GIBSON DUNN

Department of Labor Issues Temporary Regulations for Families First Coronavirus Response Act

Client Alert | April 2, 2020

On April 1, 2020, the Wage and Hour Division (the "Division") of the U.S. Department of Labor posted a temporary rule relating to the paid leave provisions of the Families First Coronavirus Response Act (the "FFCRA"), which was enacted to provide additional paid leave to employees in light of the novel coronavirus ("COVID-19") pandemic.[1] These temporary regulations expand on the additional guidance provided by the Division over the weekend, which took the form of additional questions and answers on the Division's FFCRA Q&A website.[2] Below, we provide an overview of the Division's temporary regulations and additional guidance. For a summary of the Division's prior guidance on the FFCRA paid leave provisions—the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (the "Emergency FMLA Expansion Act")—see Gibson Dunn's March 26, 2020 update here.

Application of FFCRA Paid Leave to Furloughed Employees and Closed Worksites

As we noted in our March 26 update, the Division's initial March 24 guidance left open the question of whether employers who are covered under the paid leave provisions of the FFCRA—those with fewer than 500 employees—were required to provide paid leave under the FFCRA to employees on furlough or lay off status who had not been terminated. The Division has now clarified that employers are not required to provide paid sick leave or expanded family and medical leave to furloughed employees or employees whose worksites have closed, even if the employees were furloughed or the worksites were closed after the FFCRA's April 1, 2020 effective date.[3] If an employer closes a worksite while an employee is on paid sick leave or expanded family and medical leave, the employer must pay for any such leave that the employee used before the worksite closed, but the employer is not required to provide any further paid sick leave or expanded family and medical leave as of the date of the worksite closure. Further, if the employer closes a worksite but later reopens it, the employer is not required to provide paid sick leave and expanded family and medical leave to employees for the period that the worksite was closed. The Division's further guidance notes that employees who are furloughed or subject to worksite closures may be eligible for unemployment insurance benefits and refers employees to https://www.careeronestop.org/LocalHelp/service-locator.aspx for further information.[4]

The Division also clarified that employees who have been laid off or furloughed and have not subsequently been reemployed do not count toward the 500-employee threshold for determining employer eligibility under the FFCRA.[5]

Qualifying Reasons Under the Emergency Paid Sick Leave Act

The temporary regulations provide additional detail as to what constitutes a qualifying reason to take paid sick leave under the Emergency Paid Sick Leave Act.

First, employees may take paid sick leave under the Emergency Paid Sick Leave Act if the

Related People

Catherine A. Conway

Amanda C. Machin

Karl G. Nelson

Jason C. Schwartz

Greta B. Williams

Zoë Klein

employee “is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.”[6] The temporary regulations clarify that a “quarantine or isolation order” can include a broad range of governmental orders, including “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work.”[7]

Second, employees can take paid sick leave under the Emergency Paid Sick Leave Act if they have been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The advice to self-quarantine must be based on the health care provider’s belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. Further, the self-quarantine must prevent the employee from working—that is, if employees can telework during the self-quarantine, they are not eligible for paid sick leave. An employee is able to telework if (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform that work from home; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.[8]

Third, paid sick leave is available to employees who are experiencing symptoms of COVID-19 and who are seeking a medical diagnosis. The temporary regulations explain that qualifying symptoms are fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention. Additionally, the paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19. An employee waiting for the results of a test who is able to telework may not take paid sick leave under this provision unless there are extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from teleworking. An employee who is not able to telework while awaiting a test result may continue to take paid sick leave under this provision.[9]

Fourth, an employee can take paid sick leave where the employee is unable to work because he or she needs to care for an individual who is either subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine. To qualify under this provision, the “individual” must be the employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined.[10]

Fifth, paid sick leave is available to an employee who is caring for his child if the child’s school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions. Employees are eligible for paid sick leave under this provision only if no other suitable person is available to care for the child.[11]

Finally, an employee is eligible for paid sick leave if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.[12] Neither the temporary regulations nor the updated Q&As provide additional detail about what constitutes a “substantially similar condition” under this provision.

