CLEARY GOTTLIEB

ALERT MEMORANDUM

Department of Labor Issues Additional Guidance on Families First Coronavirus Response Act

April 24, 2020

As an update to our post on March 27, the Department of Labor ("DOL") continues to issue various guidance about its implementation of the Families First Coronavirus Response Act (the "FFCRA"). To supplement its prior general, FLSA and FMLA question and answer guidance, on April 23, the DOL published additional general question and answer guidance. The new guidance largely addresses the DOL's temporary regulations, published April 6 in the Federal Register and effective April 2 through December 31, 2020. All of the DOL's guidance relating to the FFCRA is available on its website on the Covid-19 and the American Workplace page. On March 31, The Internal Revenue Service ("IRS") also issued guidance on the process for receiving the tax credits, and noted that it expects to process requests for advances this month.

If you have any questions concerning this memorandum, please reach out to your regular firm contacts in the Executive Compensation and ERISA group or contact our COVID-19 task force by clicking here.

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Although the temporary regulations and additional guidance are broadly consistent with prior guidance, we have included a few items of note below (including additional guidelines on how a small employer can assess whether it is in jeopardy of ceasing to be a going concern and thus deny a leave request from an employee seeking leave to care for a child as the result of school closures or other loss of childcare). We also wanted to note that although it is unclear that it will effectuate any change in the DOL's views, in their letter to the DOL, Patty Murray, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions, and Rosa Delauro, Chair, House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, took significant issue with the DOL's interpretation of: (i) certification and documentation, (2) that the employer have available work for an employee, and (3) governing the intermittent leave provisions, as well as certain definitions.

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— **Eligibility for emergency paid sick leave under FFCRA**– An employee may take sick leave under the FFCRA only if the order of quarantine or isolation, infection with COVID-19 itself, or the need to care for another prevents him or her from working (including teleworking if possible under the circumstances, even if the employee is required to use their own equipment to do so). An employee is not entitled to sick leave where the employer does not have work for or has furloughed the employee (furloughed employees also do not count for purposes of determining whether an employer is subject to the rules), and in those instances, the employee should look to whether he or she qualifies for state unemployment insurance. The regulations provide additional guidance with respect each of the following instances in which employees are entitled to paid sick leave under the FFCRA:

- **Employees subject to quarantine or isolation orders** – Federal, State, or local COVID-19 quarantine or isolation orders preventing employees from being able to work/telework entitle employees to paid sick leave. Quarantine or isolation orders include government orders advising citizens to stay at home or shelter in place; essential workers generally do not fall under this category. However, extenuating circumstances preventing an employee from teleworking, such as a power outage, may entitle an employee paid sick leave.
- **Employees advised to self-quarantine by healthcare provider -** An employee may not take sick leave under the FFCRA to self-quarantine without (a) seeking a medical diagnosis and (b) being unable to work/telework due to self-quarantine. In addition to individuals who have been told to quarantine or isolate as a result of having or potentially having COVID-19, the DOL clarified that the FFCRA also picks up individuals who have been advised by a health care provider to quarantine because they are particularly vulnerable to COVID-19.
- **Employees seeking medical diagnosis of COVID-19** – An employee who experiences symptoms of COVID-19 and cannot work/telework while making, waiting for or attending an appointment for a COVID-19 test may be eligible for paid sick leave.
- **Employees caring for another individual** –
  - Employees who cannot work/telework due to the need to care for an individual who is (a) subject to government quarantine or isolation order or (b) has been advised to self-quarantine by a health professional may be entitled to paid sick leave. The employee must have a personal relationship with an expectation of care (e.g., immediate family members or a roommate) with the individual in need of care.
  - Employees who cannot work/telework due to the need to care for their son or daughter whose (a) school is closed or (b) child care provider is unavailable due to COVID-19 related reasons may be entitled to paid sick leave only if there is no alternative suitable caretaker available (e.g. co-parent, co-guardian who does not themselves need to work).

— **Determining compensable time under flexible telework arrangements –** The DOL provides additional guidance on the meaning of "telework," clarifying that telework is no less work than if it were to be performed on-site and that employees must carefully track their hours. Furthermore, the DOL noted that its regular continuous workday guidance is inconsistent with the FFCRA only with respect to teleworking employees, such that an employer is not required, for teleworking employees only, to count as hours worked all time between the first and last principal activity performed and may enter into flexible arrangements with its employees, as long as it compensates the employees for all hours actually

(tele)worked. The DOL recognizes the need for employers to promote flexible telework schedules enabling employees to tend to family and other responsibilities, such as homeschooling, which may require employees to perform work at unconventional times.

