DOL Temporary Regulations Implementing FFCRA

By Mark Opara, John Vering, and Shannon Johnson

April 2, 2020

On April 1, 2020, the U.S. Department of Labor (DOL) ***issued temporary regulations*** and guidance (124 pages) to help carry out the Families First Coronavirus Response Act (FFCRA). The temporary regulations, which are effective April 1, 2020, provide employers with much needed guidance on many frequently asked questions that have been left unanswered by the DOL's previous guidance. The following summarizes some of the main issues addressed in the regulations:

Qualifying Reasons for Paid Leave

Under the FFCRA, an employee qualifies for ***emergency paid sick leave*** if the employee is unable to work (or unable to telework) due to a need for leave because the employee: (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 related to COVID-19; (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis; (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or (6) is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. Under the FFCRA, an employee qualifies for ***expanded family and medical leave*** if the employee is unable to work (or telework) because the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

With respect to the first qualifying reason for emergency paid sick leave, where an employee is unable to work because he or she is subject to a governmental quarantine or isolation order, the temporary regulations clarify that a "quarantine or isolation order" includes "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them." Accordingly, if an order forces a business to temporarily or indefinitely close or reduce operations resulting in no work being available for an

employee, the employee is unable to take paid sick leave or expanded FMLA leave because the employee would not be able to work even if he/she were not required to stay at home.

With regard to the second reason for paid sick leave where an employee is advised by a health care provider to self-quarantine, the regulations clarify that an employee is entitled to such paid leave if the health care provider believes that the employee has COVID-19, may have COVID-19, or "is particularly vulnerable to COVID-19," and following the advice of a health care provider to self-quarantine prevents the Employee from being able to work, either at the Employee's normal workplace or by telework.

With regard to the third reason for paid sick leave where an employee is seeking medical diagnosis for COVID-19, the regulations explain that if the employee is experiencing any symptoms of fever, dry cough, shortness of breath or any other COVID-19 symptoms identified by the CDC, the employee is entitled to paid sick leave "limited to the time the Employee is unable to work because the Employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19." An employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.

The regulations also provided much needed limitations for qualifying leave related to caring for an individual subject to an order or self-quarantine. The regulations clarify that such leave may not be taken to "care for someone with whom the employee has no personal relationship." To take leave, the individual being cared for by the employee must be an "immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined."

With respect to paid sick leave and expanded family and medical leave for a school closure or unavailability of a child care provider, the regulations limit the availability of such leave to situations where another suitable individual— such as a co-parent, co-guardian, or the usual child care provider—is not available to provide the care the employee's child needs.

With respect to any type of qualifying leave, an employee is unable to take paid sick leave if there is work for the employee to perform and he or she is permitted to perform the work via telework, unless there are extenuating circumstances that prevent the employee from performing the work/telework (e.g. power outage, the employee is experiencing serious COVID-19 symptoms, or the employee actually is caring for his or her child).

Finally, the regulations clarify that the FFCRA definition of "telework" means no less work than if the work was performed at an employer's worksite. Employees who are teleworking for COVID-19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with FLSA requirements. However, although 29 CFR 790.6(a) and the DOL's continuous workday guidance generally provide that all time between performance of the first and last principal activities is compensable work time, such rules will not apply to employees who are teleworking for COVID-19 related reasons. An employer allowing flexibility for teleworking employees during the COVID-19 pandemic "shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked." Section 790.6 and the DOL's guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID-19 related reasons.

Leave to Care for a Child—Interaction between laws

The regulations clarify that an employee's allotment of expanded family and medical leave depends on the employee's use of conventional FMLA leave during the applicable 12-month FMLA leave year for reasons unrelated to COVID-19. If the employee has already used a portion of their 12-week allotment of

conventional FMLA prior to utilizing expanded family and medical leave, the employee would only have the balance of such allotment available for expanded family and medical leave. The regulations give the example of an employee who takes three weeks of leave in January 2020 for a serious health condition; if the employer operates under a calendar year FMLA leave year, upon the April 1 effective date of FFCRA, the employee would only have nine weeks of expanded family and medical leave available. Additionally, employees are limited to a total of twelve weeks of expanded family and medical leave, even if the applicable time period for such leave (April 1 to December 31, 2020) spans two twelve-month leave periods under the FMLA.

Intermittent Leave

In order to take paid sick leave and/or expanded family and medical leave intermittently, the regulations emphasize that the employee and employer must have "a clear and mutual understanding" that such leave(s) can be taken in such manner and must also have an agreement on the increments of time in which the intermittent leave may be taken. Absent such an agreement, which need not be in writing, no leave under the FFCRA may be taken intermittently.

