employee’s child care provider is unavailable for “reasons related to COVID-19.”
Unable to work because the employee is “experiencing substantially similar condition” as specified by the DHHS.

The sick leave pay is at 100% of the employee’s regular rate for causes #1 and #2, and at 2/3rds (66.6%) of the employee’s regular rate for causes #3, #4, #5, and #6. The regular rate is defined by the Fair Labor Standards Act Section 3 and 7(e). A tax credit is available to the employer for the sick leave pay and the cost of employer provided health insurance.

**Expanded E-FMLA**

An employee who must be absent for causes #4 and #5 above may qualify for E-FMLA leave of an additional ten (10) weeks of paid sick leave at 2/3rds (66.3%) of their regular rate. A tax credit is available for the sick leave pay plus the cost of employer provided health insurance.

**Small Employers**

Businesses with less than 50 employees, (FT & PT) are “eligible” for an exemption from the requirement to provide child care leave, #4 and #5, if the viability of the business is threatened. This is not a guaranteed exemption. The regulations will define how employers will qualify for and secure this exemption. The SOL has promised to be understanding and clear with the requirements.

**Hours of Leave**

For full time employees, including salaried exempt employees, the leave is based on a 40-hour workweek. For part time employees, the leave is based on the average weekly hours worked at part time in the previous six months. For new employees or new positions, the hours of leave are what is expected in that position or similar position.

**Tax Credits**

There is no payroll tax liability for the emergency paid leave of the E-FMLA leave. The tax credit is an immediate dollar for dollar tax offset against the employer’s payroll taxes of FICA and Medicare. There are maximums for the tax credits for the E-FMLA paid leave. Tax credits will be immediately available when the employer files their return. Where the credits exceed the taxes due, the IRS will issue a refund “as quickly as possible.” The IRS has said it will issue guidance Monday, March 23, 2020.

**Who Is an Employee and Employer?**

The definitions of employee and employer are those in the FLSA and FMLA. These definitions are broader than the IRS definitions. Virtually all employers are subject to the law. There are no exemptions for employers other than the less than 50 employees and less than 25 employees “partial” exemptions. There are no exemptions or exclusions for employees. That means that part-time employees, temporary employees, student learners, and homeworkers are included. It also means that despite the lack of need paid leave, the consumer workers paid commensurate wages under FLSA Section 14(c) are subject to the FFCRA protection and sick leave benefits. Certain employer groups must lobby Congress and/or the USDOL to exclude these workers to avoid threatening the viability of these mostly nonprofit organizations.

The FFCRA also provides similar benefits for self-employed individuals.
Enforcement and Liability

The FFCRA incorporates by direct reference the full protections and employer liability of the FLSA, Sections 15, 16 and 17, including the private individual employee rights to secure compliance with private action and litigation. It is presumed to also have the same two and three-year statute of limitations. However, the SOL has indicated that it will provide a “30 day nonenforcement policy” from the effective compliance date.

More Details

There is many more details and much more guidance needed from the agencies. It is premature and unreasonable to expect all the precise details and have all the questions answered before the regulations and guidance are published by the USDOL and the IRS. In fact we don’t know all the questions to ask. The guidance will unfold and change almost daily. We all must be patient and remain flexible.

USDOL Guidance Friday, March 20, 2020: https://www.dol.gov/newsroom/releases/os/ec/osec20200320

(Look for IRS guidance to be published/released Monday, March 23, 2020)

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