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U.S. Department of Labor Issues Regulations Implementing the Families First Coronavirus Response Act's Leave Provisions

SUMMARY

Updated April 22, 2020. On April 20, 2020, the U.S. Department of Labor's Wage and Hour Division (the "DOL") announced the end of its temporary period of non-enforcement of the leave provisions of the Families First Coronavirus Response Act.

On April 1, 2020, the day that the Families First Coronavirus Response Act ("FFCRA") took effect, the DOL posted a "temporary rule" issuing implementing regulations for the FFCRA's leave provisions.[1] On April 6, 2020, the DOL published a revised version of that temporary rule in the Federal Register.[2] On April 10, 2020, the DOL published a "correction notice" to make certain "correction[s] and correcting amendment[s]" to the previously published temporary rule.[3] The temporary rule, as amended (the "Rule"), became operational as of the date of its initial posting, April 1, 2020, and expires on December 31, 2020—the same day as the FFCRA leave provisions.

Previously, the DOL had issued guidance on the FFCRA's leave provisions, including in the form of a Questions and Answers document. The Rule provides new clarifications and expands upon that guidance. Below is a summary of the Rule's key takeaways for private employers who are covered by the FFCRA's leave provisions (*i.e.*, employers who have fewer than 500 U.S. employees at the time an employee's leave is taken). Of particular note, the Rule provides that an employer is required by the FFCRA to provide leave to an employee only if the employer has work for the employee to do and the employee is unable to perform that work because of a qualifying COVID-19-related reason. Accordingly, under the Rule, an employer whose worksite is closed because of a stay-at-home order is not required to provide FFCRA leave to its

employees. On April 14, 2020, the New York Attorney General filed a lawsuit on behalf of the State of New York challenging the Rule, including these specific provisions, as being contrary to the text of the statute and outside the authority granted to the DOL.

BACKGROUND

On March 18, 2020, Congress passed the FFCRA, the second emergency legislation adopted in response to COVID-19. The FFCRA was amended in part on March 27, 2020 by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), the third emergency federal legislation adopted in response to COVID-19. Our memorandum to clients regarding the enactment of the FFCRA is available here, and our memorandum to clients covering the CARES Act amendments to the FFCRA's leave and tax provisions is available here.

The FFCRA enacted (1) the Emergency Paid Sick Leave Act (the "Sick Leave Act") and (2) the Emergency Family and Medical Leave Expansion Act ("Expansion Act" and, together with the Sick Leave Act, the "Acts"). The Sick Leave Act is the first ever federal paid sick leave mandate for private sector employers, and the Expansion Act temporarily amends the Family and Medical Leave Act of 1993 (the "FMLA"). The Acts apply to private employers with fewer than 500 U.S. employees and to public employers. The Acts became effective on April 1, 2020 and apply to eligible leave taken between April 1 and December 31, 2020. The Acts grant the Secretary of Labor the authority to issue regulations necessary to carry out the purposes of, and to ensure consistency between, the Acts.

Sick Leave Act. The Sick Leave Act, as implemented by the Rule, requires a covered employer to provide an employee with up to two weeks of paid sick leave for one or more of six reasons related to COVID-19. An employer is required to provide paid sick leave to an employee at the greater of the employee's regular rate of pay or the applicable federal, state, or local minimum wage if the employee is unable to work because the employee is (1) subject to a federal, state, or local quarantine or isolation order related to COVID-19, (2) complying with advice by a health care provider to self-quarantine related to COVID-19, or (3) experiencing symptoms and seeking a medical diagnosis of COVID-19. An employer is not required by the Sick Leave Act to pay an employee taking paid sick leave for these reasons more than $511 per day or $5,110 in aggregate.

In addition, an employer is required to provide paid sick leave to an employee at two-thirds the rate described above if the employee is unable to work because the employee is (4) caring for a family member who is subject to a quarantine or isolation order related to COVID-19 or complying with a health care provider's advice to self-quarantine due to COVID-19, (5) caring for a son or daughter whose school or place of care is closed or care provider is unavailable due to COVID-19, or (6) experiencing "any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with

the Secretary of the Treasury and the Secretary of Labor." An employer is not required by the Sick Leave Act to pay an employee taking paid sick leave for these reasons more than $200 per day or $2,000 in aggregate.

Expansion Act. The Expansion Act, as implemented by the Rule, requires a covered employer to provide an eligible employee with up to 12 weeks of leave if the employee is unable to work because the employee is caring for a son or daughter whose school or place of care is closed or care provider is unavailable due to COVID-19. An employer is not required to pay an employee for the first two weeks of child care leave under the Expansion Act. After the first two weeks, an employer is required to provide paid leave to an employee at two-thirds of the employee's regular rate of pay, based on the number of hours the employee would normally work. An employer is not required by the Expansion Act to pay an employee taking child care leave under the Expansion Act more than $200 per day or $10,000 in aggregate.

Prior Paid Leave Related to COVID-19. The paid leave provisions of the FFCRA are not retroactive. An employer who provided an employee paid leave prior to April 1, 2020 for any reason, including those set forth in the FFCRA, is still required to provide that employee the leave required under the FFCRA.[4]

Non-Enforcement Period. Although the leave provisions of the FFCRA became effective on April 1, 2020, the Wage and Hour Division will observe a "temporary period of non-enforcement" through April 17, 2020, provided that the employer made "reasonable, good faith efforts" to comply with the FFCRA.[5] On April 20, 2020, the DOL announced the end of its temporary period of non-enforcement.

DOL's Guidance. The DOL issued guidance regarding the leave provisions of the FFCRA before it issued the Rule, including in a Questions and Answers document, which it has continued to update. Our posts covering the DOL's Questions and Answers are available here: Part I, Part II, and Part III.

Challenges to the Rule and DOL's Guidance. On April 1, 2020, Senator Patty Murray (Ranking Member, Senate Committee on Health, Education, Labor, and Pensions) and Representative Rose DeLauro (Chair, House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies) wrote a letter to the Secretary of Labor (the "April 1, 2020 Letter"), disagreeing with certain aspects of the DOL's previously issued guidance, "request[ing] [that] DOL immediately revise its [guidance] materials in accord with the text and congressional intent of the FFCRA," and asking that such revisions be reflected in "any regulations DOL promulgates."

