

Labor Department Offers Guidance On Families First Coronavirus Response Act, Effective As Of April 1

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The U.S. Department of Labor released a preliminary “Questions and Answers” page today, attempting to answer some preliminary compliance questions related to the new Families First Coronavirus Response Act, which will bring emergency family and medical leave, as well as paid sick leave, for many employers across the country. The agency stated it also will be issuing implementing regulations regarding the new law in the near future. The big news is that the law will take effect April 1, 2020 – not April 2 as originally expected – but there are also plenty of other helpful pieces of information in the document. What do employers need to know about this latest development? Our COVID-19 Taskforce has analyzed the document and developed this summary.

Not An April Fool’s Joke: Law Effective April 1, 2020

As a major surprise, the Department of Labor (DOL) announced the paid leave provisions of the Families First Coronavirus Response Act (FFCRA) are effective on April 1, 2020 and will apply to leave taken between April 1, 2020 and December 31, 2020.

This effective date took many by surprise. The FFCRA states the leave provisions “shall take effect not later than 15 days after the date of enactment.” As the FFCRA was signed by President Trump on March 18, 2020, many assumed DOL would implement the law on April 2, 2020.

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The DOL gave no reason why it chose to move up implementation by one day, but there is speculation this was done to line up the effective date of the law with the calendar quarter.

How Do You Count To 500?

Both leave provisions of the FFCRA apply to private employers with fewer than 500 employees. One of the most common questions for employers regarding the FFCRA involves uncertainty as to how and when you count employees for these purposes, and when you consider separate entities to be a single employer for these purposes. The DOL's Questions and Answers attempt to address the following by stating:

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). 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.

*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 two 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 and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.***

*In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). **If two 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 expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.***

Therefore, the DOL provides the opinion that an employer is covered if, at the time the leave is to be taken (a "snapshot" approach), the business employs fewer than 500 employees. Moreover, the analysis addresses important issues regarding whether separate entities are counted as one



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employer for purposes of the new leave laws. First, the DOL states that if two entities are found to be “joint employers” under the FLSA, all of their common employees must be counted in determining whether leave must be provided under for Emergency Paid Sick Leave and Emergency Family and Medical Leave.

The DOL document also states that if two entities are an “integrated employer” under the Family Medical Leave Act (FMLA), all of the employees of the integrated employer will be counted in determining employer coverage for purposes of Emergency Family and Medical Leave.

The “joint employer” analysis under the FLSA and the “integrated employer” analysis under the FMLA are complicated and involve a critical analysis of specific facts. Employers with questions about how these tests may apply to their specific situation should contact their Fisher Phillips attorney, or any member of our COVID-19 Taskforce, for assistance.

Is The FFCRA Retroactive?

Another common inquiry was whether employees can take paid sick leave under the FFCRA prior to the effective date (that would count towards their FFCRA paid sick leave entitlement), and whether the law will have retroactive effect. The DOL attempted to address these issues by stating:

Can my employer deny me paid sick leave if my employer gave me paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

Are the paid sick leave and expanded family and medical leave requirements retroactive?

No.

Does Emergency Paid Sick Leave And Emergency FMLA Run Concurrently For Leave Related To School Closures?

The qualifying reason for leave under the Emergency FMLA involves caring for a child when their school or place of care is closed. One of the six qualifying reasons for Emergency Paid Sick Leave similarly addresses this same reason. Therefore, many employers have inquired as to whether these leaves will run concurrently when taken for the same qualifying reason. The DOL addressed this issue when it stated:



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If I am home with my child because his or her school or place of care is closed, or child care provider is unavailable, do I get paid sick leave, expanded family and medical leave, or both—how do they interact?

You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Next Steps

Employers should note that this is an initial and informal compliance assistance document from DOL. These answers may change or be added to over time. Moreover, the DOL will be developing more formal guidance and regulations that may definitively answer these questions and may do so in a different manner. Nevertheless, this preliminary "Questions and Answers" document may give some indication about how the agency is likely to formally interpret and enforce the new law in the near future.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or any member of our COVID-19 Taskforce. If your business has questions about a designation as an essential business under a local shelter-in-place or shutdown order, contact any member of our Essential Business Taskforce. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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