KAUFMAN DOLOWICH LLP

The U.S Department of Labor Publishes Helpful FAQ's for Employers and Families First Coronavirus Response Act

The U.S. Department of Labor has published FAQ's regarding the rights of employees, and the obligations of employers with 500 or fewer employees under the Families First Coronavirus Response Act (FFCRA).

The FAQ includes basic information regarding the FFCRA, including the following: It will take effect on April 1, 2020; it will not apply retroactively to employees who have taken leave before the effective date; and employers with fewer than 50 employees may apply for a small business exemption, on the basis that providing paid sick leave will jeopardize the viability of the business. The FAQ provides the below additional helpful guidance:

500 Employee Threshold

- The FFCRA applies to employers with fewer than 500 employees if, at the time the employee's leave is to be taken, the employer employs fewer than 500 full-time and part-time employees within the United States.
- Employees to Include in the 500-Employee Threshold. Employees on leave; temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly-employed employees are maintained on only one employer's payroll); and day laborers supplied by a temporary agency.
- Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.
- Joint Employers. Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If 2 entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act (EPSLA) and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act (EFMLEA).
- Integrated Employer Test. In general, 2 or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If multiple entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of the FFCRA.

Calculating Paid Sick Leave and Expanded Family and Medical Leave

- Part-Time Employees. A part-time employee is entitled to leave for the average number of work hours he/she is normally scheduled to work, in a 2-week period. For employees with unknown normal scheduled hours or varying schedules, employers may use a 6-month average to calculate the average daily hours. Such part-time employees may take paid sick leave for this number of hours per day for up to a 2-week period, and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after the 2-week period.
  If the above calculation cannot be made because the employee has not been employed for at least 6 months, an employer may use the number of hours that it and the employee agreed that the employee would work upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his/her employment.

- **Full-Time Employees. The calculation of hours worked for full-time employees with varying schedules is calculated in the same manner as for part-time employees, discussed above.**
- **Overtime. The EFMLEA requires an employer to pay an employee for hours the employee would have been normally scheduled to work even if that amount exceeds 40 hours in a week. However, the EPSLA caps the total number of hours paid at 80. Pay under both the EFMLEA and the EPSLA does not need to include a premium for overtime hours.**
- **Paid Sick Leave Amounts.**

  An employee taking paid sick leave because he/she is unable to work or telework due to a need for leave because he/she (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the employee will receive for each applicable hour the greater of:
  - Regular rate of pay,
  - Federal minimum wage in effect under the FLSA, or
  - Applicable State or local minimum wage.

  In the above circumstances, the employee is entitled to a maximum of $511.00 per day, or $5,110.00 total over the entire paid sick leave period.

  An employee is entitled to compensation at 2/3 of the greater of the amounts above if he/she is taking paid sick leave because he/she is: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services.

  Under the above circumstances, the employee is subject to a maximum of $200 per day, or $2,000 over the entire two-week period.

- **Paid Expanded Family and Medical Leave Amounts.**
  An employee taking expanded family and medical leave may take paid sick leave for the first 10 days of that leave period for which an employer is not required to provide paid leave under the EFMLEA, or may substitute any accrued vacation leave, personal leave, or medical or sick leave under the employer's policy. For the following 10 weeks, the employer must pay the employee for leave at an amount of 2/3 of the employee's regular rate of pay for the hours he/she would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage.
  Paid leave is capped at $200.00 per day or $12,000.00 for the 12 weeks that include both paid sick leave and expanded family and medical leave, when the employee is on leave to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- **Calculating an Employee's Regular Rate of Pay for Purposes of the FFCRA.**

  For purposes of the FFCRA, the regular rate of pay used to calculate an employee's paid leave is the average of his/her regular rate over a period of up to 6 months prior to the date on which the employee takes leave. If the employee has not worked for the current employer for 6 months, the regular rate used to calculate paid leave is the average of the employee's regular rate of pay for each week he/she has worked for the current employer.
  Commissions, tips, and piece rates, are to be included into the above calculation.

  An employer can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period, and divide that sum by all hours actually worked in the same period.

- **Intersection Between Paid Sick Leave and Paid Expanded Family and Medical Leave.**

  An employee may take up to 2 weeks (10 days)(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which an employee may receive paid sick leave is capped at 80 hours under the EPSLA.
  An employee may be eligible for both paid sick leave and paid expanded family and medical leave, but only for a total of 12 weeks of paid leave. An employee may take both paid sick leave and expanded family and medical leave to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The EPSLA provides for an initial 2 weeks of paid leave. This period thus covers the first 10 workdays of expanded family and medical leave, which are otherwise unpaid under the EFMLEA unless the employee elects to use existing vacation, personal, or sick leave under the employer's policy. After the first 10 workdays have elapsed, the employee will receive 2/3 of his/her regular rate of pay for the hours he/she would have been scheduled to work in the subsequent 10 weeks under the EFMLEA.

  The employee can only receive the additional 10 weeks of expanded family and medical leave under the EFMLEA for leave to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

As always during the unprecedented global crisis, the experienced Labor and Employment attorneys at Kaufman, Dolowich & Voluck will continue to keep you apprised of any further developments impacting the workplace, as well as be available for any questions you may have or guidance you may need for your business.

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