Legal Update

AMENDED COVID-19: NEWLY-UPDATED DOL GUIDANCE ON THE FFCRA IS A GAME-CHANGER

The Department of Labor ("DOL") has issued updated guidance regarding the requirements of the Families First Coronavirus Response Act (FFCRA). Some of this guidance significantly alters the impact of the FFCRA and changes the way California employers may choose to proceed with business operations.

Under the FFCRA, employees are eligible for up to eighty (80) hours of paid sick leave when they are off work because the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19. In California, where the Governor has issued a mandatory "stay home" order for all people and businesses not deemed essential, this would apply to all employees unable to work
(or telework) at this time. This would presumably require employers who have already been forced to shut down their businesses to continue providing FFCRA benefits to their employees, even when the business cannot operate. While tax credits and a variety of loans and advances may be available, the immediate burden of the FFCRA is daunting for California employers.

In newly-updated guidance from the DOL, several key questions and answers address the question on every employer's mind: do I have to pay FFCRA benefits if my workplace is shut down due to the statewide shut down order or because of a lack of work? According to the DOL, the answer is no:

**Q 23:** If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?

**A:** No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive....

**Q 24:** If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?

**A.** No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive....

**Q 25:** If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?

**A.** If your employer closes while you are on paid sick leave or expanded family and medical leave, your employer must pay for any paid sick leave or expanded family and medical leave you used before
the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive.

Surprisingly, this guidance appears to directly contradict the FFCRA itself, which specifically provides for benefits to employees when "the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19." If FFCRA benefits are not available to employees when the employee is off work because of a state isolation order (as is the current status in California) or a downturn in business arising out of that order, then there would be no reason to have a specific provision in the FFCRA granting benefits in that very scenario. Nevertheless, the DOL is tasked with enforcement of the FFCRA, and employers can rely upon its guidance as written unless and until otherwise instructed.

This is obviously a key development for employers, as numerous California businesses have wondered how to pay for FFCRA benefits if they cannot remain open or have experienced business losses related to COVID-19. While tax credits and other benefits are available to employers to offset this burden, it seems that employers can avoid the FFCRA burden entirely where their worksite is closed due to "lack of business or because the employer was required to close pursuant to a Federal, State or local directive," as indicated by the DOL.

Employers should note that the same standards apply where employees have been furloughed (Q 26 in the DOL guidance) or the worksite is closed temporarily (Q 27 in the DOL guidance). The DOL also notes that FFCRA benefits are not available where an employee is working but the total work hours have been reduced because there is little or no work available to be performed (Q 28). The DOL states that this is because the reduction in work hours is not preventing the employee from working those hours for a qualifying FFCRA reason, "even if your reduction in hours was somehow related to COVID-19." As a result, it seems clear (as mud) that the FFCRA benefits apply only when the employee’s inability to work is directly caused by having a personal COVID-19 issue, or caring for a family member who does.
Personal Mandates to Stay Home Under Government Orders Still Subject to FFCRA

Employers should remember that some local government orders have mandated or suggested that employees of a certain age, or with pre-existing health conditions, should be sent home even when the rest of the business is still operational. In a situation where an employee has been sent home under a federal, state or local order because of the employee's personal conditions rather than because the business has shut down, the employee would still qualify for FFCRA benefits, including benefits related to a government isolation or quarantine order. For a listing of all state and local government stay home orders and recommendations, click here.

Given this guidance, it seems that the FFCRA's provision of benefits when there is a lack of work due to a government isolation order (such as California's stay home order) will not apply to business conditions, but would still apply to employees personally impacted by a government order even when the rest of the business is still operational as an essential business and the employee would otherwise be working. The DOL continues to state that ongoing guidance will be forthcoming, so employers are advised to watch further developments as they arise for complete information.

Layoff or Furlough?

Many employers wondered whether they should lay off employees instead of implementing temporary furloughs, on the assumption that even an unpaid furlough for continuing employees would result in having to provide FFCRA benefits. It appears that this is no longer the case, according to the DOL.

That said, remember that California's Division of Labor Standards Enforcement has opined that a furlough of up to 10 days would not be considered a termination (thus implying that a furlough of longer than 10 days would become a termination). Given the obligation to pay out all final wages and vacation upon termination of employment, employers who want to implement a furlough of longer than 10 days (rather than a layoff) should consider paying out final wages and vacation pay to employees at the outset of the furlough, to avoid a later claim for waiting time penalties based upon the alleged failure to pay final wages at the time of termination.
Health Insurance Benefits Under the FFRCA

One key point in the DOL guidance is to note is the DOL's reminder that health care benefits continue and premiums are paid in the same manner during a FFCRA-qualifying leave as they would be prior to FFCRA leave:

Q. 30: If I elect to take paid sick leave or expanded family and medical leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?

A: If your employer provides group health coverage that you've elected, you are entitled to continued group health coverage during your expanded family and medical leave on the same terms as if you continued to work. If you are enrolled in family coverage, your employer must maintain coverage during your expanded family and medical leave. You generally must continue to make any normal contributions to the cost of your health care coverage....

Additional Information

The DOL guidance also provides additional information regarding the calculation of benefits, use of benefits intermittently, supplementation of FFCRA benefits with company-sponsored or state-mandated benefits, and other issues.

Employers should review the DOL's guidance in its entirety to understand the full scope of their obligations under the FFCRA. The updated DOL guidance can be found on the DOL website or by clicking here.

For further questions or legal assistance with COVID-19 issues specific to your company, contact the employment attorneys at LightGabler.

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