Interaction with FMLA Leave

An employee’s eligibility for expanded family and medical leave under the Emergency FMLA Expansion Act depends on how much FMLA leave the employee has already taken during the 12-month period used by the employer for FMLA leave.

Under the FMLA, eligible employees are entitled to 12 workweeks of unpaid leave during a 12-month period due to (1) the birth of a child or placement of a child with the employee for adoption or foster care; (2) the need to care for a spouse, son, daughter, or parent who

has a serious health condition; (3) a serious health condition that makes the employee unable to perform the essential functions of his or her job; or (4) any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty.[13]

Under the Emergency FMLA Expansion Act, eligible employees—those who are unable to work due to the need to care for children because the children's school or place of care has been closed or child care provider is unavailable—are entitled to a total of 12 workweeks of expanded family and medical leave between April 1, 2020 and December 31, 2020.[14] The first two weeks of leave under the Emergency FMLA Expansion Act are unpaid, while the remainder of the 12 weeks of leave must be paid at a rate of two-thirds of the employee's regular rate of pay for 40 hours per week for full-time employees, or, for part-time employees, the number of hours the employee is normally scheduled to work over that period.[15]

The Division has clarified that the Emergency FMLA Expansion Act provisions do not change the overall amount of FMLA leave employees can take during an applicable FMLA 12?month period. For example, if an employee took four weeks of FMLA leave in February 2020 to recover from a surgical procedure, the employee would be entitled to take up to eight weeks of expanded family and medical leave under the Emergency FMLA Expansion Act, rather than the full 12 weeks. Conversely, if an employee has not taken any FMLA leave in the 12-month period used by the employer for FMLA leave and elects to take all 12 weeks of expanded family and medical leave to care for his children who are out of school due to COVID-19, that employee would not be entitled to any additional FMLA leave for the remainder of the 12-month period.[16] In addition, employees are limited to a total of 12 weeks of expanded family and medical leave under the Emergency FMLA Expansion Act even if the applicable time period (April 1 to December 31, 2020) spans two 12-month leave periods under the FMLA. For example, if an employer's 12-month period begins on July 1 and an eligible employee took seven weeks of expanded family and medical leave in May and June 2020, the employee could only take up to five additional weeks of expanded family and medical leave between July 1 and December 31, 2020, even though the first seven weeks of expanded family and medical leave fell in the prior 12-month period.[17]

Unlike with expanded family and medical leave, eligible employees under the Emergency Paid Sick Leave Act—for example, employees who are subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or who have been advised by a health care provider to self-quarantine due to concerns related to COVID-19—are entitled to paid sick leave regardless of how much leave they have taken under the FMLA. However, if an employee takes paid sick leave concurrently with the first two weeks of expanded family and medical leave (which would otherwise be unpaid), then those two weeks do count toward the 12 workweeks to which eligible employees are entitled under the FMLA.

Telework and the FFCRA

In response to the COVID-19 pandemic, many employees are now working from home, or "teleworking." The temporary regulations clarify that telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA. In addition, under federal law as interpreted by these rules, employees who are teleworking must be compensated for all hours actually worked and which the employer knew or should have known were worked.[18]

The temporary regulations also clarify that the FLSA's continuous workday rule does not apply to teleworking under the FFCRA. The continuous workday rule generally provides that all time between performance of the first and last principal activities is compensable worktime.[19] However, the Department of Labor has determined that an employer allowing employees to telework during the COVID-19 pandemic will not be required to count as hours worked all time between the first and last principal activity the employee performed while teleworking. This means that if an employee teleworks from 9:00 am to

12:00 pm and then again from 3:00 pm to 5:00 pm, the employer must compensate the employee for the hours actually worked (five hours) but not for all eight hours between the employee's first principal activity at 9:00 am and her last principal activity at 5:00 pm.[20]

The Division further clarified that if an employer permits teleworking but an employee is unable to telework for a qualifying reason under the FFCRA (if, for example, the employee who is teleworking is caring for a child whose school or place of care is closed), then the employee is entitled to take leave under the FFCRA. However, if the employee is able to telework while caring for a child, paid sick leave and expanded family and medical leave are not available.[21]

