SQUIRE PATTON BOGGS

The Families First Coronavirus Response Act Regulations:

Part One in a Five-part Series

On April 1, 2020 (no, not an April Fool's Day joke!), the US Department of Labor (DOL) issued its final regulations interpreting the Families First Coronavirus Response Act (FFCRA), a landmark piece of federal legislation that provides paid sick leave and paid family leave to eligible employees who are unable to work for certain qualifying reasons due to COVID-19, such as quarantine, isolation, COVID-19 infection, suspected COVID-19 infection and childcare obligations due to school and daycare closures. The FFCRA went into effect April 1, 2020 and sunsets on December 31, 2020, but the 124-page long federal rule published on April 1 proves that there is much to learn and digest in a short time.

Rather than try to summarize all of the regulatory guidance at once, we will be summarizing key provisions of the FFCRA regulations daily, one general topic each day for one week. In the interim, if you have any questions about FFCRA coverage, eligibility, compensation or job restoration responsibilities, please reach out to your labor and employment counsel.

In this first update, we discuss which employees are entitled to protection under, and which employers are required to provide leave pursuant to, the FFCRA.

FFCRA-covered Employers

To take advantage of FFCRA leave, an employee must work for an employer covered by the FFCRA at the time the requested leave is taken. Under 29 C.F.R. § 826.40, covered employers include the following:

1. Any private entity or individual who employs fewer than 500 employees.

- All US employees – full-time and part-time – are counted.
- Only US employees are counted; workers permanently based outside the country (meaning outside the 50 states, District of Columbia, and Territories and Possessions of the US) are not included.
- Employees on leave of any kind are included.
- All employees currently employed, regardless of how long they have worked for the employer, are included in the headcount.
- Employees of temporary placement agencies that are jointly employed by the employer and another employer, regardless of which employer's payroll the employee appears on, are included.
- Day laborers supplied by a temporary placement agency, regardless of whether the employer is the temporary placement agency or the client firm.
- Independent contractors are not included in the headcount.
- Employees who have been laid off or furloughed and not subsequently reemployed are not included in the headcount.

The DOL regulations provide better clarity on how to count employees of companies that are partially or wholly owned by parent companies or affiliates. The default rule is that a corporation – including its separate establishments or divisions – is considered a single employer and all of its employees must be counted together. Where one corporation has an ownership interest in another corporation, the two corporations are separate employers, unless they are joint employers with respect to certain employees, or treated as integrated employers.[1]

Joint employment – The FFCRA regulations incorporate by reference the joint employment test under the Fair Labor Standards Act, set forth in 29 CFR Part 791. Joint employment exists where an employee has an employer who suffers, permits or otherwise employs the employee to work, but another person simultaneously benefits from that work. The other person (the putative joint employer) is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. Factors weighed in the fact-intensive analysis include whether the putative joint employer (i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records. The putative joint employer must actually exercise – directly or indirectly – one or more of these indicia of control to be a joint employer. If two entities are joint employers with respect to certain employees, all common employees of joint employers must be counted together.

1 Prior to the implementation of the regulations, informal DOL guidance seemed to suggest that the joint employer test was applicable to both the paid sick leave and paid family leave provisions of the FFCRA, but that the integrated employer test applied only to determining coverage under the paid family leave provisions. The regulations clear up this apparent incongruity and clarify that if two entities satisfy *either* the joint employer test *or* the integrated employer test, then employees of all entities making up the integrated or joint employer will be counted in determining coverage for purposes of coverage under both the emergency paid sick leave and emergency paid family leave provisions of the FFCRA. The informal guidance has been updated to reflect this.

Integrated employment – The FFCRA regulations incorporate by reference the integrated employer test under the Family Medical Leave Act, set forth in 29 C.F.R. § 825.104(c)(2). That test – which is ordinarily applied when determining if two entities' employees should be aggregated for meeting the 50-employee threshold applicable to non-FFCRA FMLA coverage determinations – starts with the general principle that a corporation is a single employer rather than its separate establishments or divisions, but separate entities will be deemed to be parts of a single employer for purposes of the FMLA if they meet the integrated employer test. The determination is not based on any single criterion, but requires consideration of the entities' entire relationship in its totality. Factors considered in determining whether two or more entities are an integrated employer include (i) common management; (ii) interrelation between operations; (iii) centralized control of labor relations; and (iv) the degree of common ownership/financial control. If two entities are an integrated employer under this test, then employees of all entities making up the integrated employer are counted together. Barring either or both of these tests being satisfied, corporations are measured separately.

