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Small Business Coverage Under the Paid Leave Provisions of the FFCRA

Insight — 04/17/2020

Under the FFCRA, all private employers that employ fewer than 500 employees must comply with the emergency paid sick leave (EPSLA) and paid family leave (EFMLEA) provisions of the coronavirus relief legislation. The statute does not distinguish between for-profit and non-profit entities; employers of both types must comply with the FFCRA if they otherwise meet the requirements for coverage.

While small businesses typically have fewer than 500 employees, they may be exempted from these requirements due to US Department of Labor regulations promulgated at the beginning of April. Specifically, the DOL regulations clarify when small businesses that are affiliated with larger entities may be treated as a single employer for purposes of counting the 500 employee coverage threshold and when certain small businesses with less than 50 employees otherwise may be exempted from the paid leave requirements under the statute.

As a general matter, all full-time and part-time employees in the United States (including all of its territories) are counted towards the 500 employee coverage threshold, regardless of whether the employees are currently on leave, supplied by a temporary placement agency, or are day laborers. It is clear that a corporation with multiple establishments or divisions is considered to be one employer and all of its employees count towards the 500 employee coverage marker.

The trickier question is what happens when a corporation has an ownership interest in another corporation, such as a when a larger corporation has an ownership stake in a small business. In this circumstance, each corporation is considered a separate employer unless the two corporations (1) qualify as joint employers under the Fair Labor Standards Act (FLSA), or (2) satisfy the integrated employer test under the Family Medical Leave Act (FMLA).

Joint Employer Rule Under FLSA

The DOL's new FLSA joint employer rule took effect on March 16, 2020. While the test is flexible, it typically looks at whether two (or more) entities share the power to: (1) hire or fire employees; (2) supervise and control employee's work schedules or conditions of employment; (3) determine the employees' rate and method of payment; and (4) maintain the employees' employment records. If two separate entities are found to be joint employers, all of their common employees count towards the 500

employee threshold under the EPSLA and and EFMLEA.

FMLA Integrated Enterprise Test

The DOL's integrated enterprise test under the FMLA considers the extent to which two (or more) entities have: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) the degree of common ownership/financial control. If the test is satisfied, then the multiple entities will be considered an “integrated employer” under the FMLA and all of their employees together will count towards the 500 employee threshold.

The Small Business Exemption

The FFCRA provides an exemption for employers with fewer than 50 employees from providing paid sick and family/medical leave.

To qualify, the small business employer must keep a written record showing that:

1. the paid leave would cause the employer's expenses and financial obligations to exceed available revenues and cause the business to cease operating at a minimal capacity; or
2. the absence of the employees requesting leave would pose a substantial risk to the financial health or operational capacity of the business because of the employees' skills, knowledge, or responsibilities; or
3. the small business cannot find enough other workers to perform the work of the employees requesting leave and this work is necessary to keep the business operating at minimal capacity.

For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave to otherwise eligible employees. The business need only keep a written record in its own files of its denial of leave and its qualifying reasons; it need not submit anything in writing to the Department of Labor.

In exercising its authority to exempt certain employers with fewer than 50 employees, the Department stated that it was trying to balance two potentially competing objectives of the FFCRA. “On the one hand, the leave afforded by the FFCRA was designed to be widely available to employees to assist them navigating the social and economic impacts of COVID-19 as well as public and private efforts to contain and slow the spread of the virus. On the other hand, the Department recognizes that FFCRA leave entitlements have little value if they cause an employer to go out of business and, in so doing, deny employees not only leave but also jobs.”

Small businesses should take care to become informed about the paid medical leave provisions under the FFCRA in the event that the exemption does not apply, either because they are over the 50 person limit or because they cannot establish the written certifications required under the

law.

There is likely to be a see-saw effect in the workplace as we work toward reopening and some employees may not feel comfortable returning to the workplace. We encourage employers to continue to be flexible and consider offering telework as an accommodation during this time even if not technically required in all instances.

Employers subject to the paid medical leave requirements of the FFCRA should take care not to discriminate or retaliate against employees who seek to take such leave. By way of reminder, the FFCRA entitles eligible employees for up to two weeks of paid sick leave (at their customary wages) and up to twelve weeks of expanded family and medical leave, of which up to 10 weeks may be paid (at two thirds of customary wages).

Qualifying reasons for paid leave under the FFCRA include:

- the employee or someone the employee is caring for is subject to a government quarantine order or has been advised by a health care provider to self-quarantine;
- the employee is experiencing COVID-19 symptoms and is seeking medical attention; or,
- the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19.

The U.S. government recently issued guidance regarding childcare closures over the summer. In Field Assistance Bulletin No. 2020-4, issued June 26, 2020, the United States Department of Labor, Wage and Hour Division, recognized a number of ways an employee can establish eligibility for Family First Coronavirus Response Act (FFCRA) leave based on the closure of a summer camp or program that the employee claims would have been the place of care for the employee's child over the summer. In addition to proof of actual enrollment or application to a camp or program, if an employee's child attended a camp or program in the summer of 2018 or 2019 and the child remains eligible for the camp or program for Summer 2020, that may be sufficient. Likewise, if an employee's child is accepted to a waitlist pending the reopening of a camp or program or the reopening of the camp or program's registration process, that, too, may be sufficient. Although the DOL states that mere interest in a summer camp or program is not enough, this broad interpretation opens the door to many new requests for FFCRA leave for employees. If you have an employee who requests paid leave because of a summer camp closure, you may wish to seek counsel to discuss whether paid leave is required in such circumstance. At minimum, you should know that summer camp closure is essentially treated akin to school closure.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new

topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.