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DEPARTMENT OF LABOR CLARIFIES COVERAGE FOR EMPLOYERS AND EMPLOYEES UNDER THE FFCRA

By: Sean F. Darke, Esq.

The U.S. Department of Labor continues to provide necessary guidance on the Families First Coronavirus Response Act ("FFCRA"), which will help guide businesses through implementation of this Act. Importantly, the U.S. Department of Labor (DOL) provides clarification regarding which employers and employees are covered under the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLEA") to apply. The following issues are from the regulations issued by the U.S. DOL.

WHAT DOES IT MEAN TO HAVE FEWER THAN 500 EMPLOYEES?

The DOL has specifically stated that in order to determine whether or not a company falls under the fewer than 500 threshold, the company must determine the 500 employee count at the time the employee's leave is to be taken. This has created situations where an employer will fall in and out of the Act's coverage from week-to-week. As a result, employers need to maintain accurate headcount from week-to-week, as more and more businesses continue to have employees' call-in sick from COVID-19.

The DOL also includes a broad array of employees for employers to use when calculating the fewer than 500 threshold, specifically:

- Full-time and part-time employees;
- Employees who are on leave;
- Temporary employees who are jointly employed by the employer with another company (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 the employer is the temporary agency or the client firm if there is a continuing employment relationship).

Employers cannot use independent contractors to meet the fewer than 500 threshold. However, the DOL has adopted the integrated employer test.

The DOL regulations reiterates that an employer is typically considered a single employer, meaning that it must count all of its employees in that single company. However, if a company has an ownership interest in a separate company, the two (2) companies may be joint employers. Of great importance is that a joint employment analysis is fact intensive and should be reviewed by the company's attorney.

If two or more companies are looking at the "integrated employer test" set out in the FMLA, the entire relationship should be looked at in its totality, focusing on common ownership, interrelation between operations, centralized control of labor and common management. But again, this analysis should be reviewed by the company's attorneys.

WHAT IS THE SMALL BUSINESS EXEMPTION?

The FFCRA provides that employers[1] with fewer than 50 employees may be exempt from the FFCRA leave, if the leave would jeopardize the viability of the business as a going concern. Employers should not simply take the view that it's under 50, and therefore, exempt, as each situation should be analyze. But once the decision is made to implement the exemption, employers need to document its reasons.

[1] This includes a religious or nonprofit organization.

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If the employer is going to use the exemption, the DOL explains the necessary criteria employers should review:

1. The provides leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
3. The employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity

If the employer meets one of the criteria, then it can use the exemption. However, an employer will want to analyze any request to first determine whether an individual or group of employees who are requesting the leave trigger one of the above criteria. For example, if an otherwise eligible employee who requests the leave would not cause the employer's expenses and financial obligation to exceed available business review pose a substantial risk, or prevent the small employer from operating at minimum capacity, the employer should grant the leave, as the above criteria does not apply.

WHICH EMPLOYEES ARE ELIGIBLE FOR THE EXPANDED FMLA LEAVE?

The DOL regulations provide that an employee who is employed for at least 30 calendar days will be eligible for leave. This means, if an employee requests leave today and has been on the employer's payroll for the last 30 calendar days the employee is eligible. Further, the regulations provide that "employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least 30 of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer." 29 U.S.C. 2611(2)(B)(i).

IF MY BUSINESS IS THAT OF A HEALTH CARE PROVIDER, ARE WE COVERED UNDER THE FFCRA?

The FFCRA excludes certain employees of health care providers. The DOL regulations provides that a health care provider is anyone employed at any doctor's office, hospital, heath care center, clinic, post-secondary education institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institution.

The DOL regulations further state that the definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is 100 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 the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19. § 826.30 (c)(i)-(ii).

WHAT ABOUT EMERGENCY RESPONDERS?

The DOL regulations provide that emergency responders may be excluded. The DOL regulations provide that emergency responders are anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child

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welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, 101 including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19.

DOES AN EMPLOYER NEED TO RESTORE THE EMPLOYEE TO THE SAME OR EQUIVALENT POSITION UPON RETURN FROM PAID SICK LEAVE OR FROM THE EXPANDED FMLA LEAVE?

The short answer is yes; however, the DOL has provided situations where the individual employee would not need to be restored to the same or equivalent position. If the employer is issuing layoffs, regardless of any requested leave, then the employee would not need to be restored to the same or similar position. And if the employer is going to suffer "substantial and grievous economic injury" to the operations, if the employer restores the "key" employee, then the employer does not need to restore the individual.

According to the DOL, the term "key employee" is a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees at the employee's worksite. The employer will want to discuss the necessary written notice and other rules under FMLA with an attorney, if the employer is going to take such action. In addition, the DOL provides that if an employer who has fewer than 25 employees and the employee took leave to care for their son or daughter because their school or place of care was closed, or their child care provider was unavailable, the employer does not need to restore the employee if the following hardship conditions exists:

- The employee's position does not exist due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the employee's leave;
- The employer made reasonable efforts to restore the employee to the same or an equivalent position;
- The employer made reasonable efforts to contact the employee if an equivalent position becomes available; and,
- The employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

As the U.S. DOL continues to provide clarification to the Paid Sick Leave and the Expanded FMLA Leave, employers are encouraged to seek guidance from their attorney on their specific issue under the new emergency laws.

Sean Darke is a Partner at Litchfield Cavo's Chicago office. He focuses his practice on labor and employment issues and successfully defends businesses in all areas of employment and labor law, including wage and hour laws in both State and Federal court. Most recently, Sean has been named a Leading Lawyer in the area of Employment Law Management Side by *Leading Lawyers* annually since 2017.

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