Intermittent Work

While an employee is teleworking, the employer and employee may agree to allow the employee to take intermittent paid sick leave or expanded family and medical leave. Employees may take intermittent leave in any increment agreed upon by the employer and employee.[22]

However, to discourage conditions that may exacerbate the spread of COVID-19, the Division notes that the ability of an employee to take intermittent leave while working at the employee's usual worksite is more limited. Once the employee begins taking paid sick leave for any qualifying reason other than caring for a child whose school or place of care is closed, the employee must continue taking paid sick leave each day until (1) the employee uses the full amount of paid sick leave, or (2) the employee no longer has a qualifying reason for taking paid sick leave. But if an employee is taking paid sick leave to care for a child whose school or place of care is closed, the employee and employer may agree that the employee can take paid sick leave intermittently, in any increment. The Division provides the following example: if any employee's child is at home because his place of care is closed or his child care provider is unavailable, the employee may take paid sick leave on Mondays, Wednesdays, and Fridays, but work at the employee's normal worksite on Tuesdays and Thursdays.[23]

The Division encourages employers and employees to memorialize in writing any agreement relating to intermittent leave arrangements, but notes that this is not a requirement and that "a clear and mutual understanding between the parties is sufficient."[24]

Recordkeeping

The temporary regulations provide that employees taking paid sick leave under the Emergency Paid Sick Leave Act must provide their employers with documentation in support of their sick leave. Employees must provide written requests for paid leave under the FFCRA that include (1) the employee's name; (2) the date or dates for which leave is requested; (3) a statement of the COVID-19 related reason for which the employee is requesting leave; and (4) a statement that the employee is unable to work (or telework) for that reason.[25] In the case of a leave request based on a quarantine order or self-quarantine advice, the employee must include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine.[26]

If an employee takes paid sick leave or expanded family and medical leave to care for a child whose school or place of care is closed, the statement from the employee should include the name of the child to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving leave.[27] The employer may request that an employee provide additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA.[28]

An employer may require an employee to follow reasonable notice procedures to inform

the employer of the employee's need to take paid sick leave or expanded family and medical leave. The employer may require notice after the first workday or portion thereof for which an employee takes such leave, but may not require notice in advance. Whether a notice procedure is reasonable is determined under the facts and circumstances of each particular case. If an employee fails to give proper notice, the employer should provide notice of the failure to the employee and an opportunity to provide required documentation prior to denying the request for leave.[29]

Employers must retain all documentation provided by employees for four years, regardless of whether leave was granted or denied. Employers also must document any oral statements provided by an employee to support his or her request for leave. If an employer denies an employee's request for leave pursuant to the small business exemption, the employer must document its authorized officer's determination that the prerequisite criteria for the exemption are satisfied and retain such documentation for four years.[30]

Private employers providing paid leave under the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits, and should retain appropriate documentation in order to claim those tax credits. Additional information about these requirements can be found on the Department of Treasury website here.

All existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA.

Returning to Work After FFCRA Leave

The temporary regulations clarify that the FFCRA requires that employers provide the same or equivalent job to an employee who returns to work following paid sick leave or expanded family and medical leave under the FFCRA. However, employees are not protected from employment actions that would have affected them regardless of whether they took leave. For example, an employee who is on leave under the FFCRA can be laid off for legitimate business reasons, such as closure of a worksite. The employer must be able to demonstrate that the employee would have been laid off even if the employee had not taken leave.[31]

An employer may also refuse to return an employee who took leave under the FFCRA to work in his or her same position under the following circumstances:

(1) the employer has fewer than 25 employees;

(2) the employee took leave to care for his or her child whose school or place of care was closed; and

(3) all of the following hardship conditions exist:

(a) the employee's position no longer exists due to economic or operating conditions that affect employment and that are caused by the COVID-19 emergency;

(b) the employer made "reasonable efforts" to restore the employee to the same or an equivalent position;

(c) the employer makes "reasonable efforts" to contact the employee if an equivalent position becomes available; and

