Answering The Most Common Employer Questions On The Families First Coronavirus Response Act

How is the "fewer than 500 employees" cap calculated? Who is considered an employee for purposes of the "500 employee" threshold? Who is the "employer" for purposes of this calculation?

- An employer has fewer than 500 employees if, at the time an employee's leave is to be taken the employer employs fewer than 500 full-time and part-time employees within the US (including any state, the District of Columbia or territory or possession).
- In making this calculation, employers should include employees on leave, temporary employees who are jointly employed by the employer (See the DOL Fact Sheet: Final Rule on Joint Employer Analysis under the FLSA) and another employer (regardless of which joint employer maintains the employee on payroll), and day laborers supplied by a temp agency. Independent contracts are not considered employees for purposes of the 500-employee threshold.
- The DOL has provided guidance on how to determine if a business is under the 500 employee threshold. FFCRA: Questions and Answers No.2. It explains that a corporation (including separate establishments or divisions) should be considered a single employer and all employees should be counted towards the 500 employee threshold. However, when a corporation has an ownership interest in another corporation, the two corporations are considered separate employers, unless they meet the "integrated employer test" under the FMLA. Id. The relevant regulation for the integrated employer test is 29 C.F. R. Section 825.104. According to this regulation, "Where this [integrated employer] test is met, the employees of all of the corporations or entities making up the integrated employer will be counted in determining employer coverage and employee eligibility." It then lists the following factors which courts will use to determine whether an integrated entity exists,
    - Common management
    - Interrelation between operations
    - Centralized control of labor relations
    - Degree of common ownership/financial control 29 C.F.R. § 825.104(c)(2)(i)-(iv).
- The ultimate determination of whether different entities are an integrated employer is based on the totality of the relationship between the entities as opposed to any single factor. 29 C.F.R. § 825.104(c)(2). There does not need to be evidence supporting each factor. Some courts generally give the most weight to the first three criteria, with centralized control of labor relations being the most crucial, and others weigh the factors equally.
- Some employers may consider arguing they are an integrated or joint employer and not subject to FFCRA. This could be problematic in future litigation if the employer later wants to take the position the entities are not subject to suit as a joint or integrated employer. Relatedly, if they have taken the position in past litigation that the entities are not joint or integrated employers, this could raise questions about the accuracy fo this decision and could subject the employer to potential exposure.

- Conversely, if an employer takes the stance now that they are separate employers and provide Emergency Paid Sick Leave or FMLA in attempt to maximize tax credits, the risk is that the employer may be determined to be a single employer not eligible for tax credits related to the benefits provided under the FFCRA.
- See this helpful document prepared by Myra Creighton and Steve Mitchell on helping clients with this analysis.

When do you count the number of employees for determining the "fewer than 500 employees" cap?

- DOL provides that the determination is made "at the time your employee's leave is to be taken"
- Since employees on leave count toward the 500-employee threshold, the count should be upon effective date of the law (April 1, 2020) and during the period that follows until December 31, 2020, when the leave provisions sunset.

What is the effective date of the new requirements?

- The Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act are effective on April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020.

Is the legislation retroactive? Do employers have to pay employees for time already taken off before the law goes into effect?

- No.

For what purposes may an employee take leave?

- **Emergency Paid Sick Leave:**
    - **Must provide paid sick time "to the extent the employee is unable to work (or telework) due to a need for leave because:**

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order or self-quarantine as described above.
5. The employee is caring for a son or daughter whose school/child care is closed/unavailable due to COVID-19 related reasons.
6. The employee is experiencing "any other substantially similar condition" specified by HHS (catch all).

- **Emergency Family and Medical Leave:**
    - Any employee who has been employed for at least **30 days** is entitled to **12 weeks** of job protected leave when:
        - "The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if

the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."

- "Public Health Emergency" is defined to mean an emergency with respect to COVID-19 declared by a Federal, State or local authority.

Is an Employee Eligible for Emergency Paid Sick Leave and/or Expanded Family and Medical Leave if an Employer Closes the Worksite, furloughs the employee or reduces the employee's work hours?