Similarly, on April 14, 2020, the New York Attorney General filed a lawsuit on behalf of the State of New York against the DOL and the Secretary of Labor (the "Complaint") in the U.S. District Court for the Southern District of New York (the "Court"), alleging that the Rule "is contrary to the text of the FFCRA and exceeds the authority delegated by Congress by authorizing unsupported exclusions from employee eligibility, and by inventing new restrictions and burdens on employees that have no support in the statute's text."[6]

Specifically, and similar to the arguments made in the April 1, 2020 Letter, the Complaint alleges that the Rule violates the FFCRA and exceeds the DOL's authority under the FFCRA by: (1) "unlawfully authoriz[ing]" an employer to deny FFCRA leave to an employee if the employer "unilaterally determin[es]" that it does not have work for the employee to do;[7] (2) defining "health care provider" too broadly for employee exclusion purposes;[8] (3) placing restrictions on intermittent leave, including by granting an employer the ability to deny intermittent leave;[9] and (4) imposing "documentation requirements on workers as a precondition" of taking FFCRA leave.[10] The New York Attorney General requests in the Complaint and in a separately filed motion for summary judgment that the Court sever, vacate, and set aside the challenged provisions of the Rule.[11] As of the date of this memorandum, the DOL and the Secretary of Labor have not responded to the Complaint or the motion for summary judgment.

KEY EMPLOYER TAKEWAYS

A private employer is covered by the FFCRA if it has fewer than 500 U.S. employees at the time an employee requests leave. All employees of a covered employer are eligible for up to 80 hours of paid sick leave under the Sick Leave Act, whereas an employee is eligible for leave under the Expansion Act only if he or she has been employed by a covered employer for at least 30 calendar days.

The Rule currently provides that an employer is not required to provide FFCRA leave to an employee if the employer does not have work for the employee to do, regardless of whether the employee has a qualifying COVID-19-related reason. Of particular note, an employer whose worksite is closed because of a stay-at-home order is not required to provide FFCRA leave to its employees. The Rule also provides that an employer is not required to provide FFCRA leave if an employee fails to provide materials sufficient to support the applicable tax credit, as described in the "Documentation" section below. The New York Attorney General's lawsuit challenges these provisions of the Rule.

In addition, the Rule encourages flexibility in work arrangements. An employer is not required to provide FFCRA leave to an employee who is able to telework or work an alternative schedule, and an employer may allow an employee to take intermittent leave in any increment if the employee is teleworking or is taking leave to care for a son or daughter whose school or place of care is closed or care provider is unavailable due to a COVID-19-related reason. The New York Attorney General's lawsuit challenges the Rule's restrictions on intermittent leave.

COVERED EMPLOYERS

The Rule provides that for purposes of determining whether a private employer has fewer than 500 employees, a corporation is generally considered a single employer, and a corporation should count all employees of the corporation's separate establishments or divisions.[12]

- **Included Employers.** Employers include: (1) "[a]ny person acting directly or indirectly in the interest of an employer in relation to an Employee";[13] (2) an employer's successor in interest;[14] (3) joint employers under the Fair Labor Standards Act (the "FLSA"), with respect to certain employees;[15] and (4) integrated employers under the FMLA.[16]
  - **Joint Employers.** Two corporations are considered separate employers, even where one corporation has an ownership interest in the other, unless the corporations meet the joint employers test under the FLSA with respect to certain employees. A corporation must count all employees over which it is a joint employer in determining whether it has fewer than 500 employees for purposes of determining coverage under the FFCRA.[17]
  - **Integrated Employers.** Generally, two or more entities are considered separate employers, unless the entities meet the integrated employer test under the FMLA. If two entities are an integrated employer under this test, then employees of all entities making up the integrated employer must be counted in determining whether the integrated employer has fewer than 500 employees for purposes of determining coverage under the FFCRA.[18]
- **Timing.** An employer should count its employees "at the time the [e]mployee would take leave."[19]
- **Included Employees.** An employer should include both full-time and part-time employees, regardless of how long those employees have worked for the employer, including employees on leave, temporary employees who are jointly employed with another employer (regardless of which employer maintains the payroll), and day laborers provided by a temporary agency (regardless of whether the employer is the temporary agency or the client firm, so long as there is a continuing employment relationship), so long as such individuals are "within the United States," including any territory or possession of the United States.[20] An employer should not include independent contractors, as determined under the FLSA, or workers who have been laid off or furloughed and have not subsequently been reemployed.[21]
- **Collective Bargaining Agreements.** An employer signatory to a multiemployer collective bargaining agreement may satisfy its obligations to provide paid leave under the FFCRA by making contributions to a multiemployer fund, plan, or other program in accordance with its existing collective bargaining obligations. Such a fund, plan, or other program must allow employees to obtain their pay for the related leave they take. An employer may also satisfy its obligations under the FFCRA by other means, provided those means are consistent with the employer's bargaining obligations and any applicable collective bargaining agreement.[22]

EMPLOYEE ELIGIBILITY

The Rule provides that an individual must meet the definition of "Employee" under the FLSA to be eligible for leave under the FFCRA.[23] An employee is eligible for paid sick leave under the Sick Leave Act regardless of the length of his or her employ.[24] By contrast, an employee is eligible for paid child care leave under the Expansion Act if the employee has been on the employer's payroll for the 30 calendar days "immediately prior to the day" the employee's leave begins.[25] An employer may choose to exclude an otherwise eligible employee from the requirements of the Sick Leave Act and/or the Expansion Act if the employee is a "health care provider" or an "emergency responder," as defined by the Rule for purposes of the exclusion.[26]

- **Rehired Employee.** If an employer "laid off or otherwise terminated" an employee on or after March 1, 2020, and then "rehired or otherwise reemployed" the employee on or before December 31, 2020, the employee is an eligible employee under the Expansion Act if he or she

had been on the employer's payroll "for thirty or more of the sixty calendar days prior to the date the [e]mployee was laid off or otherwise terminated."[27]

