DOL Publishes Initial Guidance on How to Implement Emergency Paid Sick and Paid FMLA Leave

By Jeff Nowak on March 25, 2020

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Late yesterday afternoon, the Department of Labor issued an initial question and answer guidance aimed at helping employers administer emergency paid sick leave (EPSL) and paid FMLA leave (FMLA+) as part of the Families First Coronavirus Response Act (pdf), which aims to provide initial relief to American workers in the wake of the coronavirus pandemic. (We covered this new law in a webinar yesterday, the recording of which you can access here.)

Among the key questions answered in the DOL's Q&A, the agency set the effective date of the new law, addressed which (and when) employees should be included in the calculation to determine employer coverage, and outlined how to calculate the employee's regular rate of pay when providing EPSL and FMLA+.

Here are the highlights:

Effective date of the new law: *Is this some April fools trick?* Although we all anticipated the new law to take effect on April 2, 2020 (i.e., 15 days after President Trump signed the legislation), the DOL set the effective date as **April 1, 2020**, which is 14 days after enactment. Go figure, but we'll get over it.

According to the statute, the law expires on December 31, 2020.

Employer Coverage: As we know from the law itself, it applies to a private-sector employer with 499 or fewer employees. Perhaps the most notable (and helpful) portion of the guidance is information on how employers calculate whether they fall under that employee threshold.

When does the employer calculate? The Q&A makes clear that an employer should calculate its total head count ***each time*** an employee's leave is to be taken. As difficult as this may be for employers to track, DOL was left precious little leeway by Congress on how best to determine employer coverage. But it nevertheless presents the dilemma that an employer will dip above and below the 500-line at any given time. *Think about it*: Johnny seeks leave on a Monday when the Company has 505 employees (he's out of luck), but one week later, Susie requests leave at a time when the Company dips to 499 employees (she's in luck). At a minimum, it surely will create some awkward situations.

Which employees should be counted? The Q&A states that employers should count:

- Full-time and part-time employees (no independent contractors are counted)
- Only those employees within the United States (as the FMLA does not apply outside the United States and its territories)
- Employees on leave
- Temporary employees who are jointly employed by the employer and another company (regardless of whether the jointly-employed employees are maintained on only one employer's payroll)

- Day laborers supplied by a temporary agency (regardless of whether the employer or the temporary agency or the client firm if there is a continuing employment relationship).

Are related businesses aggregated to determine total head count? Last night, several of my Littler colleagues and I published an analysis of this issue, which still is a bit amorphous even after the Q&A. We see the DOL's guidance this way:

The guidance states that typically, a corporation (including its separate establishments or divisions) will be considered a single employer and all of its employees must each be counted towards the employee threshold for that single corporation. Where a corporation has an ownership interest in another corporation, the two corporations are still typically separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether EPSL and FMLA+ leave must be provided.

In addition, the DOL's Q&As adopt the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA) to determine whether two or more entities are separate, or combined, for FMLA+ purposes. Those factors under the FMLA include *common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/control*. *See* 29 CFR 825.104(c)(2). If two entities constitute an integrated employer

under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of FMLA+ requirements.

Regular Rate Confirmed, Overtime must be Counted as Part of Pay

The Q&A makes clear that employers must pay an employee for hours the employee would have been normally scheduled to work. However, the DOL confirmed what the law indicates -that EPSL benefits are **capped** at 80 hours total over a two-week period. The guidance also notes, by way of example, that an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and only30 hours of paid sick leave in the second week because of the 80-hour cap.

Notably, the DOL confirmed also that the payment made to the employee "does not need to include" a premium for overtime hours under either the EPSL or FMLA+.

Leave Given Prior to Effective Date of Law Cannot be Credited Later

As expected, the Q&A confirms that EPSL and FMLA+ benefits are effective beginning on the April 1 effective date. As a result, any paid leave provided before April 1 will not count towards the new requirements and this gratuitous leave will not be eligible for the tax credits available under the law.