- No. Neither an employer's closure for lack of business nor furloughs nor reduced hours for lack of work are qualifying reasons for emergency paid sick leave or expanded family and medical leave. The DOL FAQs 23-27 appear to indicate that a closure related to a federal, state or local directive also would not make an employee eligible. However, employer should monitor for further guidance by the DOL on this issue.

Do the traditional FMLA standards for employer and employee apply to the emergency family and medical leave?

- No.
- The only requirement is that the employee has been employed for **30** calendar days. There is no requirement that they work for 12 months and 1,250 hours as under traditional FMLA.
- Nor are covered employers required to have 50 employees within a 75-mile radius as under traditional FMLA.

What is the duration of the leave?

- **Emergency Paid Family Leave:**
  - Full-time employees: 80 hours over a two-week period
  - Part-time employees: average number of hours the employee is normally scheduled to work in a two-week period.
  - If a part-time employee's schedule varies, the amount of leave entitlement is calculated using a six-month average to calculate the average daily hours and the individual is entitled to paid sick leave for this number of hours per day for a two-week period.
  - If the part-time employee has not been employed for at least six months, the leave entitlement is determined using the number of hours the employer and employee agreed that the employee would work upon hiring and, if there was no such agreement, the leave entitlement is determined based on the number of hours per day the employee was scheduled to work over the entire term of his or her employment.
- **Emergency Family and Medical Leave:**
  - Up to twelve weeks (the first 10 days of which may be unpaid).
  - The employee may elect to substitute any accrued paid leave (including emergency paid sick leave) during this 10-day period. The employer may not require the employee to substitute paid leave.

What is the rate of pay?

- **Emergency Paid Sick Leave:**
  - The higher of their regular rate of pay, the federal minimum wage, or the local minimum wage for qualifying reasons (1), (2) and (3), above.
    - **Capped at $511 per day and $5,110 in the aggregate per person.**
  - Two-thirds the regular rate of pay for qualifying reasons (4), (5) and (6), above.
    - **Capped at $200 per day and $2,000 in the aggregate per person.**
- **Emergency Family and Medical Leave**
  - After 10 days (unpaid, but could apply emergency paid sick leave or any other accrued paid leave), employees are compensated at 2/3 of their regular rate of pay.
    - **Capped at $200 per day and $10,000 in the aggregate per person.**

How is the regular rate of pay calculated?

- The DOL Question and Guidance states the following:
  - For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave.[2] If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

  - If you are paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA.

  - You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

Are the two types of leaves separate or combined?

- They are two separate programs, not mutually exclusive.
- They are essentially designed to work in conjunction with each other where possible, and where the qualifying reasons for leave are satisfied.
- For example, the first 10 days of emergency FMLA are unpaid. However, the emergency paid sick leave provides 80 hours (essentially 10 days) of paid time, which an employee could use during the unpaid portion of the emergency FMLA, as long as the conditions qualified for both leaves.
- Of course, an employee doesn't need to use both. Some employees will qualify for the paid sick leave (which has six qualifying reasons) but not the FMLA because it only covers school/day care closure.

Are employers required to pay the paid sick leave and emergency FMLA now (when law is in effect), and then seek reimbursement via tax credits?

- Yes. Under both provisions, employers subject to the requirements are entitled to a tax credit equal to the amount of the qualified sick leave or paid family leave requirements paid by the employer (subject to the caps discussed below).
- The tax credits for qualified wages are capped at the same amounts of the cap on leave payments discussed above.
- Eligible employers may also receive a tax credit for the costs they expend to maintain health insurance coverage for eligible employees during their leave.
- The tax credits are applied against employer Social Security taxes. They will not be applied to other employer taxes such as FUTA. If the value of the tax credits exceeds the employer's contributions to Social Security, the excess will be treated as an overpayment, which may be refunded to the employer. The IRS expects to release guidance that will enable eligible employers to retain payroll taxes equal to the amount of leave they paid, rather than remit them to the IRS and then receive a credit. The IRS also plans to release guidance on an expedited refunded procedure.

How do the paid sick leave requirements interact with paid leave the employer already provides pursuant to employer policy or state/local laws?

