KUTAKROCK

COVID-19
SPECIAL PUBLICATION

Employment Law

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DOL Publishes Initial Guidance and Employee Notice Regarding Families First Coronavirus Response Act

The U.S. Department of Labor ("DOL") has published an initial round of guidance for employers covered by the Families First Coronavirus Response Act ("FFCRA") and the Emergency Family and Medical Leave Expansion Act. The DOL's guidance includes three key publications: (1) a fact sheet for employers, (2) a fact sheet for employees, and (3) a question-and-answer document.

The DOL also has created a notice outlining employee rights under the FFCRA, which employers must post in a conspicuous place on their premises or provide to employees by emailing, direct mailing, or posting to an employee information internal or external website. The poster and accompanying questions and answers may be found on the DOL website. Employers may download/print the notice or obtain it for free by contacting the DOL's Wage and Hour Division at 1-866-4-USWAGE (1-866-487-9243).

Effective Date

The FFCRA goes into effect on April 1, 2020, and it is not retroactive. Therefore, covered employers must comply with the FFCRA beginning April 1, 2020, until it expires on December 31, 2020.

Because the Emergency Paid Sick Leave Act imposes a new sick leave requirement beginning April 1, 2020, employers may not deny paid sick leave to an employee for a reason identified in the Emergency Paid Sick Leave Act before that date.

Counting Employees

The FFCRA applies to certain public employers, and private employers with fewer than 500 employees. The DOL clarified that in calculating the total number of employees, all full- and part-time employees working within the United States must be counted, including employees on leave and temporary employees who are jointly employed with another company under the Fair Labor Standards Act ("FLSA"). Workers classified as independent contractors under the FLSA are not counted.

The DOL also confirmed that the joint employer test under the FLSA and the integrated employer test under the Family and Medical Leave Act ("FMLA") will be used to determine if multiple entities constitute a single employer for purposes of determining whether an employer has 500 employees or less.

Joint Employer Test

Where a corporation has an ownership interest in another corporation, the two corporations will be considered separate employers unless they are joint employers under the FLSA. A joint employment relationship may exist in situations such as:

- Where a temporary or leasing agency supplies employees to a second employer;
- Where employers have an arrangement to share an employee's services or to interchange employees;

- Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

- Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

The determination of whether a joint employment relationship exists is not determined by the application of any single criterion; rather the entire relationship is to be viewed in its totality. If two corporations are found to be joint employers, all their common employees must be counted.

Integrated Employer Test

Generally, two or more entities will be considered separate employers unless they meet the integrated employer test under the FMLA. Separate entities may be so integrated that they are considered one employer, whether commonly owned or not. Individual determinations of whether to treat separate entities as a single employer under the integrated employer test are highly fact-specific and are based on the following factors:

- Interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
- Common management, common directors and boards;
- Centralized control of labor relations and personnel, i.e., hire and fire employees; and
- Common ownership and financial control.

Like the joint employer test, the determination of whether separate entities are an integrated employer is not determined by the application of any single factor, but rather the entire relationship should be viewed in its totality. If two entities are considered an integrated employer under the FMLA, then employees of each entity must be counted.

Calculating Pay

For purposes of the FFCRA, the regular rate of pay used to calculate an employee's paid leave is the average of the employee's regular rate over a period of up to six months before the date on which the employee takes leave. If an employee has not worked for the employer for six months, the regular rate used to calculate the employee's paid leave is the average of the employee's regular rate of pay for each week the employee worked for the employer.

For employees paid with commissions, tips or piece rates, these wages should be incorporated into the calculation.

Employers also may compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

Including Overtime When Calculating Emergency Paid Sick Leave

Overtime worked by an employee must be included when calculating the number of hours paid to an employee in a single workweek under the Emergency Paid Sick Leave Act, subject to the 80-hour cap under the Emergency Paid Sick Leave Act. An employee's overtime premium, however, is not used to calculate the employee's regular rate of pay for purposes of calculating the amount of the paid leave benefit.

Small Business Exemption

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. Small businesses seeking the exemption should document why they meet the exemption criteria, and the DOL has stated it will issue these criteria in regulations that are "expected April 2020."

If you have any questions about how the DOL's guidance affects your enterprise, please contact your Kutak Rock attorney, or any of the attorneys in the Employment Law Group, and we would be happy to discuss this with you.