- **Temporary Employee.** If an employer hired an employee on a full-time basis after the employee worked for the employer on a temporary basis, the employer should count any days the employee previously worked as a temporary employee towards the employee's 30-day eligibility period under the Expansion Act.[28]

CALCULATING HOURS AND RATE OF PAY

Determining Hours of Paid Leave. The Rule provides that an employer should determine the number of hours to which an employee is entitled to paid leave using the below calculations. An employer is not required by the FFCRA to provide paid leave in excess of the applicable daily and aggregate caps per employee. If an employee's qualifying reason for taking paid leave under the FFCRA stops before the employee uses the full amount of paid leave available, the employee is entitled to take the remainder of the paid leave at a later time for a qualifying reason, until December 31, 2020.[29]

- **Sick Leave Act**. An employer is required to provide an employee up to two weeks of paid sick leave under the Sick Leave Act. An employer must provide (1) up to 80 hours of paid sick leave to full-time employees, and (2) paid sick leave to part-time employees based on the hours the employee normally would have been scheduled to work over two weeks.
  - **Variable Schedule.** If a part-time employee lacks a "normal weekly schedule," and the employee has been employed for at least six months, the employee is entitled to paid sick leave equal to fourteen times the average number of hours per calendar day that employee was scheduled to work over the preceding six months. If a part-time employee has worked fewer than six months, the employee is entitled to paid sick leave equal to fourteen times the average number of hours per calendar day that the employee agreed to work at the time of hiring or, if there was no such agreement, was scheduled to work over the length of employment.[30]
  - **Individual Use.** An individual is entitled to no more than 80 hours total of paid sick leave under the Sick Leave Act, even if the individual changes employers. If an individual has taken some but not all of his or her paid sick leave with one employer, he or she is entitled to only the remaining portion of paid sick leave from his or her next employer, assuming such employer is also covered by the FFCRA. An individual's paid sick leave expires at the earliest of: (1) 80 total hours, regardless of employer; (2) the number of hours the employee normally works on a part-time schedule over two weeks for the current employer; or (3) December 31, 2020.[31]
- **Expansion Act**. Under the Expansion Act, an employer must provide up to two weeks of unpaid leave and up to 10 weeks of paid leave to all employees (both full-time and part-time) based on the employee's "scheduled number of hours" for each day of leave taken.
  - **Variable Schedule.** If the employer cannot determine the number of hours the employee would have worked on the day for which leave is taken, the "scheduled number of hours" is the average number of hours the employee was scheduled to work each workday for the preceding six months, including hours for which the employee "took leave of any type." If the employee worked for less than six months, the employer should calculate the "scheduled number of hours" using (1) the average number of hours the employee agreed to work each workday or, absent an agreement, (2) the average number of hours the employee was scheduled to work each workday for the employee's full period of employment, including hours for which the employee "took leave of any type."[32]

- **Hourly Increments.** Employers can alternatively choose to compute the amount of pay under the Expansion Act using hourly increments. In that case, for each hour of child care leave taken under the Expansion Act after the first two weeks, the employer shall pay the employee two-thirds of the employee's average regular rate.[33]

- **Overtime Hours.** If an employee is normally scheduled to work overtime hours, an employer must include those hours in calculating the number of hours to which the employee is entitled to paid leave. However, an employer is not required by the FFCRA to include a premium for overtime hours.

Regular Rate of Pay. The Rule provides that an employer generally must determine an employee's average regular rate of pay for purposes of the FFCRA by calculating the employee's average weekly weighted regular rate over a period of up to six months prior to the date on which the employee takes leave.[34] An employer is not required by the FFCRA to provide paid leave in excess of the applicable daily and aggregate caps per employee.

- **Commissions, Tips, or Piece Rates.** An employer should include an employee's commissions, tips, or piece rates in calculating the employee's regular rate of pay.[35]

- **Employed Less Than Six Months.** If an employer has employed an employee less than six months, the employer should calculate the employee's regular rate of pay as the average of the employee's regular rate of pay for each week the employee worked.[36]

ABILITY TO WORK AND FLEXIBLE WORK ARRANGEMENTS

The Rule encourages employers and employees to implement flexible work arrangements that allow employees to both continue to perform work and focus on other responsibilities that may arise as a result of COVID-19.

- **Inability to Work Due to COVID-19.** An employee is unable to work, including telework, due to COVID-19 if: (1) the employer has work for the employee to do; and (2) one of the qualifying reasons listed in the FFCRA prevents the employee from being able to do that work. An employee's inability to work is not due to COVID-19 if: (1) the employer does not have work for the employee to do, including because of a quarantine or isolation order by a federal, state, or local government authority; or (2) one of the qualifying reasons listed in the FFCRA, as described in more detail below, is not the cause of the employee's inability to work, including telework.

  - **Teleworking.** An employee is able to telework if (1) his or her employer has work for the employee to do; (2) his or her employer allows or permits telework or the employee usually works remotely; and (3) there are "no extenuating circumstances," including but not limited to "serious COVID-19 symptoms," that prevent the employee from working. An employer is required to pay regular wages for telework, and telework cannot be compensated through FFCRA leave. If an employer permits teleworking, but an employee is unable to perform that telework due to a qualifying reason related to COVID-19, the employee is unable to work under the FFCRA.[37]

  - **Alternative Work Schedules.** If an employer and employee agree that an employee's normal number of hours can be worked outside of that employee's normally scheduled hours, such an arrangement will not justify leave under the FFCRA unless a qualifying reason prevents the employee from working the alternative schedule.

