CLIENT ALERT: U.S. Department of Labor Issues Q&A on the Families First Coronavirus Response Act

Last week, we published a client alert on the Families First Coronavirus Response Act ("FFCRA") which may be found here. On March 24, 2020, the United States Department of Labor ("DOL") issued a list of questions and answers to assist in the implementation of the new Emergency Paid Sick Leave Act and Emergency Family Medical Leave Expansion Act included within the FFCRA. The following is an overview of the highlights from the DOL's Q&A.

(1) The FFCRA, including the Emergency Paid Sick Leave Act and Emergency Family Medical Leave Expansion Act, is effective April 1, 2020. The Q&A makes clear that the new law applies only to leave taken between April 1, 2020 and December 31, 2020. The benefits of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act ("FMLEA") cannot be applied retroactively.

(2) The "fewer than 500 employees" threshold is to be determined as of the date the leave is to be taken. Full and part-time employees within the United States or any Territory or possession of the United States must be included in making this determination. Additionally, employees who are on leave, temporary employees who are jointly employed by two employers (regardless of which employer's payroll the employee is maintained on), and day laborers supplied by a temporary agency must be counted toward the 500 employee threshold.

(3) Joint employers must count shared employees, and integrated employers must count all employees who comprise the integrated entity, toward the "fewer than 500 employees" threshold. The Q&A clarifies that a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.

Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they meet the "joint employers" test under the Fair Labor Standards Act ("FLSA") with respect to certain employees.

The FLSA joint employer test is a fact-specific analysis that looks at a variety of relevant factors, including, without limitation, the extent to which each entity:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

If two entities are considered joint employers, all common employees must be counted to determine whether the Emergency Paid Sick Leave and Emergency FMLEA benefits must be provided.

Two or more entities may also be considered one employer if they meet the "integrated employer test" under the Family and Medical Leave Act of 1993 ("FMLA"). Like the FLSA's joint employer test, the FMLA integrated employer test is a fact-specific analysis that considers, without limitation, 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.

If two entities are an integrated employer under the FMLA, then employees of both entities making up the integrated employer must be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency FMLEA.

Employers should be mindful that a determination that they meet the "joint employer" or "integrated employer" test for purposes of the FFCRA may have implications as to the applicability of other employment laws and/or legal requirements under other laws to its business.

(4) Small businesses with fewer than 50 employees seeking an exemption from the leave provisions of the FFCRA should document why providing child-care related Paid Sick Leave and Emergency FMLEA Leave would jeopardize the viability of the business as a going concern. The Q&A specifically advises small businesses that believe they meet the criteria to document the reasons why the business qualifies for an exemption, but directs them not to send any materials to the DOL. The Q&A explains that more details will be provided in the forthcoming regulations regarding this exemption.

(5) Part-time employees are entitled to Paid Sick Leave and Emergency FMLEA Leave in an amount equal to the average number of hours they are normally scheduled to work in a two-week period. If a part-time employee's schedule varies from week to week or the regular schedule is unknown, an employer should use a six-month average to calculate the average daily hours. If the employee has not yet been employed for six-months and there is no regular schedule, the employer may calculate the appropriate number of hours of leave based on the agreed upon number of hours the employee was to work upon hire; if there is no such agreement, the employer can calculate the hours of leave based upon the average hours per day the employee was scheduled to work over the entire term of their employment.

(6) Overtime hours must be included in calculating the number of hours the employee would have been regularly scheduled to work for purposes of calculating the leave entitlement, but the pay provided does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave or the Emergency FMLEA. Emergency Paid Sick Leave remains capped at 80 hours (for full-time employees), or the average number of hours the employee works over a two-week period (for part-time employees). Therefore, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week, but only 30 hours of paid sick leave in the second week.

(7) In general, employees will be paid at their "regular rate" of pay for leave taken under the Paid Sick Leave Act or the Emergency FMLEA. An employee's regular rate of pay is the average of his or her regular rate over a period of up to six months prior to the date the leave commences. The FLSA provides that an employee's regular rate may be determined by dividing the total compensation in the workweek by the total hours worked in the workweek.

As outlined previously, for Emergency Paid Sick Leave taken pursuant to an employee's own quarantine or COVID-19 symptoms/diagnosis, the employee will be paid the greater of his or her regular rate, or the highest applicable minimum wage (state, local, or federal). Sick leave for these purposes is capped at $511 per day or $5,110 in the aggregate. For sick leave taken to care for an individual subject to a quarantine order, to care for the employee's minor child resulting from school or daycare closure, or because the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, the sick leave will be the greater of 2/3 of the employee's regular rate, or 2/3 of the highest applicable minimum wage (state, local, or federal). Sick leave taken for these purposes is capped at $200 per day or $2,000 in the aggregate. For Emergency FMLEA (which is only available for the school/daycare closure reason), following the first ten days (which are unpaid), the paid leave is the greater of 2/3 of the employee's regular rate, or 2/3

of the highest applicable minimum wage (state, local, or federal), capped at $200 per day or $10,000 in the aggregate.

(8) Emergency Paid Sick Leave may only be taken for up to 80-hours, total. Employees may not take 80-hours of paid leave for one purpose (i.e., for their own COVID-19 condition), and then another 80-hours for a different purpose (i.e., to care for a family member diagnosed).

(9) Employees who are home with a child due to school or daycare closure are eligible for twelve weeks of paid leave, total. Employees in this circumstance are eligible for *both* Emergency Paid Sick Leave, and Emergency FMLEA, but the leave may not exceed twelve weeks total, *i.e.,* during the first two weeks of Emergency FMLEA, the employee may receive Emergency Paid Sick Leave, and for the remaining ten weeks, the employee may receive Emergency FMLEA pay, for a total of twelve weeks.

(10) Employers cannot deny eligible employees Emergency Paid Sick Leave even if they have already taken paid sick leave for a reason covered by the Emergency Paid Sick Leave Act. Employers who have already provided employees paid sick leave for COVID-19 reasons and/or any other reason prior to April 1, 2020 must still provide the 80-hours of paid sick leave under the Emergency Paid Sick Leave Act.

(11) Employees are considered to have been employed for "at least 30 calendar days" if they have been on the employer's payroll for the 30 calendar days immediately preceding the commencement of leave. Employees working as temporary employees who are subsequently hired on a full-time basis may count days worked as a temporary employee toward the 30-day eligibility period.

Please note that the above is only some of the implementation guidance from the DOL. In addition to the Q&A, the DOL will be issuing regulations in the coming weeks to further assist with implementation and compliance. Employers with questions about FFCRA, FMLA, other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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