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Employer Coverage under the Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) requires covered employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The FFCRA includes: 1) the Emergency Paid Sick Leave Act (EPSLA); and 2) the Emergency Family and Medical Leave Expansion Act (EFMLEA).

The Department of Labor's (DOL) Wage and Hour Division has issued a rule designed to assist employers in navigating these new laws' paid leave requirements. These provisions will apply from April 2, 2020 through December 31, 2020.

Which employers are covered by the EPSLA and the EFMLEA and thus, must provide paid sick leave as described in those Acts?

- ***All private employers with fewer than 500 employees in a U.S. State, the District of Columbia, or a territory or possession of the United States at the time an employee would take leave.***

If the employer has more than 500 employees BUT less than 500 employees are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States:

- ***The employer will be considered to have less than 500 employees and is thus subject to the FFCRA.***

Who counts as an employee toward the 500-employee threshold?

- ***Full-time and part-time employees;***
- ***Employees on leave;***
- ***Temporary employees who are jointly employed by the employer and another employer; and***
- ***Day laborers supplied by a temporary placement agency.***

Who does NOT count as an employee toward the 500-employee threshold?

- ***Independent contractors; and***
- ***Employees who have been laid off or furloughed and have not subsequently been reemployed.***

Determining the number of employees for joint or integrated employers:

- ***Joint or integrated employers must combine employees in determining the number of employees they employ.***
- ***The Fair Labor Standards Act's (FSLA) test for joint employer status applies in determining who is a joint employer for purposes of coverage, and the Family and Medical Leave Act's (FMLA) test for integrated employer status applies in***

determining who is an integrated employer, under both the EPSLA and the EFMLEA.

Which employers might be exempt from certain provisions of the EPSLA and EFMLEA?

- **Small businesses with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or childcare availability if the leave requirements would jeopardize the *viability of the business as an ongoing concern, and***
- ***Small businesses with 25 or less employees are exempt if the position no longer exists due to the economic condition or other changes in operation.***

***Interpreting the ongoing** concern assumption:*

- *The American Institute of Certified Public Accountants does not provide a formula to determine the viability of a business as a going concern, but rather the standard considers conditions or events in the aggregate.*

Determining when an employer with fewer than 50 employees can deny leave to care for a child whose school is closed, or childcare provider is unavailable:

- *The employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would:*
  - *1) cause the small employer's expenses and financial obligations to exceed available business revenue;*
  - *2) pose a substantial risk to the financial health or operational capacity of the business; or*
  - *3) prevent the small employer from operating at minimum capacity.*

Hypos:

Hypo #1

On April 20, 2020, GreenSpace has 450 employees and Simone, an employee, is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19.

GreenSpace would need to provide Simone with paid sick leave.

Hypo #2

Same facts as above. However, GreenSpace hires 50 new employees between April 21, 2020, and August 3, 2020, such that it now employs 500 employees as of August 3, 2020.

GreenSpace would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

Hypo #3

GreenSpace employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States.

GreenSpace will be considered to have 250 employees and is thus subject to the FFCRA.

The interaction of these new laws with the "old" continues to rapidly evolve. Given the DOL's historic proclivity of issuing interpretative guidance, this most recent rule can be expected to similarly evolve during the year as employers set about implementing it in their workplaces.

KD IS HERE TO HELP

In this challenging and unprecedented time, the Kaufman, Dolowich & Voluck attorneys look forward to assisting employers who are grappling with complex issues in an effort to mitigate the impact of the COVID-19 pandemic on their employees and businesses. KD's Labor and Employment Law Group is continuing to monitor all governmental directives and will provide updates accordingly. For guidance and/or more information, please contact an experienced member of KD's Labor & Employment Law Practice Group.