(d) the employer continues to make "reasonable efforts" to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the employee's leave began, whichever is earlier.[32]

In addition, an employer may refuse to return an employee who took leave under the

FFCRA to work in his or her same position if the employee is a highly compensated "key" employee as defined in the FMLA (which requires, among other things, specific advance notice to that employee) and if such denial is necessary to prevent "substantial and grievous economic injury to the operations" of the employer.[33]

Supplementing Paid Leave Provided by the FFCRA

As discussed previously, the first two weeks of expanded family and medical leave are unpaid, but employees may choose to take paid sick leave under the Emergency Paid Sick Leave Act during those two weeks. The Division's initial guidance did not address whether employees may simultaneously take paid sick leave under the Emergency Paid Sick Leave Act concurrently with any paid leave he or she might have under the employer's paid leave policy, such as personal leave or paid time off. The temporary regulations now clarify that, during the first two weeks of unpaid expanded family and medical leave, an employee may not simultaneously take paid sick leave under the Emergency Paid Sick Leave Act *and* other paid leave to which the employee is entitled under the employer's policies, unless the employer allows the employee to supplement the amount received from paid sick leave with the employee's preexisting leave, up to the employee's normal earnings.[34]

After the first two weeks of expanded family and medical leave, however, employees may elect to take—or employers may require the employee to take—the remaining expanded family and medical leave at the same time as any existing paid leave that would be available to the employee under the employer's preexisting policies. If any employer requires an employee to take existing leave concurrently with the expanded family and medical leave, the employer must pay the employee the full amount to which the employee is entitled under the employer's existing paid leave policy for the period of leave taken, and the employer is not entitled to a tax credit for payment of any leave that exceeds the limits set forth in the Emergency FMLA Expansion Act.[35]

Exclusions

Both the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act contain exclusions for certain health care providers and emergency responders, as well as for employees of small businesses (defined as businesses with fewer than 50 employees).[36] The temporary regulations contain some additional parameters detailing when small businesses and employers of health care providers and emergency responders may avail themselves of these exclusions.

Health Care Providers and Emergency Responders

Employers who employ "health care providers" or "emergency responders" may exclude such employees from being able to take paid leave under the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act. The temporary regulations clarify who qualifies as a "health care provider" and an "emergency responder."

For purposes of this exclusion, a "health care provider" is "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."[37] This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. Further, the definition includes anyone employed by any 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. Finally, the highest official of a state or territory may determine that additional

individuals fall within the definition of “health care provider” if those individuals are necessary for that state’s or territory’s response to COVID-19.[38]

An “emergency responder” is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public 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. Again, the highest official of a state or territory may determine that additional individuals fall within the definition of “emergency responder” if those individuals are necessary for that state’s or territory’s response to COVID-19.[39]

The Division encourages employers to be “judicious” when using these definitions to exempt health care providers and emergency responders from the provisions of the FFCRA.

Small Businesses

The FFCRA authorized the Department of Labor to outline an exemption to the paid leave requirements for employers with fewer than 50 employees when providing leave would jeopardize the viability of the small business as a going concern.[40] In outlining the requirements for this exemption, the Department of Labor guidance states that it may apply *only* if the employee seeks to use such leave to care for a child whose school or place of care is closed and doing so would jeopardize the viability of the small business as a going concern. If an employee of a small business seeks to use paid sick leave under the Emergency Paid Sick Leave Act for one of the other qualifying reasons (such as if the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19), the employer is not exempt from providing such leave. Furthermore, a small business may only claim the exemption if an authorized officer of the business makes certain determinations (outlined in the regulations) about the effect of the leave on the business.[41]

Other Guidance

Health Insurance Coverage

If an employer provides group health coverage, employees are entitled to continue such coverage during FFCRA leave. Employees must continue to make any normal contributions to the cost of their health coverage during this time.[42]