- **Intermittent Leave.** An employer and an employee may agree that an employee may take intermittent leave (*i.e.*, leave in separate periods of time, rather than one continuous period) under the FFCRA, subject to the restrictions set forth below.[38] If an employee is taking intermittent leave, only the amount of leave actually taken may be counted toward the employee's leave entitlements.[39]
    - **Teleworking.** An employer may allow an employee who is teleworking to take leave intermittently under the FFCRA, in any increment, if the employee meets one of the qualifying reasons for leave.[40]
    - **Child Care Leave.** An employer may allow both on-site and teleworker employees to take leave intermittently, in any increment, to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19-related reasons.[41]
    - **Leave Other Than Child Care Leave.** An employee who is continuing to report to the employer's worksite may not take intermittent leave for reasons other than child care leave.[42] Once an employee who is continuing to report to the employer's worksite begins taking paid sick leave (other than child care leave) for a COVID-19 qualifying reason, that employee must continue to take paid sick leave each day until the employee either (1) uses the full amount of paid sick leave, or (2) no longer has a qualifying reason for taking paid sick leave.[43]

As described above, the New York Attorney General argues in the Complaint that the Rule violates the FFCRA and exceeds the DOL's authority under the FFCRA because the Rule (1) does not require an employer to provide FFCRA leave to an employee if the employer does not have work for the employee to do, and (2) places restrictions on an employee's ability to take intermittent leave, including by requiring employer agreement.[44]

QUALIFYING REASONS FOR FFCRA LEAVE

As set forth above, and in Part III of our coverage of the DOL's guidance, there are six qualifying reasons for paid sick leave under the Sick Leave Act, and there is one qualifying reason for leave under the Expansion Act. The DOL used its authority under the FFCRA to consistently interpret the entitlements and obligations related to child care leave under both the Sick Leave Act and the Expansion Act in the Rule, subject to the exceptions described herein.

I. Child Care Leave

The Rule provides that, subject to certain restrictions described below, an employer is required to provide an eligible employee up to 12 weeks of paid child care leave under the FFCRA: (1) up to two weeks of paid sick leave under the Sick Leave Act, and (2) up to 10 weeks of paid child care leave under the Expansion Act. An employer is not required by the FFCRA to pay an employee who takes child care leave under both the Sick Leave and the Expansion Act more than $12,000 in total. To be entitled for child care leave under these Acts, as implemented by the Rule, an employee must be unable to work, including telework, because of the need to care for a son or daughter whose school or place of care is closed or care provider is unavailable due to COVID-19-related reasons. The need to care for the employee's son or daughter must

be the cause of the employee's inability to work; if the employer does not have work for the employee to do, the employee is not entitled to child care leave under the FFCRA.[45]

- **Son or Daughter Includes Disabled Adult Children.** A "son or daughter" is an employee's "own child," which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee is standing in loco parentis. Although the text of the Expansion Act requires a son or daughter to be under 18 years of age, because the Sick Leave Act does not require a son or daughter to be under 18 years of age, the Rule provides that the Wage and Hour Division has determined that a "son or daughter" for both Acts is also a son or daughter who is 18 years of age or older who (1) has a mental or physical disability, and (2) is not capable of self-care due to the disability.[46] An employee is not entitled to child care leave to care for an employee's child over age 18 who does not have a mental or physical disability.[47]
- **No Suitable Alternative.** An employee is entitled to child care leave under the Sick Leave Act and the Expansion Act only if no suitable person—such as a co-parent, co-guardian, or the usual child care provider—is available to care for his or her son or daughter during the period of such leave.[48]
- **Interaction of Leave Under Sick Leave Act and Expansion Act.** If an employee takes paid sick leave to care for a child under the Sick Leave Act and child care leave under the Expansion Act, the paid sick leave under the Sick Leave Act and the first two weeks of unpaid child care leave under the Expansion Act run concurrently.[49]
- **FMLA Leave.** An employer is required to provide paid sick leave under the Sick Leave Act, regardless of whether the employee previously took FMLA leave.[50] However, an employer covered by the FMLA before April 1, 2020 is not required to provide an employee more than 12 total work weeks of traditional FMLA leave and child care leave under the Expansion Act during a 12-month period. An employee who has taken some FMLA leave during the current 12-month period is entitled to take the balance of FMLA leave under the Expansion Act. An employee who has already taken all FMLA leave during the current 12-month period is not entitled to take any child care leave under the Expansion Act. If an employee takes child care leave under the Expansion Act, the leave taken counts against the employee's entitlement to traditional FMLA leave, including if the employee chooses to take the first two weeks of otherwise unpaid child care leave under the FMLA concurrently with paid sick leave under the Sick Leave Act.[51]
- **Small Business Exemption.** An employer with fewer than 50 employees need not provide an employee or employees paid child care leave under the Sick Leave Act or Expansion Act if doing so would "jeopardize the viability of the small business as a going concern." To claim this exemption, an authorized officer of the employer must determine that any of the following three conditions are met:
  - Providing child care leave "would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity";
  - Providing child care leave to the requesting employee or employees would pose a "substantial risk to the financial health or operational capacities" of the employer because of the employees' "specialized skills, knowledge of the business, or responsibilities"; or
  - The employee or employees requesting child care leave are needed for the employer to "operate at a minimal capacity," and the employer will not be able to hire "sufficient workers" to provide the labor or services otherwise provided by the employee or employees requesting paid sick leave.[52]

II. Paid Sick Leave Other Than Child Care Leave

In addition to leave to care for a child, an employee is entitled to paid sick leave under the Sick Leave Act if he or she is unable to work, including telework, for one or more of the five reasons set forth below. The Rule provides that the reason listed must be the cause of the employee's inability to work. In other words, an employer is not required to provide paid sick leave under the Sick Leave Act to an employee if the employer does not have work for the employee to do, regardless of the reason for the lack of work.[53]

- **Quarantine Order.** The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. The Rule defines "[s]ubject to a quarantine or isolation order" to include quarantine, isolation, containment, shelter-in-place, or stay-at-home orders, including orders specific to certain categories of citizens such as "certain age ranges or of certain medical conditions," regardless of whether the orders are issued by a federal, state, or local government authority.[54] An employer is not required by the Sick Leave Act to provide paid leave to an employee subject to a quarantine or isolation order if the employer "does not have work for the [e]mployee as a result of the order or other circumstances."[55] The New York Attorney General's lawsuit challenges these provisions of the Rule, as described above.[56]
- **Advice by Health Care Provider to Quarantine.** The employee is complying with advice by a health care provider to self-quarantine related to COVID-19. For purposes of determining whether an employee or other individual has received advice from a health care provider to self-quarantine, "health care provider" means a licensed doctor of medicine, a nurse practitioner, or another health care provider who is "permitted to issue a certification for purposes of the FMLA."[57]
- **Experiencing Symptoms and Seeking a Medical Diagnosis.** The employee is (1) experiencing symptoms of COVID-19, including fever, dry cough, shortness of breath, or a COVID-19 symptom identified by the U.S. Centers for Disease Control and Prevention ("CDC"); and (2) seeking a medical diagnosis of COVID-19. An employee is entitled to paid sick leave for this reason only for time the employee is unable to work because he or she is taking "affirmative steps to obtain a medical diagnosis," including "making, waiting for, or attending an appointment for a test for COVID-19."[58]
- **Need to Care for Family Member.** The employee needs to care for an individual who is subject to a quarantine or isolation order related to COVID-19 or complying with a health care provider's advice to self-quarantine due to COVID-19. The "individual" must be the employee's "immediate family member," a member of his or her household, or a "similar person."[59]
- **Substantially Similar Condition.** The employee is experiencing a "substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor."[60] No such condition has yet been specified but a condition may be specified at any time during the effective period of the law.[61]

