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Employment Question of the Day: March 25, 2020

Legal Update

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By Pamela Abbate-Dattilo

Question

Do we have more guidance yet on how the Department of Labor will interpret key provisions of the Families First Coronavirus Response Act?

Answer

A little. By now you have probably surmised that the Families First Coronavirus Response Act (FFCRA) is less than a model of clarity. Some of its provisions are fairly straightforward; as for others, even employment lawyers do not necessarily agree on the correct interpretation. The DOL is expected to issue regulations that we hope will clarify some ambiguous provisions. We expect those regulations within the next week. In the meantime, the DOL published a new "Questions and Answers" page on its website that appears to answer a few commonly asked questions.

First, the DOL specifies that full-time **and** part-time employees count toward the 500-employee threshold. Remember, only employers with less than 500 employees must comply with the FFCRA.

Second, the DOL specifies that the relevant date for determining whether an employee has 500 employees is "**at the time your employee's leave is to be taken.**" This is important, as many employers *had* more than 500 employees before massive layoffs over the past couple weeks and are now under the 500-employee threshold.

Third, commentators, including us, have been stating that the effective day is April 2, 2020, which is the date provided in the bill. The DOL has now clarified that the effective date is actually April 1, 2020.

Fourth, the DOL clarified that an employee who qualifies for the emergency FMLA leave may also qualify for emergency sick leave but can take only a total of 12 weeks. What this means is that in most instances, the first 10 days of the emergency FMLA leave is not **actually** "unpaid," which has been widely stated by commentators

quoting the FFCRA, because the employee will most likely receive pay for those two weeks under the emergency sick leave provision.

The DOL's press release announcing the guidance is available [here](#).

Takeaway

Do an employee count now and see where you land. Consider whether additional planned changes (e.g., furloughs or layoffs) this week or next will impact whether you are covered on April 1, 2020.

Please watch for an update from Fredrikson & Byron on additional guidance issued by the DOL or the forthcoming regulations. If you have questions, contact your Fredrikson and Byron Employment & Labor attorney.

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