Employment for 30 Calendar Days

Employees are eligible for expanded family and medical leave under the Emergency FMLA Expansion Act only if they have worked for the employer for at least 30 calendar days. The Division has clarified that employees are considered to have been employed for at least 30 calendar days if the employer has had the employee on its payroll for the 30 calendar days immediately prior to the day the employee’s leave would begin.[43] As an example, an employee who wants to take leave on April 1, 2020 would need to have been on the employer’s payroll as of March 2, 2020. If an employee has been working for an employer as a temporary employee and is subsequently hired on a full-time basis, the employee may count any days he or she previously worked as a temporary employee toward this 30-day eligibility period.[44] Further, an employee who is laid off or otherwise terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least 30 calendar days, and therefore eligible for expanded

family and medical leave, provided (1) the employer rehires or otherwise reemploys the employee on or before December 31, 2020, and (2) the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was terminated.[45]

Definition of "Son or Daughter"

Under the FFCRA, a "son or daughter" is the employee's own child, which includes biological, adopted, or foster children, stepchildren, legal wards, or children for whom the employee is standing in loco parentis (someone with day-to-day responsibilities to care for or financially support the child). The Division has clarified that a "son or daughter" is also an adult son or daughter (i.e., one who is 18 years of age or older) who has a mental or physical disability and who is incapable of self-care because of that disability.[46]

Maximum Amount of Paid Sick Leave

Each individual is entitled to a maximum of 80 hours of paid sick leave regardless of whether he or she changes employers during the time in which the Emergency Paid Sick Leave Act is in effect.[47] In other words, if an employee takes 80 hours of paid sick leave while working for Employer A and then resigns and begins working for Employer B, the employee is not entitled to any paid sick leave from Employer B under the Emergency Paid Sick Leave Act.

FLSA Exemption Status

The temporary regulations clarify that an employee's use of paid sick leave or expanded family and medical leave will not impact the employee's status or eligibility for any exemption from the requirements of sections 6 or 7 of the FLSA.[48] For example, an employee's use of intermittent leave combined with paid sick leave should not be construed as undermining the employee's salary basis for purposes of the FLSA.

Multiemployer Collective Bargaining Agreements

Employers that are part of a multiemployer collective bargaining agreement may satisfy their obligations through the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act by making contributions to a multiemployer fund, plan, or other program in accordance with the employer's existing collective bargaining obligations. These contributions must be based on the amount of leave to which each of the employer's employees is entitled based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act. Alternatively, employers may also choose to satisfy their obligations under the Act by other means, provided they are consistent with the bargaining obligations and collective bargaining agreement.[49]

Redress for Refusal to Provide Leave

An administrative complaint alleging any violation of the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act may be filed in person, by mail, or by telephone with the Division or any local office of the Division.[50] The Secretary of Labor has the investigative authority and subpoena authority set forth in the FLSA and FMLA with respect to enforcing these laws.[51] The temporary regulations provide that employees may file a private action to enforce the Emergency FMLA Expansion Act only if the employer is otherwise subject to the FMLA.[52]

In its updated guidance, the Division also provided a phone number and website for employees who believe their employers are improperly refusing to provide paid leave under the FFCRA. Employees contacting the Division will be directed to the nearest Division office for assistance with answering questions or filing a complaint. If the

employer employs 50 or more employees, the Division notes that an employee may also file a lawsuit against the employer directly without contacting the Division.[53]

---

[1] *See* Department of Labor, *U.S. Department of Labor Announces New Paid Sick Leave and Expanded Family and Medical Leave Implementation*, https://www.dol.gov/newsroom/releases/whd/whd20200401.

[2] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[3] 29 C.F.R. § 826.40(a)(1)(iii); Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, at Questions 23-27.

[4] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, at Questions 23-27.

[5] 29 C.F.R. § 826.40(a)(1)(iii). For more information about which employees count toward the 500-employee threshold, see Gibson Dunn's March 26 update.

[6] H.R. 6201, Division E, § 5102(a)(1).

[7] 29 C.F.R. § 826.10(a).

[8] 29 C.F.R. § 826.20(a)(3). For purposes of this provision, the Division has adopted the definition of "health care provider" contained in the FMLA, which includes medical professionals who are capable of diagnosing serious health conditions. This definition is narrower than the definition of "health care provider" used in sections 3105 and 5102(a) of the FFCRA, which are the provisions that allow employers to exempt health care providers and emergency responders from paid leave under the Act.

