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U.S. Department of Labor Issues Guidelines for Families First Coronavirus Response Act¹

Among the many adjustments that companies need to make in these difficult times, one that should not be overlooked is updating internal policies and employee handbooks to reflect newly enacted legislation.

As discussed in a previous alert, the Families First Coronavirus Relief Act (“FFCRA”) requires most small and midsize US companies to provide up to 2 weeks of paid sick leave (the Emergency Paid Sick Leave Act, or “EPSLA”) and an additional 10 weeks of paid family leave (the Emergency Family Medical Leave Expansion Act, or “EFMLEA”) to employees with a qualifying need related to COVID-19. Additionally, New York’s COVID-19 Paid Sick Leave Law requires employers of all sizes to provide paid leave alongside, and in some cases, in addition to, the FFCRA.

Below we list some answers to a few frequently asked questions as explained by recently issued DOL guidance clarifying certain aspects of the FFCRA. However, in some areas, the DOL has indicated that further guidance and regulations are forthcoming.

We are available to answer any questions about the FFCRA and New York’s Paid Sick Leave Law, as well as to assist with policy and handbook updates.

Employer Size Threshold

The FFCRA only applies to employers with fewer than 500 employees. The DOL has clarified that employer size is determined based on:

- All full-time and part-time employees, employees on leave (including furlough), temporary employees, and day laborers supplied by a temporary agency. Independent contractors are not included;
- The date the employee’s leave is to be taken; and

¹ *This update is part of Pavia & Harcourt LLP’s effort to inform clients and colleagues of new laws and regulations issued in response to the COVID-19 pandemic. Due to the extremely fast-paced changes taking place at the federal, state and local levels, please consult with counsel before taking any action related to the subject of this alert so that all up-to-date information can be considered.*

- The number of employees located within the United States.

Small Business Exemption

Employers with fewer than 50 employees may be exempt from the requirement to provide paid sick leave and expanded family medical leave related to an employee's childcare needs. Employers must document why providing such leave would jeopardize the viability of the business as a going concern.

Recordkeeping Requirements

Employers are eligible for reimbursement of paid leave under the FFCRA through tax credits. In order to receive the tax credits, the employer must submit a written request for leave received from the employee.

The employee's written request must comply with specific DOL and IRS requirements based on the employee's circumstances, and the employer must maintain records related to the paid leave request for 4 years.

Worksite Closures, Furloughs and Layoffs

The qualifying reasons for FFCRA paid leave must be the direct cause of the employee's inability to work. Therefore, employees who are unable to work due to a permanent or temporary worksite closure, furlough, or layoff are not entitled to paid leave under the FFCRA. Employees affected by these circumstances should be directed to state resources for unemployment benefits.

Existing Paid Leave Policies

Employers may not require employees to use accrued paid vacation, personal, medical, or sick leave before EPSLA leave. However, employers may allow employees to supplement EPSLA leave (which is capped at \$511 per day) with preexisting paid leave in order to receive their normal earnings during paid leave.

Employers also may not require employees to use accrued paid leave prior to claiming EFMLEA leave. But employers may require employees to use their other available paid leave (such as vacation and personal days) and EFMLEA leave concurrently.

State and Local Paid Leave Laws

Employers will also need to address requests for paid leave under both existing and recently enacted state and local programs. For example, in New York, the COVID-19 Paid Sick Leave law requires employers to provide and pay for up to 14 calendar days of paid sick leave for quarantined employees who are unable to work remotely. Employers with fewer than 100 employees are subject to reduced paid leave obligations.

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Employers may require employees to use FFCRA and New York COVID-19 Paid Sick Leave concurrently, but employers may be required to supplement wages on top of the payments that are subject to reimbursable tax credits.

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Contacting Pavia & Harcourt LLP

Questions regarding matters discussed in this publication may be directed to Adam Mitzner at 212-508-2318 or amitzner@pavialaw.com.

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