In the case of an employer that directs or allows an employee to telework, the employee may take paid sick leave or expanded family and/or medical leave intermittently, in any agreed increment of time, while the employee is teleworking.

However, if the employee is working onsite, intermittent leave is only available if the reason for leave is a school closure or unavailability of a child care provider. This is so because all the other qualifying reasons for leave carry an inherent risk that "the employee is, may be, or is reasonably likely to become, sick with COVID-19, or is exposed to someone who is, may be, or is reasonably likely to become, sick with COVID-19;" thus, permitting the employee to work onsite intermittently would run against the public policy of containing the virus.

Employee Notice and Documentation of Necessity of Leave

The regulations explain that for paid sick leave or expanded family and medical leave, an employer may require its employees to adhere to reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave. If an employee fails to give proper notice, the employer must still give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

The regulations further provide that, in connection with taking leave, an employee must provide a signed statement to their employer containing: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

In addition, an employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject, if that is the reason for paid sick leave. An employee seeking leave because he or she is self-quarantined must provide the name of the health care provider making the recommendation to quarantine. An employee caring for an individual who is quarantined must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.

For employees requesting expanded family and medical leave, they must provide:(1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Employer Coverage

The regulations confirm that for purposes of counting an employer's employees to determine whether an employer is under the 500 employee threshold for coverage under FFCRA, or under the 50 employee threshold to avail itself of the small business exemption, the DOL will employ its existing joint or integrated employer tests to determine if the employees of two separate and/or affiliated companies should be aggregated.

With respect to the small business exemption, which applies to expanded family and medical leave and emergency paid sick leave for school closures or unavailable child care providers, the preamble to the temporary regulations suggests the exemption is not a blanket exclusion from all such leave obligations, instead, it only exempts employers from the obligation to pay those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Employer Notice

All employers subject to FFCRA are required to post and keep posted on its premises, in conspicuous places, a notice explaining the FFCRA's paid leave provisions. The notice may also be emailed or direct-mailed to employees, or posted electronically on an employee information internal or external website. A model poster was made available on March 25, 2020. It can be found **here.**

The regulations specifically require small employers with less than 50 employees to post the notice even if it chooses to exempt one or more employees. The regulations do not exclude healthcare businesses who elect not to provide these benefits to their employees. Presumably, these employers are still required to display the notice notwithstanding any election to exclude some or all of their employees. If the employer of health care providers or first responders are excluding some or all employees from taking paid sick leave or expanded FMLA leave, we recommend the employer communicate that to its employees to avoid employees being confused by the required poster.

Record-Keeping

Employers are required to retain all documentation related to requests for leave for a period of four years. If employees make an oral request for leave, the employer should document and retain such information for four years. If an employer denies an employee's request for leave pursuant to the small business exemption, the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years. The regulations also explain what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). The IRS' own published guidance on appropriate documentation should be reviewed and is detailed **here.** This guidance explains when an employer can reduce its federal employment tax deposit by the qualified leave wages it has paid without incurring a failure to deposit penalty. See FAQ 17. In addition to retaining the employee documentation explained above, an employer must create and maintain records that include the following information:
? Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave. See FAQ 45.
? Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See FAQ 31 ("Determining the Amount of Allocable Qualified Health Plan Expenses") for methods to compute this allocation.
? Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, which the employer submitted to the IRS.

? Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

Continuation of Group Health Benefits

Section 826.110(b)–(g) of the regulations explains what an employer must do to continue group health plan coverage on the same terms as if the employee did not take paid sick leave or expanded family and medical leave. These requirements are similar to the regulatory requirements for employers when employees take FMLA leave for other reasons.

Employers who are laying off, furloughing, or terminating employees for COVID-19 related reasons need to check with their insurance broker and consult their summary plan description and/or seek legal advice regarding how such action impacts group health benefits for employees.

Additional Requirements

The DOL Regulations provide detailed guidance on many other issues relating to the Families First Coronavirus Response Act. We urge our clients and friends to review the regulations and seek legal advice if you have questions about interpreting these new Regulations, the underlying statutes on which they are based, or if you need assistance in wading through these extensive regulations and related guidance.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's **COVID-19 Resource Center.** Readers with legal questions should consult the authors, Mark Opara (mopara@sb-kc.com), John Vering (jvering@sb-kc.com), or Shannon Johnson (sjohnson@sb-kc.com) or any other shareholders in Seigfreid Bingham's Employment Law Group, including:, John Neyens, Brenda Hamilton, Julie Parisi, Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460.