Because the regulations make clear that the 500-employee test is measured as of the date that an employee's requested leave is to begin, employers must perform this analysis each time an employee requests leave and not simply at the time the FFCRA is enacted. For example, if an employer has 525 employees on April 1, 2020 and an employee requests leave that day for an FFCRA-qualifying reason, the employer may deny that request because it is over the 500-employee threshold. However, if the employer lays off 50 employees on May 1, 2020, leaving it with only 475 employees, and the employee renews their request for leave for an FFCRA-qualifying reason, the employer is now below the 500-employee threshold and may be required to grant the request. Conversely, if an employer is covered by the FFCRA as of the effective date of the Act, but later adds headcount so as to cross the 500-employee threshold, it will no longer be required to continue to grant paid time off under the FFCRA.[2]

To summarize:

Counted Toward 500-employee Threshold
US employees of a corporate entity
Employees on leave
Employees placed by temporary placement agencies and day laborers
Employees of joint and integrated employers

Not Counted Toward 500-employee Threshold
Foreign workers
Independent contractors
Laid-off workers not reemployed
Furloughed workers not reemployed

2. All public employers must provide employees paid sick leave, except to healthcare providers, emergency responders and those federal employees excluded by the Director of the Office of Management and Budget (OMB), including, without limitation, postal workers and certain other individuals occupying positions in the civil service and federal officers or employees covered under Title II of the pre-FFCRA FMLA.
3. All public employers must provide employees expanded Family and Medical Leave for childcare related issues, except to healthcare providers, emergency responders, certain federal employees excluded by the Director of the OMB, postal workers and other certain other federal employees.

FFCRA-eligible Employees

Duration of Employment

Employees who have been employed for any length of time are entitled to utilize the *paid sick leave* provisions of the FFCRA. However, employees must have been employed at least 30 days by the employer to utilize the expanded *paid family leave* provisions of the FFCRA. This 30-day employment requirement is satisfied if the employee has been employed by the employer for at least 30 calendar days or, if the employee was laid off or terminated on or after March 1, 2020, if the employee worked for the employer for at least 30 of the 60 calendar days prior to termination and was subsequently rehired or otherwise reemployed by the same employer. Additionally, if an employee employed by a temporary placement agency is subsequently hired by the employer, the employer will count the days worked as a temporary employee at the employer toward the 30-day eligibility period. These tenure requirements apply only for purposes of FFCRA coverage. Employees still must be employed for one year and have worked 1,250 hours in the preceding 12 months for purposes of eligibility under other non-FFCRA provisions of the FMLA.

2 For those following other congressional initiatives, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), or Phase III of the federal government's response to the coronavirus, pledges more than US$360 billion in immediate loan assistance for small businesses, including (1) an expanded Economic Injury Disaster Loan program and (2) the Paycheck Protection Program administered under the Small Business Administration's 7(a) program. Part of the qualification criteria for this financial assistance is whether the applicant business has fewer than 500 employees. Although beyond the scope of this summary, the 500-employee threshold is critical in the analysis of employer coverage under a number of COVID-19-related laws.

Exemption of Healthcare Providers and Emergency Responders

From there, employees must demonstrate that they have a qualifying reason to take leave under the FFCRA, a subject we have discussed here and will discuss in more detail in our next part in this series. But even employees who work for a covered employer and demonstrate a qualifying reason may still be exempted from coverage if they are healthcare providers or emergency responders.

Employers may exclude from paid sick leave and/or expanded paid family leave coverage a healthcare provider, which is defined solely for purposes of the FFCRA exemption as:

> …anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

The definition of "health care provider" also

> includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Although the definition of "health care provider" in the regulations is very broad, the executive summary published by the DOL with the final rule cautions that "health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency," such as "medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational." The summary, therefore, seems to suggest that the healthcare providers intended to be exempted from coverage are those who are essential to fighting the COVID-19 crisis and those employees supporting them in doing so. Although the executive summary does not have the force and effect of law, it further underscores the importance of being "judicious" in applying the exemption, as the DOL previously recommended in informal guidance.

The regulations also define "emergency responder." For purposes of the FFCRA, an employer may exclude from coverage "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19." The definition "includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility." In addition, the definition includes "any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19." The executive summary accompanying the regulations explains that the goal of exempting emergency responders "is reflective of a balance" between sparing employees from "choos[ing] between their paychecks and the individual and public health measures necessary to combat COVID-19" and ensuring that "providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society."

Small Business Exemption

Although the FFCRA expressly applies to private businesses from one to 499 employees, an employer with fewer than 50 employees (a "small business") is exempt from providing paid sick leave and/or expanded paid family leave for purposes of caring for a son or daughter whose school, place of care or childcare provider is closed or unavailable "when the imposition of such requirements would jeopardize the viability of the business as a going concern." We discuss this exemption here, and not under the section above on FFCRA covered employers, because the small business exemption analysis must be performed each time an employee makes a request for paid leave, and some employees may be permitted to take paid childcare leave whereas others may be denied, depending on their unique skills and knowledge.

A small business is entitled to an exemption from the paid sick and paid family leave obligations of the FFCRA if an authorized officer of the business has determined that:

1. The leave requested would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating a minimal capacity
2. The absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business or responsibilities
3. 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(s) requesting paid childcare leave, and these labor or services are needed for the small business to operate at a minimal capacity

According to the DOL's executive summary accompanying the final rule, "[f]or reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, post a substantial risk, or prevent the small employer from operating at a minimum capacity, respectively," reinforcing that this requires an individualized analysis after each employee request and not a prospective determination that a small business is wholly relieved from coverage.

After the employer's authorized officer makes the determination that one or more of these criteria is satisfied, the company "must document the facts and circumstances that meet the criteria . . . to justify such denial," and retain such records for its own files. If an employer denies an employee's request for leave pursuant to the small business exemption, the company must retain the documentation supporting the denial for four years.

Perfectly clear, right? And this is just the analysis of who is covered by the FFCRA. The next part will discuss the reasons for which FFCRA leave may be taken and the types of certification employers may request to confirm eligibility.

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