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U.S. COVID-19: AS THE FFCRA GOES LIVE, THE DOL CONTINUES TO PUBLISH REVISED AND NEW GUIDANCE FOR EMPLOYERS

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Although the federal Department of Labor ("DOL") declared April 1 – 17 to be a temporary period of non-enforcement of the Families First Coronavirus Response Act ("FFCRA"), the DOL was far from idle during that period. To the contrary, the DOL hosted an FFCRA webinar, published versions of the required FFCRA poster in additional languages, and actively encouraged employers and employees to become familiar with the FFCRA through posts on social media. Importantly, the DOL also provided key revised and new guidance for employers by: (1) issuing technical corrections to the temporary rule; and (2) posting additional informal questions and answers (the "Q&A").

As described below, this new guidance provides much-needed clarity on key issues, especially since the period of non-enforcement is now over.

Interplay Between the FFCRA and Employer Paid Leave Policies

Although the rules remain complicated and not entirely clear, there is now more information regarding whether and when an employee may choose, or an employer may require, leave under an employer's existing paid leave policies to be used before, concurrently with, or as a supplement to, the use of leave under the Paid Sick Leave ("PSL") and Emergency FMLA ("EFMLA") provisions of the FFCRA.

In this context, "concurrently" means "to cover the same hours as." In other words, to the extent various types of leave run concurrently, then the employee's leave entitlement is used / reduced under both types of leave at the same time. "Supplement" means that paid leave under an employer's policy is used to "top off" the pay available for leave under the FFCRA (which, in some instances, is limited to 2/3 of the employee's regular rate of pay, and is subject to caps). When leave under an employer's policies is used as a supplement, the supplemental portion of leave runs concurrently with the FFCRA leave. Importantly, when accrued paid leave under an employer's policy is used concurrently with FFCRA (either in full or as a supplement), the employer may still only claim a tax credit for the portion of pay that is FFCRA-required wages.

With that in mind, the highlights of the rules are as follows:

- **PSL:** Because the PSL is a new, stand-alone leave entitlement (unlike the EFMLA, which is an amendment to the Family and Medical Leave Act), employees have the right to choose which of the following leave to use first (when a qualifying reason for leave exists): PSL or applicable accrued paid leave under an employer policy. In other words, employers may not require employees to use accrued paid leave under employer policies before using PSL. Similarly, employers may not require employees to use accrued paid leave under employer policies concurrently with PSL. On the other hand, employers and employees may agree to use accrued paid leave under any employer policy (e.g., sick leave, vacation, PTO, personal leave) to supplement (top off) FFCRA wages so that the employee receives his or her normal earnings during leave.

- **First 2 weeks of EFMLA:** Employees may choose to take the first two weeks of EFMLA leave as unpaid, or to use either: PSL (at the FFCRA pay rate for PSL) or accrued paid leave under an employer's policy[1] (at the rate specified in the policy, typically normal earnings) concurrently with this portion of EFMLA leave, but not both. Employers may not require such concurrent use.

  - If the employee chooses to use available PSL during this 2-week period, then the employer and the employee may agree to use accrued paid leave under an employer policy to supplement (top off) pay to normal earnings.

  - If the employee does not use PSL or accrued paid leave concurrently, or if the employee exhausts such leave, then the remainder of the first 2 weeks of EFMLA leave is unpaid.

- **Remaining 10 weeks of EFMLA**: Employers may require employees to use accrued paid leave under employer policies concurrently with this portion of EFMLA leave. If not required by the employer, employees may choose to use accrued paid leave under the employer's policies concurrently with EFMLA leave.

  - The benefit to an employer of imposing such a requirement is that the employee's paid leave under both the EFMLA and the employer's policy will be used at the same time. The employer must, however, pay the normal amount of wages that would otherwise be paid under the leave policy (typically full wages). Thus, if not required by an employer, the benefit to the employee of choosing to use accrued paid leave concurrently is the receipt of full pay during the leave period.

  - Caveat: The DOL regulations and guidance are clear that, with respect to this portion of EFMLA leave, only leave available under an employer's policies that could be used for a child care purpose (e.g., vacation, PTO, or personal leave, but not sick leave) may be used concurrently with EFMLA leave.

- If/when an employee exhausts accrued paid leave, any remaining EFMLA leave is paid at the normal FFCRA rate (2/3 wages, subject to caps). In this circumstance, an employer and the employee may agree to use accrued paid leave under an employer policy to supplement (top off) pay to normal earnings, subject to federal and state law.

Future Enforcement of the FFRCA

With the DOL's temporary period of non-enforcement ending on April 17th, even those employers who make a good faith effort to comply with the law (and the DOL's ever-changing guidance) may now be subject to enforcement for violations. The DOL highlighted this point earlier this week when it announced that it had reached a settlement with an Arizona employer concerning an alleged FFCRA violation. As the DOL's press release makes clear, the DOL intends this settlement to "serve as a signal to others that the U.S. Department of Labor is working to protect employee rights during the coronavirus pandemic."

What's more, as highlighted in the Q&A, not only will the DOL enforce the FFCRA going forward, but it is also prepared to enforce the law retroactively.

Miscellaneous Additional Updates

In addition to providing guidance on the FFCRA's interaction with other forms of paid leave and enforcement generally, the updated Q&A also provides additional information on the following topics:

- The ability of an employer to decide to exempt health care providers or first responders from taking FFCRA leave for one qualifying reason (e.g., to care for a family member) but choose to permit them to take FFCRA leave for another qualifying reason (e.g., in the case of their own COVID-19 illness).
- Calculating the number of hours of PSL and EFMLA available to employees who work irregular hours;
- Calculating employees' average regular rates for each hour of leave;
- How shelter-in-place and stay-at-home orders interact with PSL entitlements; and
- Damages available to employees on whose behalf the DOL brings an enforcement action.

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[1] It is unclear whether the use of accrued paid leave under an employer's policies during this portion of EFMLA leave is restricted to paid leave that is available to be used for a child care purpose (to care for a child whose school or place of care is closed), such as vacation, PTO or

personal leave, or if leave under sick or medical leave policies may also be used. (*Cf.* 29 CFR § 826.60 *with* DOL Q&A #86 (para. 3).)

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