III. Interaction With Employer's Preexisting Leave Policies

The Rule and the DOL's Questions and Answers document address how the leave provisions of the FFCRA interact with an employer's preexisting leave policies.

- **Sick Leave Act.** An employer is required to provide paid sick leave under the Sick Leave Act in addition to any other leave provided under federal, state, or local law, an applicable collective bargaining agreement, or the employer's preexisting leave policy. An employee may first use the paid sick time provided under the Sick Leave Act, and an employer may not require an employee to first use other paid or unpaid leave provided by the employer.[62] Further, an employer is not

required to allow an employee to concurrently take both paid sick leave under the Sick Leave Act and paid leave that the employer provides under preexisting leave policies, including vacation, personal, medical, or sick leave. An employer may choose to allow an employee to supplement wages paid under the Sick Leave Act with preexisting leave, up to the employee's normal earnings. However, an employer cannot require an employee to do so. If an employer pays an employee more than required under the Sick Leave Act, the employer is not entitled to tax credits for the optional amounts paid. An employer may amend its policies consistent with applicable law.[63]

- **Expansion Act – Unpaid Leave.** If an eligible employee has exhausted his or her paid sick leave under the Sick Leave Act, the employee's first two weeks of leave under the Expansion Act may be unpaid. An eligible employee "may choose to substitute earned or accrued paid leave" for the otherwise unpaid leave under the Expansion Act, but if the eligible employee "does not elect" to do so, he or she "will remain entitled to any paid leave . . . earned or accrued under the terms of his or her [e]mployer's plan."[64]
- **Expansion Act – Paid Leave.** As discussed above, after the first two weeks of unpaid leave, an employee may be entitled to ten weeks of paid leave under the Expansion Act.
  - **Employer or Employee May Unilaterally Select Concurrent Leave.** The Rule provides that (i) an employer may require an employee to concurrently take paid child care leave under the Expansion Act and paid leave that the employer provides under preexisting leave policies, or (ii) an employee may choose to do so.[65] The preexisting leave must be otherwise available to the employee.[66] For example, under many employer policies, an employee may take vacation or personal leave to care for a child but generally cannot take medical or sick leave unless the employee or the child is ill.[67] The DOL's Questions and Answers comport with the Rule and provide that either an employer may require or an employee may opt to take such concurrent leave.[68]
  - **Amounts Paid.** If an employee takes paid leave under the Expansion Act concurrent with preexisting paid leave, the employer must pay the employee the full amount set by the preexisting leave policy for the taken period of leave.[69] If an employer pays an employee more than required under the Expansion Act, the employer is not entitled to tax credits for the optional amounts paid.[70] An employer may amend its policies consistent with applicable law.[71]

WORKSITE CLOSURES, FURLOUGHS, AND REDUCED WORK HOURS

The Rule and the DOL's guidance address the interaction of FFCRA leave provisions with certain business restructuring actions, such as worksite closures, furloughs, and reduced hours. We note that the April 1, 2020 Letter challenges the DOL's guidance on these topics, arguing that the FFCRA does not "give employers the authority to refuse employees their statutory right to paid leave by not assigning them work, furloughing them, or closing a particular worksite."[72] The April 1, 2020 Letter further argues that DOL's position regarding worksite closures is "generally unreasonable" and "alarming" because "it implies to employers and employees that shelter in place orders may not qualify for paid leave—a conclusion that is not authorized by the Act."[73] The New York Attorney General makes similar arguments in the Complaint, arguing that the Rule "unlawfully authorizes employers to deny workers their statutory right to [FFCRA] leave by unilaterally determining when the employer has work available on each of the days that the employee is otherwise categorically eligible for leave."[74] As stated above, the DOL has not revised its interpretation on these topics as of the date of this memorandum. The Rule and the DOL's current guidance is summarized below.

- **Worksite Closures.** An employer is not required by the FFCRA to provide paid leave to an employee if the employer closes the employee's worksite before the employee takes leave, even if (1) the employee requested leave before the closure, or (2) the employer plans to reopen the worksite in the future. It does not matter whether the worksite closed due to lack of business or because of a federal, state, or local directive. If an employer closes an employee's worksite while the employee is on paid leave under the FFCRA, the employer must pay the employee for any leave used before the closure, but is not required by the FFCRA to provide paid leave after the closure. Employees whose worksites are closed may be eligible for unemployment benefits.[75]
- **Furloughed Employees.** An employer is not required by the FFCRA to provide paid leave to an employee who has been furloughed for lack of work or business. Furloughed employees may be eligible for unemployment benefits.[76]
- **Reduced Work Hours.** An employer who reduces an employee's work hours is not required by the FFCRA to provide paid leave to that employee for the hours the employee is no longer scheduled to work, unless a COVID-19 qualifying reason prevents the employee from working the reduced schedule.[77]
- **Unemployment Benefits.** If an employer provides an employee with paid leave under the FFCRA, the employee cannot also collect unemployment benefits. The DOL recently clarified, however, that states have additional flexibility to extend partial unemployment benefits to employees whose pay or hours of work have been reduced.[78]

JOB PROTECTIONS AND BENEFITS

Job Protections. The Rule provides that an employee has "a right to be restored to the same or equivalent position" after taking paid sick leave under the Sick Leave Act or child care leave under the Expansion Act.[79] However, an employer may refuse to allow an employee taking leave to return to work as set forth below:

