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RECENT DEVELOPMENT

DOL Issues Return-to-Work Guidance Under the Families First Coronavirus Response Act

By Jim Paretti and Sebastian Chilco on July 21, 2020

On July 20, 2020, the U.S. Department of Labor issued additional guidance on return-to-work issues under the Families First Coronavirus Response Act (FFCRA). Enacted at the end of March, the FFCRA provides emergency paid sick leave, and paid family leave under the Family and Medical Leave Act (FMLA) for certain workers affected by COVID-19.

In general, employers of fewer than 500 employees are required to grant up to 80 hours of paid sick leave to workers exposed to COVID-19, required to quarantine, or unable to work or telework because of the closure of their child's school or place of care (the rate of pay is capped). Parents of children whose place of care is closed may also be eligible for up to 12 weeks of FMLA leave, 10 of them paid (again, subject to statutory caps). The DOL previously issued guidance as to employees' rights to leave for school or other child care closures during the summer months. Paid leave under the FFCRA is fully paid for by the federal government by way of refundable tax credits.

The recently issued guidance makes clear, for example, that where an employee was eligible for extended FMLA leave, and used four weeks of leave before being furloughed, they are entitled upon their return to work to the remaining eight weeks of leave (if it is still needed because a child's school or place of child care is closed). Put more simply, the DOL makes clear that the period of time that the employee was on furlough did *not* count against their FFCRA/FMLA leave entitlement.

The new guidance also provides direction to employers that have employees returning to work after caring for a family member exposed to COVID-19. The DOL notes that while employees returning to work after paid FFCRA leave are entitled to be restored to their same or equivalent position, an employer may be able to bring the employee back to work in a position requiring less interaction with co-workers, or require them to telework. Employers may also require employees

to test negative for COVID-19 before returning to work, but should be mindful not only of the DOL's guidance, but also of EEOC guidance on this topic, lest they run afoul of the Americans with Disabilities Act (ADA).

Finally, the DOL's guidance makes clear that where an employer that furloughed employees due to a quarantine order, but now is contemplating reopening insofar as the quarantine order has been lifted, may not extend an employee's furlough simply because they would need to take FFCRA leave if called back to work. The DOL's guidance expressly states that employers may not discriminate or retaliate against employees for the use of FFCRA leave, and may not use the anticipated need for FFCRA leave upon reopening as a negative factor in an employment decision.

The FFCRA's leave provisions are currently scheduled to expire at the end of the year, December 31, 2020 (the U.S. House of Representatives earlier this year passed a bill that would extend the FFCRA for an additional year, but it is highly uncertain whether this extension will become law). Given the complex nature of the federal statutes, and their interaction with state and local laws, employers facing leave-related questions in connection with resuming operations are advised to consult with counsel.