- Paid sick leave and expanded family medical leave under the FFCRA is in addition to employees' preexisting leave entitlements under employer policy and state or local law.
- An employee may simultaneously take paid sick leave or expanded family and medical leave under the FFCRA and paid leave already provided by an employer if the employer agrees to allow the employee to supplement the amount received from paid sick leave or expanded family and medical leave under the FFCRA up to the employee's normal earnings. (For example, if an employee is receiving 2/3 of normal earnings from paid sick leave under the FFCRA and the employer permits, the employee may use preexisting employer-provided paid leave to get the additional 1/3 of his or her normal earnings.) An employer is not required to permit an employee to use existing paid leave to supplement the amount the employee receives from paid sick leave or expanded family and medical leave and may not require an employee to do so.

What if a collective bargaining agreement provides different paid sick leave benefits?

- Emergency paid sick leave is in addition to other leave provided under an applicable collective bargaining agreement.
- The paid sick leave legislation says it shall not be construed to "diminish" the rights or benefits an employee is entitled to under a collective bargaining agreement.
- Therefore, if the collective bargaining provides for greater paid sick leave benefits, those must be provided.
- On the other hand, if the law provides for greater paid sick leave than the collective bargaining agreement, the employer must provide the greater leave required by the new law.
- Both laws also have special provisions regarding how contributions are made under multi-employer collective bargaining agreements.

Is the emergency paid family and medical leave in addition to existing unpaid leave under the FMLA?

- Under the FMLA an employee is entitled to 12 weeks during a 12 month period, including the emergency paid family and medical leave.

Do employees have to provide notice?

- The emergency FMLA provisions provide that, where the necessity for leave is foreseeable, an employee shall provide the employer with such notice of leave "as is practicable."
- The paid sick leave provisions provide that, after the first workday (or portion thereof) an employee receives paid sick leave under this law, an employer may "require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time."

Can employers require employees to provide certification?

- If an employee takes paid sick leave, the employee must provide to the employer supporting documentation as specified in applicable IRS forms, instructions, and information for purposes of the refundable tax credit.
- If an employee takes expanded family and medical leave to care for a child whose place of care is closed/unavailable due to COVID-19, the employer may require the employee to provide documentation in support of the leave such as a notice that has been posted on a government/school/daycare website. However, this should be relatively easy for the employer to verify without requiring the employee to provide documentation.

Are there notice requirements employers must provide?

- Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements. An employer may satisfy this requirement by emailing or mailing the notice to its employees, or posting it on the internal or external website.
- Poster: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- This is in addition to the general FMLA poster.

What are the exceptions for small businesses?

- An employer with fewer than 50 employees is exempt from providing (a) paid sick leave due to school or place of care closures or childcare provider unavailability and (b) expanded family and medical leave due to school or place of care closures or childcare provider unavailability when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exception if an authorized officer of the business had determined that:
    - 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.

Are group health plans required to cover COVID-19 testing and related services without cost sharing?

- Yes, at least through the end of the public emergency period.
- The new law requires group health plans (self-insured and insured (including grandfathered)) to provide coverage for FDA-approved COVID-19 diagnostic testing and related services to employees and covered dependents.
- Mandated coverage must be provided without cost sharing (deductibles, copayments and coinsurance) during the date starting with enactment (March 18, 2020) through the end of the public emergency period.
- Covered services and related cost waivers apply to diagnostic testing, health care provider services (in-person and telehealth), and facility costs (physician office, urgent care center and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, a COVID-19 diagnosis.
- Plans may not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.

Who qualifies as a "health care provider" that employers may elect to exclude from paid sick leave/expanded FMLA's provisions?

- According to the DOL Questions and Answers, a healthcare provider is 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, requirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.
- This definition includes any permanent or temporary location where medical services are provided that are similar to such institutions.
- This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain 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 DC, determines is a health care provider necessary for that state's or territory's or DC's response to COVID-19.

- The DOL encourages employers to be "judicious" when using this definition to exempt healthcare provide from the provisions of the FFCRA to minimize the spread of COVID-19.