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Families First Coronavirus Response Act ("FFCRA") Update

April 1, 2020

Beginning today, April 1, 2020, certain public and private employers with fewer than 500 employees are now subject to the Emergency Paid Sick Leave Act ("EPSL") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"), requirements of the Families First Coronavirus Response Act ("FFCRA"). Click here for a summary of the statute.

On its face, the FFCRA left open several questions of interpretation, which the U.S. Department of Labor ("DOL") has diligently been trying to answer through a series of frequently asked questions over the last week. On March 24, 2020, the DOL released an initial set of FAQs (#1-14) concerning the FFCRA's respective leave provisions. On March 26, 2020, the DOL released additional FAQs (#15-37) regarding the respective obligations of employers and employees under the FFCRA. The second set of FAQs followed the initial set of FAQs on the same webpage. Highlights of the second set of FAQs include:

- Employees must provide appropriate documentation in support of leave requests. (FAQ #15-16)
- Employees are not eligible for EPSL or EFMLA during furloughs, work closures or temporary layoffs. (FAQ #26-27)
- Leave under the EPSL generally must be taken in full day increments for employees who are working on the employer's premises; however, leave may be taken intermittently for child-care reasons if the employer consents. For employees who are teleworking under EPSL or EFMLA, the employer and employee may agree to intermittent leave for any of the covered reasons. (FAQ #20-22)
- The ability to telework appears to be a decision by the employer; however, cooperation and understanding between the employee and employer are encouraged. (FAQ #17-19). If an employee is too sick to perform his or her job requirements, he or she is "unable to work or telework." It does not appear, however, that mere inconvenience is a reason for paid leave under the FFCRA. The employer and employee should try to identify alternative work arrangements to the greatest extent possible.
- Health coverage continues during leave. (FAQ #30, 51)
- If you are eligible to take ESPL or EFMLA under the FFCRA, as well as employer provided paid time off, you must choose one type of leave to take unless your employer agrees otherwise. You may not simultaneously take both, unless your employer agrees to supplement the amount you receive from EPSL or EFMLA under the FFCRA, up to your normal earnings, with preexisting leave or paid time off. (FAQ #31) The employer will not receive tax credit for such supplemental amounts. (FAQ #32, 34)

On March 28, 2020, the DOL released a third set of FAQs (#38-59), which includes further details about the FFCRA's exemption for certain small employers; information about how the Family and Medical Leave Act (FMLA) interacts with the EPSL and EFMLA and additional clarification on the "healthcare provider" and "emergency responder" exceptions.

With regard to the small business exemption, a small business is exempt from mandated ESPL or EFMLA requirements only if the: (i) employer has less than 50 employees; (ii) leave is requested because the child's school or place of care is closed, or the child-care provider is unavailable, due to COVID-19 related reasons; and (iii) an authorized officer of the business has determined that at least one of the three conditions exist:

- The provision of paid sick leave or expanded family and medical leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

(FAQ #58-59). In the third rendition of the FAQs, the DOL also revised and clarified previously issued Q&As from earlier in the week.

Although the DOL's FAQs may be considered by courts as unofficial guidance, employers should remember that the FAQs do not have the effect of law or official regulations (which are believed to be forthcoming by the DOL). Further, the FAQs leave many questions unanswered and can be modified at any time by the DOL without notice. Therefore, to the degree employers rely upon the FAQs in practice (before official regulations are issued by the DOL), they should confirm they are reviewing the latest version of the FAQs and that they are taking into consideration the FFCRA's interaction with other federal, state or local leave laws, if applicable.

In that regard, as a reminder, New York also passed its own COVID-19 sick leave law, which became effective on March 18, 2020. The law applies to all New York employers and requires up to fourteen (14) days of paid or unpaid leave. Click here for a summary of that law.

The interaction between the FFCRA, New York's COVID-19 sick leave law, and other leave laws and employer policies is highly fact-specific and complex. Employers are encouraged to consult with legal counsel to ensure compliance with the myriad of responsibilities and requirements as they apply to individual businesses and employees.

If you have questions regarding any aspects of employment law and any implications the COVID-19 virus has caused or will cause to your place of business, feel free to contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

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