— **FFCRA leave and other accrued leave entitlements** – The DOL has provided the following guidance with respect to the interaction between leave taken under the FFCRA and other leave entitlements:

- **Taking PTO and regular FMLA with FFCRA enhanced FMLA–** An employer may require an employee seeking leave to care for a child to take accrued PTO concurrently with the first two weeks of the expanded Family and Medical Leave Act of 1993 ("FMLA") (but not sick leave) protection under the FFCRA, which the DOL felt was appropriate to allow employers to minimize employee absences. In no circumstances may an employer require an employee to take otherwise accrued PTO before leave that relies on the FFCRA. However, the general 12-week FMLA period is inclusive of the enhanced FMLA under the FFCRA, and as a result, an employee who has used some or all of their existing FMLA entitlement for the current year will have a reduced FFCRA entitlement and may be limited to relying the FFCRA's sick leave alone.

- **Employers' voluntary COVID-19 leave policies** – the DOL acknowledged that some employers voluntarily adopted policies relating to COVID-19 prior to the enactment of FFCRA. While this counts as an existing policy such that an employee must remain eligible for the entirety of the benefits to which they are entitled, employers may prospectively terminate any voluntary additional paid leave offering. On the other hand, employees may not apply the FFCRA provisions retroactively to leave already taken.

— **Healthcare workers' use of existing employer leave entitlement** – As to health care workers, although employers may exclude them from the provisions of the FFCRA, the DOL clarified that this exception may not be relied upon to prevent a health care worker from taking other accrued leave to which they are entitled under existing employer policies.

— **Requesting and denying leave and intermittent leave arrangements–**

- **Employees seeking leave** – Employees seeking leave must provide the employer with (and the employer must retain to support its tax credit) a signed statement outlining the dates of the requested leave, the basis for the leave and a statement that the employee will be unable to work/telework. Depending on the basis of the leave, the employee may also need to provide the name of the government agency issuing the quarantine or isolation order or the health care provider advising quarantine or isolation. For those requesting leave to care for a child, the employee must provide the name of the child, the name of the school or regular childcare provider, and a statement representing that there is no other suitable caregiver (the DOL does not provide any basis for why such a statement is not required when the leave is to care for another individual who is sick or quarantined/isolating). An employer may impose reasonable notice requirements on employees, including sufficient information to determine that the leave is covered by the FFCRA. However, the employer may not require documentation beyond the documentation outlined above, other than as may be necessary to satisfy the IRS in respect of its application for the payroll tax credit.

- **Employers denying leave requests** – For those employers with fewer than 50 employees seeking to deny an employee's request to take leave to care for a child as a result of school closures or a loss of childcare, the exemption from the FFCRA requires that such leave

would cause (a) the employer's expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at minimal capacity, (b) a substantial risk to the employer's financial health or operational capacity of the employees specialized skills, knowledge or responsibilities, or (c) the employer to experience a shortage in required labor.

- **Intermittent leave –** for an employee to take intermittent leave under the FFCRA, the employer and the employee must each agree to the intermittent schedule. For an employee who is not teleworking and is taking leave intermittently, the intermittent leave must ensure that it does not create additional risk of the spread of COVID-19 and intermittent leave may not be taken under any circumstances by an employee whose basis for the leave is either the need to self-quarantine or isolate or take care of someone who needs to self-quarantine or isolate (owing to the risk that such an employee will contribute to the spread of the virus).

— **Clarification of "son or daughter" definition –** Notwithstanding the reference to "a son or daughter under 18 years of age," for consistency with FMLA generally, as well as for consistency between the emergency paid sick leave and emergency family leave provisions, the DOL clarified that for purposes of the FFCRA the definition includes children who are 18 years of age or older but incapable of self-care as the result of a mental or physical disability.

— **Clarification of "two-week" and "10 day" periods –** In addition to providing other relevant definitions, the regulations confirmed that the "two-week" and "10 day" periods under the sick leave and FMLA, respectively, portions of the FFCRA are not intended to be different and are deemed for purposes of the rules to be the same.

— **Clarification of FFCRA enforcement date –** As we have previously mentioned, the DOL in its April 3rd webinar clarified that enforcement of the FFCRA will begin April 17, 2020. The webinar can be accessed here.

We will continue to update you as additional guidance is released. In the meantime, if you have any questions or would like to discuss this, or other topics relating to the coronavirus outbreak, further, please do not hesitate to reach out to your regular contacts in the Executive Compensation and ERISA group or contact our COVID-19 task force directly by clicking here.

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