- **Business Reasons.** An employer can take "employment actions, such as layoffs" if the employer can show that the employment action "would have affected the employee regardless of whether he or she took leave."[80]
- **Key Employees.** An employer may refuse to allow a highly compensated "key" employee, as defined under the FMLA, to return to work if the "key" employee took child care leave under the Expansion Act and "if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer."[81]
- **Employers with Fewer Than 25 Employees.** An employer with fewer than 25 employees may refuse to permit an employee to return to work if all of the below conditions exist:
  - **Child Care Leave Under Expansion Act**. The employee took leave under the Expansion Act to care for his or her son or daughter whose school or place of care was closed, or whose care provider was unavailable, for COVID-19-related reasons;
  - **Economic Conditions.** The employee's position is eliminated during the employee's leave because of "economic conditions or other changes in operating conditions" affecting employment that are caused by COVID-19-related reasons;
  - **Reasonable Restoration Efforts.** The employer makes "reasonable efforts" to restore the employee to "a position equivalent to the position the eligible employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment"; and

- **Reasonable Efforts to Contact.** If the reasonable efforts to restore an employee fail, the employer continues to make "reasonable efforts" to contact the employee "if an equivalent position becomes available" for one year after the earlier of the date (1) the COVID-19 Public Health Emergency concludes, or (2) 12 weeks after the employee's leave began.[82]

- **Health Care Coverage.** An employer is required to maintain an employee's health care coverage as if the employee "had been continuously employed during the entire leave period."[83]

EMPLOYER NOTICE AND ENFORCEMENT

Workplace Posters. The Rule provides that a covered employer must provide notice of the FFCRA requirements to all current employees by (1) posting the applicable workplace poster provided by the Wage and Hour Division "in a conspicuous place on its premises" where all employees can see it; (2) emailing or direct mailing the workplace poster to employees; or (3) posting the workplace poster on "an employee information internal or external website."[84] An employer is not required to provide notice to recently laid-off workers or to prospective hires but must provide notice to newly hired employees through one of the above-listed methods.[85] The model workplace poster for covered private employers is available here. Businesses of fewer than fifty employees claiming the small-business exemption for child care leave are still required to post notice.[86]

Failure to Comply:

- **Sick Leave Act.** A covered employer who fails to provide paid sick leave as required by the Sick Leave Act will be considered to have failed to pay minimum wages in violation of Section 6 of the FLSA (codified at 29 U.S.C. § 206) and will be subject to penalties under the FLSA, which include civil fines of up to $1,000 for each such violation.[87] In addition, an employer is prohibited from discharging, disciplining, or discriminating against an employee for taking or attempting to take paid sick leave under the Sick Leave Act, and an employer who willfully violates these whistleblower provisions will be considered to violate Section 15(a)(3) of the FLSA (codified at 29 U.S.C. § 215(a)(3)) and will be subject to penalties under the FLSA, which include civil fines up to $10,000 or criminal prosecution.[88]

- **Expansion Act.** A covered employer who interferes with the exercise of an employee's right to child care leave under the Expansion Act is subject to the enforcement provisions set forth in Section 107 of the FMLA (codified at 29 U.S.C. § 2617), which include damages and equitable relief.[89] An employer is also prohibited from discriminating against an employee for taking or attempting to take child care leave under the Expansion Act, and from interfering with proceedings or inquiries, as set forth in the FMLA.[90] An eligible employee may file a private action to enforce the Expansion Act only if the employer is otherwise subject to the FMLA in the absence of the Expansion Act.[91]

EXCLUSIONS FOR HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS

As set forth above, the Rule provides that an employer with employees who are "health care provider[s]" or "emergency responder[s]" may choose to exclude such employees from leave under FFCRA. The DOL's guidance encourages employers to be "judicious" when deciding whether to exempt health care providers

and emergency responders from the provisions of the FFCRA.[92] The New York Attorney General challenges as too broad the Rule's definition of "health care provider" described below.[93]

- **"Health Care Provider" Under FFCRA.** For purposes of determining whether an employer may exclude an employee from leave under the FFCRA, "health care provider" means "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity."[94] This definition also includes workers:
  - Employed at "any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions";
  - Employed by an entity that contracts with any of the above-listed institutions, employers, or entities to "provide services or to maintain the operation of the facility";
  - Employed by an entity that "provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments"; or
  - Whom "the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19."[95]
- **"Emergency Responder" Under FFCRA.** For purposes of determining whether an employer can exclude an employee from leave under the FFCRA, "emergency responder" means an employee who is "necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19."[96] Examples include:
  - "[M]ilitary or national guard, law enforcement officers, correctional institution personnel";
  - "[F]ire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators";
  - "[C]hild welfare workers and service providers";
  - "[P]ublic works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility"; and
  - Any employee whom "the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19."[97]

DOCUMENTATION

The Rule provides that an employee seeking leave under the FFCRA is required to provide appropriate documentation to his or her employer, and the employer may request "additional material as needed" to support the employer's request for tax credits under the FFCRA. An employer is not required to provide FFCRA leave to an employee if materials sufficient to support the applicable tax credit have not been

provided.[98] The New York Attorney General challenges these provisions of the Rule, arguing that the Rule imposes a documentation obligation on employees with "no statutory basis."[99]