[9] 29 C.F.R. § 826.20(a)(4).

[10] 29 C.F.R. § 826.20(a)(5).

[11] 29 C.F.R. § 826.20(a)(6).

[12] 29 C.F.R. § 826.20(a)(1)(vi).

[13] 29 U.S.C. § 2612(a)(1). Additionally, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness is entitled to 26 workweeks of leave during a single 12-month period to care for the servicemember. 29 U.S.C. § 2612(a)(3).

[14] H.R. 6201, Division C, § 3102; 29 C.F.R. § 826.23.

[15] *Id.* For both full-time and part-time employees, the amount of pay to which employees are entitled under the Emergency FMLA Expansion Act is capped at $200 per day and $10,000 in the aggregate. 29 C.F.R. § 826.24(a).

[16] Expanded family and medical leave under the Emergency FMLA Expansion Act is only available until December 31, 2020. After that date, employees may only take FMLA leave.

[17] 29 C.F.R. § 826.70(e).

[18] 29 C.F.R § 826.10(a).

[19] *See* 29 C.F.R. § 790.6(a).

[20] 29 C.F.R § 826.10(a).

[21] 29 C.F.R § 826.20. In separate guidance relating to the notice requirements under the FFCRA, the Division clarified that employers may satisfy the notice-posting requirement for employees who are teleworking by emailing or direct mailing the notice to employees, or posting it on an employee information internal or external website. *See* Department of Labor, *Families First Coronavirus Response Act Notice – Frequently Asked Questions*, https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions.

[22] 29 C.F.R. § 826.50.

[23] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, at Question 21.

[24] 29 C.F.R. § 826.50(a).

[25] 29 C.F.R. § 826.100(a).

[26] 29 C.F.R. § 826.100(b)-(c).

[27] 29 C.F.R. § 826.100(e).

[28] 29 C.F.R. § 826.100(f).

[29] 29 C.F.R. § 826.90.

[30] 29 C.F.R. § 826.140.

[31] 29 C.F.R. § 826.130.

[32] The regulations do not elaborate on what constitutes the “reasonable efforts” employers need to undertake to restore an employee to the same or similar position or to contact the employee if an equivalent position becomes available.

[33] 29 C.F.R. § 826.130(2).

[34] 29 C.F.R. § 826.70(f).

[35] 29 C.F.R. § 826.160(c).

[36] H.R. 6201, Division C, §§ 3102, 3105, Division E, §§ 5102, 5111.

[37] 29 C.F.R. § 826.30(c)(1).

[38] *Id.*

[39] 29 C.F.R. § 826.30(c)(2).

[40] *See* 29 C.F.R. § 826.40(b) for a more detailed discussion of how this determination should be made.

[41] *Id.*

[42] 29 C.F.R. § 826.110. For additional information about employee health insurance coverage under the FMLA, see Department of Labor, *Fact Sheet #28A: Employee*

Protections under the Family and Medical Leave Act, https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections.

[43] 29 C.F.R § 826.30(b).

[44] *Id.*

[45] 29 C.F.R. § 826.30(b)(1)(ii).

[46] 29 C.F.R § 826.10(a).

[47] 29 C.F.R. § 826.160(f).

[48] 29 C.F.R. § 826.20(c).

[49] 29 C.F.R. § 826.120.

[50] 29 C.F.R. § 826.152.

[51] 29 C.F.R. § 826.153.

[52] 29 C.F.R. § 826.151.

[53] *See* Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions, at Question 41-42.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding legal developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn attorney with whom you work in the Labor and Employment Group, or the following authors:

Catherine A. Conway – Co-Chair, Labor & Employment Practice Group

Amanda C. Machin – Washington, D.C.

Karl G. Nelson – Dallas

Jason C. Schwartz – Co-Chair, Labor & Employment Practice Group

Zoë A. Klein – Washington, D.C.

Greta B. Williams – Washington, D.C.

Charlotte A. Lawson – Washington, D.C.

Related Capabilities

Labor and Employment