ALERT MEMORANDUM

Department of Labor Issues Guidance on Families First Coronavirus Response Act

March 27, 2020

This week the Department of Labor ("DOL") issued various guidance about its implementation of the Families First Coronavirus Response Act (the "FFCRA"). On March 24, the DOL issued an employer fact sheet, an employee fact sheet and FAQs. In addition to announcing that the FFCRA will take effect on April 1st, the guidance, summarized more fully below, addresses how an employer (i) should count employees to determine whether they are covered by the law, (ii) with fewer than 50 employees can obtain an exemption (although much of the details will be provided in a forthcoming release), (iii) should count hours for part-time employees, and (iv) should calculate the wages to which employees relying on the FFCRA may be entitled. In the guidance, the DOL also clarified that while the FFCRA's sick leave provisions may be used for the full two-week period as the result of more than one qualifying reason (e.g., first to self-quarantine and then to care for another), an employee is not permitted to rely on multiple qualifying reasons to receive cumulative FFCRA sick leave in excess of the two weeks. The DOL's Wage and Hour Division also issued Field Assistance Bulletin 2020-1 ("FAB 2020-1"), providing for a temporary amnesty in the case of an employer's unintentional and good faith violation of the FFCRA. In addition, the U.S. Congress made minor amendments to the FFCRA, also summarized below, as part of its Coronavirus Aid, Relief and Economic Security Act "CARES").

We refer you to our earlier Alert Memorandum of the FFCRA for a more complete summary of the FFCRA provisions.

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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— ***When will the DOL begin enforcing the FFCRA?*** Under the guidance, the DOL states that it will not enforce the FFCRA for 30 days following the effective date, as long as the employer is acting "reasonably" and "in good faith". Given the stated effective date of April 1, this would suggest that the stay on enforcement extends until May 1. However, this is inconsistent with FAB 2020-1, which states that the stay extends only until April 17, after which time the limited stay of enforcement will be lifted and the DOL will fully enforce violations of the FFCRA. Absent further clarifying guidance, covered employers should plan to be in full compliance by April 17.

— ***For purposes of the enforcement stay, when will an employer be found to be acting "reasonably" and "in good faith"?*** FAB 2020-1 provides that for purposes of the stay on enforcement, an employer who has otherwise violated the FFCRA will be considered to have acted "reasonably" and "in good faith" when all of the following facts are present (absent all of these facts, the DOL reserves its rights to bring an enforcement action):

- as soon as reasonably practicable, the employer has remedied any violations and made affected employees whole;
- the violations were not "willful" (i.e. the employer did not know, or show reckless disregard for whether, it had committed a violation); and
- the employer provides the DOL with a written commitment to comply with the FFCRA in the future.

— ***How does an employer generally determine its number of employees for purposes of the FFCRA mandated coverage?*** An employer is subject to the requirements of the FFCRA if, on the date the requested leave is to be taken, the employer has fewer than 500 full- and part-time employees within the United States (including the District of Columbia or any U.S. Territory or possession), including employees who are on leave, temporary employees who are jointly employed with another employer, regardless of on whose payroll, and all day laborers supplied by a temp agency.[1] Independent contractors under the Fair Labor Standards Act ("FLSA") do not count.

— ***What about joint or integrated employers under the FLSA?*** Employers who are joint employers for purposes of the FLSA must each count common employees for purposes of determining whether they are subject to the FFCRA. Entities who meet the criteria under the FLSA's integrated employer test (based on common management, interrelation of operations, centralized control of labor relations and common ownership or financial control) will need to count all employees of all entities making up the integrated employer.

— ***How can an employer seek an exemption from the DOL if the employer believes it is in jeopardy of ceasing to be a going concern?*** An exemption is available to employers with fewer than 50 employees if an employee's absence to care for a child whose school is closed or other childcare is unavailable would jeopardize the employer's ability to remain a going concern. At this time the DOL has asked that employers document why they meet the criteria, to be established in forthcoming guidance, and that employers not send any materials to the DOL.

— ***How are part-time hours counted?*** A part-time employee is entitled to leave based on the average number of work hours in a two week period. For those with a regular schedule, the DOL simply requires that the normal hours be counted. For those with a variable or otherwise unknown schedule, the employer may use the average hours over a 6 month period. The guidance does not appear to permit periods other than 6 months,

[1] Note that under the DOL's guidance, temporary employees will generally count both at the temp agency and the client firm.

other than in the case of a part-time employee who has not worked for the employer for 6 months, in which case the employer should use (i) the number of hours agreed upon at the time of hire, or (ii) in the absence of such an agreement, the average hours over the entire length of their employment.

— ***Must overtime be included, and how many hours do the FFCRA benefits replace?*** Generally the answer is yes. However, the DOL noted that the FFCRA does not provide for a premium (e.g., time and a half) for overtime hours.

- For purposes of the expanded FMLA protection under the FFCRA, employers must pay their employees for hours the employees would normally have worked, subject to the applicable caps, even if that exceeds 40 hours, in which case overtime would be included as applicable.
- On the other hand, for purposes of the expanded sick leave protection under the FFCRA, the FFCRA only requires sick leave for the hours that would have been worked, capped at 80 hours over a two week period. For those employees, full- or part-time, with a variable weekly schedule, the DOL requires the same calculation as applies for determining how part-time hours are counted, summarized in the preceding question.
- As a reminder, for sick leave under the FFCRA, employees are entitled to up to 80 hours of paid leave, for up to $200 per day per employee ($2,000 in the aggregate) for those taking care of a child or other person ill or quarantined with Covid-19, and $511 per day per employee ($5,110 in the aggregate) otherwise, and for FMLA benefits under the FFCRA, after the initial two-week period, two-thirds of their regular pay, up to $200 per day and $10,000 in the aggregate. Although the first two weeks under the FMLA portion of the FFCRA are unpaid, employees may rely either on the sick leave provided by FFCRA or other accrued leave. In addition, the DOL clarified that if a covered employee is eligible for both the expanded FMLA and sick leave protections, the initial 2 weeks of paid sick leave will run concurrently with the first two weeks of FMLA leave.

— ***How is an employee's regular rate of pay determined?*** The employee's regular rate of pay is the average pay for the 6-month period preceding the leave, unless the employee has been working for the employer for less than 6 months, in which case it is the average for the entire period. For those employees whose pay fluctuates, the regular rate of pay refers to their average weekly pay over the preceding 6-month period (including wages, tips and commissions).

— ***How does one determine if an employee has worked for thirty days for purposes of the FMLA provisions?*** An employee who has been on the employer's payroll for at least 30 calendar days prior to the date the leave would begin is entitled to the enhanced FMLA protections under the FFCRA. If an employee was initially hired as a temporary employee and the employer subsequently hires the employee on a permanent basis, the days employed as a temporary employee count towards the 30 days. CARES also added a provision requiring employers to cover employees who were laid off on or after March 1, 2020 and are rehired, if the employee had worked for 30 of the 60 calendar days preceding the layoff.

The DOL released a Notice Poster for employers to use to satisfy the FFCRA notice requirements. The DOL accompanied this release with a Notice FAQ, that among other things, clarifies that an employer may satisfy its obligation to post a notice of the FFCRA requirements in a conspicuous place on its premises by emailing or direct mailing the notice to employees, or otherwise posting the notice on an employee information internal or external website. The DOL has indicated that it will release additional fact sheets and Q&A guidance in the future; we will continue to update you as additional guidance is released.

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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