- **Sick Leave Act.** An employee seeking paid sick leave under the Sick Leave Act is required to provide appropriate documentation to his or her employer, including:
  - The employee's name and the dates for which the employee is requesting leave, and any other pertinent information;
  - The qualifying reason for requesting leave, including information about the source of any quarantine or isolation order, or the name of the health care provider who has advised the employee to self-quarantine;
  - An oral or written statement that the employee is unable to work; and
  - Written documentation in support of the paid sick leave as specified in applicable Internal Revenue Service ("IRS") forms, instructions, and information.[100]
- **Expansion Act.** An employee seeking Expansion Act leave is required to provide documentation to his or her employer showing that the employee is unable to work because the employee needs to care for a son or daughter whose school or place of care is closed, or whose care provider is unavailable, because of COVID-19-related reasons. In addition to the employee's name, the dates for which the employee is requesting leave, and a statement that the employee is unable to work, appropriate documentation includes:
  - The name of the child and the name of the place of care that has closed or become unavailable;
  - A notice of closure or unavailability from the child's school or place of care, such as a notice posted on a government, school, or day-care website, published in a newspaper, or emailed from an employee or official of the school or place of care; and
  - A representation from the employee that no other suitable person is available to care for the child during the period of leave sought.[101]
- **Notice.** An employer may require an employee to follow "reasonable notice procedures." Reasonableness "will be determined under the facts and circumstances of each particular case," but, in any event, notice "may only be required after the first workday" for which an employee takes paid sick leave for a reason other than caring for a son or daughter.[102] When an employee seeks leave under the Sick Leave Act or the Expansion Act due to a foreseeable need to care for a son or daughter, the employee should provide notice "as soon as practicable."[103] If an employee does not provide notice, the employer should provide the employee with an opportunity "to provide the required documentation" before denying leave.[104]
- **Document Retention.** An employer is required to retain documentation (including documentation of oral statements) provided by employees for four years, regardless of whether leave was granted or denied.[105]
- **Claiming Tax Credits.** If an employer intends to claim a tax credit under the FFCRA, it should consult applicable forms, instructions, and information provided by the Internal Revenue Service regarding the procedures that it must follow to claim a tax credit, including any substantiation to be retained to support the credit. The DOL advises employers seeking to claim tax credits to maintain for four years: (1) documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid, including records of work, telework and leave taken; (2) documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages; (3) copies of any completed IRS Forms 7200 that the employer submitted to the IRS; (4) copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third-party payers to meet their employment tax

obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and (5) any other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.[106]

* * *

ENDNOTES

1 U.S. Department of Labor, Wage and Hour Division, News Release No. 20-562-NAT: *U.S. Department of Labor Announces New Paid Sick Leave and Expanded Family and Medical Leave Implementation* (Apr. 1, 2020), *available at* https://www.dol.gov/newsroom/releases/whd/whd20200401.

2 U.S. Department of Labor, Wage and Hour Division, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg. 19,326 (effective date Apr. 2, 2020, publication date Apr. 6, 2020), *available at* https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act (herein "Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020)").

3 U.S. Department of Labor, Wage and Hour Division, *Paid Leave Under the Families First Coronavirus Response Act; Correction*, 85 Fed. Reg. 20,156 (effective date Apr. 10, 2020, publication date Apr. 10, 2020), *available at* https://www.federalregister.gov/documents/2020/04/10/2020-07711/paid-leave-under-the-families-first-coronavirus-response-act-correction.

4 29 C.F.R. § 826.160(a)(2). In addition, an employer is not required by the FFCRA to provide retroactive compensation to an employee who took unpaid or partially paid leave prior to April 1, 2020, even if such leave was taken for COVID-19-related reasons. *Id*.

5 U.S. Department of Labor. Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act (FFCRA), March 24, 2020 (Field Assistance Bulletin No. 2020-1), *available at* https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1.

6 Compl. at ¶ 60, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

7 *Id.* at ¶ 68.

8 *Id.* at ¶¶ 75–77.

9 *Id.* at ¶¶ 82, 86.

10 *Id.* at ¶ 92.

11 *Id.* at 28 (Prayer for Relief); *see also* Pl.'s Summ. J. Mem., *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 4 (S.D.N.Y. Apr. 14, 2020).

12 29 C.F.R. § 826.40(a).

13 29 C.F.R. § 826.10(a)(i)(B)(1).

14 29 C.F.R. § 826.10(a)(i)(B)(2).

15 29 C.F.R. § 826.10(a)(i)(B)(3) (incorporating the FLSA test for joint employers set forth in 29 C.F.R. § 791).

16 29 C.F.R. § 826.10(a)(i)(B)(4) (incorporating the FMLA test for an integrated employer set forth in 29 C.F.R. § 825.104(c)(2)).

17 29 C.F.R. § 826.40(a)(2).

18 29 C.F.R. § 826.40(a)(2)(iii).

19 29 C.F.R. § 826.40(a)(1).

20 The Rule defines "Employee" by reference to the defined term in Section 3(e) of the FLSA (codified at 29 U.S.C. § 203(e)). *See* 29 C.F.R. § 826.10(a).

21 29 C.F.R. § 826.40(a)(1)(iii).

22 29 C.F.R. § 826.120.

ENDNOTES CONTINUED

[23] *See* 29 CFR § 826.10(a) (incorporating the definition of "Employee" in Section 3(e) of the FLSA (codified at 29 U.S.C. § 203(e)).

[24] 29 C.F.R. § 826.30(a).

[25] 29 C.F.R. § 826.30(b)(1)(i).

[26] 29 C.F.R. § 826.30(c).

[27] 29 C.F.R. § 826.30(b). An employee who has been employed by an employer for at least 30 calendar days is eligible for expanded family and medical leave under the Expansion Act regardless of whether the employee would otherwise be eligible for leave under the FMLA. *Id*.

[28] 29 C.F.R. § 826.30(b)(2).

[29] 29 C.F.R. § 826.50(d).

[30] 29 C.F.R. § 826.21. Employees that do not have a normal weekly schedule are considered to be full-time employees if the average number of scheduled hours per workweek, including hours for which the employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of (1) the six-month period ending on the date on which the employee takes paid sick leave, or (2) the entire period of the employee's employment. Employees that do not meet the definition of full-time employees are part-time employees. *Id*.

[31] 29 C.F.R. § 826.160(f).

[32] 29 C.F.R. § 826.24(b).

[33] 29 C.F.R. § 826.24(c).

[34] 29 C.F.R. § 826.25 (incorporating the methodology set forth in 29 C.F.R. §§ 531 and 778 to calculate the regular rate for each full workweek, then requiring the calculation of the average regular rate, "weighted by the number of hours worked for each workweek").

[35] 29 C.F.R. § 826.25(b).

[36] U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #8, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[37] Telework may be performed during normal hours or at other times agreed by the employer and employee. An employer is required to compensate an employee who is teleworking due to COVID-19-related reasons for "all hours actually worked" and all hours which the employer "knew or should have known" the employee worked. However, 29 C.F.R. § 790.6, which provides that all continuous time from performance of the first principal activity through performance of the last principal activity is compensable work time, does not apply to an employee who is teleworking for COVID-19-related reasons. 29 C.F.R. § 826.10(a).

[38] 29 C.F.R. § 826.50(a). The employer and employee may memorialize such an agreement in writing, but a clear and mutual understanding between the parties is sufficient. *Id*.

[39] 29 C.F.R. § 826.50(d).

[40] 29 C.F.R. § 826.50(c).

[41] 29 C.F.R. § 826.50(b)(1).

[42] 29 C.F.R. § 826.50(b)(2).

[43] *Id.*

[44] Compl. at ¶ 68, 82, 86, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

ENDNOTES CONTINUED

45 29 C.F.R. §§ 826.20(a)(1)(v), (a)(8)–(9), 826.20(b).

46 *See also* 29 C.F.R. § 826.10. Due to differences in the definition of "son or daughter" between the Sick Leave Act and the Expansion Act, the DOL determined that "it would create needless confusion and complication to have different rules" and therefore it will "treat[] the definitions as the same (*i.e.*, to include children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability), pursuant to its statutory authority to issue regulations to ensure consistency" between the Sick Leave Act and the Expansion Act. Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,328 (Apr. 6, 2020).

47 29 C.F.R. § 826.10; *see also* U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #66, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

48 29 C.F.R. §§ 826.20(a)(7), (b); Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,330 (Apr. 6, 2020).

49 29 C.F.R. § 826.60(a).

50 29 C.F.R. § 826.60(a)(1)–(4).

51 29 C.F.R. § 826.70(b)-(c). An employee who has taken FMLA to care for a covered service member is entitled to child care leave under the Expansion Act as calculated in accordance with 29 C.F.R. § 825.127(e). 29 C.F.R. ¶ 826.70(d).

52 29 C.F.R. § 826.40(b).

53 U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #23–#28, #60, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

54 29 C.F.R. §§ 826.10(a), 826.20(a)(1)(i), (a)(2).

55 29 C.F.R. § 826.20(a)(2).

56 Compl. at ¶ 66, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

57 29 C.F.R. §§ 826.10(a), 826.20(a)(1)(ii), (a)(3).

58 29 C.F.R. §§ 826.20(a)(1)(iii), (a)(4).

59 29 C.F.R. § 826.20(a)(1)(iv), (a)(5)–(7).

60 29 C.F.R. § 826.20(a)(1)(vi).

61 U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #73, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

62 29 C.F.R. § 826.160(a)-(b).

63 *Id.*; U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #31–#32, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

ENDNOTES CONTINUED

64 29 C.F.R. § 826.60(b)(2)–(3). *But see* 29 C.F.R. § 826.160(c) (providing that Section 102(d)(2)(A) of the FMLA, codified at 29 U.S.C. § 2612(d)(2)(A), applies to leave under the Expansion Act, such that an eligible employee "may elect to use, or an [e]mployer may require" that the employee use, his or her "provided or accrued leave available" to care for a son or daughter, "such as vacation or personal leave or paid time off," concurrently with leave under the Expansion Act; 29 C.F.R. § 826.23(c) (same). Because 29 C.F.R. § 826.60(b) applies specifically to the otherwise unpaid leave under the Expansion Act when an employee has exhausted his or her paid sick leave under the Sick Leave Act, we interpret 29 C.F.R. §§ 826.23(c) and 826.160(c) to apply only to the up to 10 weeks of paid leave under the Expansion Act.

65 29 C.F.R. §§ 826.23(c), 826.24(d), 826.160(c).

66 *Id.*

67 Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,328, 19,333, 19,341 (Apr. 6, 2020).

68 U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #31, #33, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

69 29 C.F.R. §§ 826.24(d), 826.160(c)(2).

70 29 C.F.R. § 826.24(d); Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,341 (Apr. 6, 2020).

71 U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #33, available at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

72 April 1, 2020 Letter at 3.

73 *Id.* at 6.

74 Compl. at ¶ 68, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

75 29 C.F.R. § 826.20; Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,329 (Apr. 6, 2020); U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #23–#25, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

76 U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #26, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

77 *Id.* at #28.

78 *Id.* at #29.

79 29 C.F.R. § 826.130.

80 29 C.F.R. § 826.130(b)(1).

81 29 C.F.R. § 826.130(b)(2).

82 29 C.F.R. § 826.130(b)(3).

83 29 C.F.R. § 826.110(a).

84 29 C.F.R. § 826.80.

85 U.S. Department of Labor Wage and Hour Division, Families First Coronavirus Response Act Notice – Frequently Asked Questions (April 1, 2020), *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions.

ENDNOTES CONTINUED

86 *Id.*

87 29 C.F.R. § 826.150(b)(1) (incorporating 29 U.S.C. §§ 216–17).

88 29 C.F.R. § 826.150(a), (b)(2) (incorporating 29 U.S.C. §§ 216–17).

89 29 C.F.R. § 826.151(b) (incorporating 29 U.S.C. § 2617 and 29 C.F.R. § 825.400).

90 29 C.F.R. § 826.151(a) (incorporating 29 U.S.C. § 2615).

91 29 C.F.R. § 826.151(b).

92 Supplementary Information, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,334 (Apr. 6, 2020); U.S. Department of Labor, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, at #56–#57, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

93 Compl. at ¶ 75–77, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

94 29 C.F.R. § 826.30(c)(1)(i).

95 29 C.F.R. § 826.30(c)(1)(ii).

96 29 C.F.R. § 826.30(c)(2).

97 *Id.*

98 29 C.F.R. § 826.100(f).

99 Compl. at ¶ 87, *New York* v. *U.S. Dep't of Labor*, 20-cv-03020, ECF No. 1 (S.D.N.Y. Apr. 14, 2020).

100 29 C.F.R. § 826.100.

101 29 C.F.R. § 826.100(a), (e).

102 29 C.F.R. § 826.90(a)(1).

103 29 C.F.R. § 826.90(a)(2).

104 29 C.F.R. § 826.90.

105 29 C.F.R. § 826.140(a)–(b).

106 29 C.F.R. § 826.140(c).

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