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Department of Labor Issues Families First Coronavirus Response Act Regulations

On April 1, 2020, the Department of Labor (DOL) issued its first regulations under the Families First Coronavirus Response Act (FFCRA). Although the regulations include many of the same provisions highlighted by the DOL's FAQs covered in Reinhart's recent article, employers should be aware of new answers to questions under the FFCRA. Below are highlights and key takeaways for employers from the DOL's regulations.

Quarantine and Isolation Orders. Federal, state or local quarantine or isolation orders include shelter-in-place or stay-at-home orders and orders that apply to certain categories of citizens (e.g., of certain age ranges and certain medical conditions). However, an employee can only take leave due to a shelter-in-place or stay-at-home if the employee is unable to work because of the order even though his or her employer has work that the employee could perform. An employee may not take FFCRA leave because his employer is subject to or adversely affected by a shelter-in-place or stay-at-home order. Additionally, an employee whose work is "essential" under such an order would likely not be entitled to the leave.

Caring for an Individual. The FFCRA allows an employee to take leave if they are caring for an "individual" who satisfies certain conditions. An "individual" is:

- an 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.

An "individual" is not someone with whom the employee has no personal relationship.

Advised to Self-Quarantine by a Health Care Provider. An employee satisfies this condition for Emergency Paid Sick Leave (EPSL) if the Health Care Provider advises the employee to self-quarantine because:

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- The employee has COVID-19;
- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19.

The regulations also uses the same definition of "Health Care Provider" as the FMLA — one who is able to complete serious health condition certification forms. This definition is much narrower than the definition describing which heath care employees may be excluded from FFCRA leave.

Experiencing COVID-19 Symptoms and Seeking a Medical Diagnosis. To qualify for EPSL under this condition, an employee must be experiencing fever, dry cough, shortness of breath or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention ***and*** must be affirmatively taking steps to obtain a medical diagnosis, including making, waiting for or attending an appointment for a test for COVID-19.

Intermittent Leave. Employees must meet certain conditions in order to take intermittent leave. Employees who are *unable to telework* may take intermittent EPSL or FMLA if:

- the employee is caring for a son or daughter whose school or child care provider is closed, or whose child care provider is unavailable; *and*
- Both the employer and the employee agree to the intermittent leave.

Employees who are *able to telework* may take intermittent EPSL or FMLA for any qualifying reason as long as both the employer and the employee agree to the intermittent leave.

The agreement between the employer and the employee does not have to be in writing. A clear and mutual understanding between the parties is sufficient.

Calculating the Number of Employees. When calculating the number of employees, an employer must count the following employees *within the United States*:

- Full-time employees;
- Part-time employees;

- Employees on leave;
- Temporary employees jointly employed by the employer (see below); and
- Day laborers supplied by a temporary agency.

An employer *should not* include independent contractors in its calculations.

An employer must calculate its total head count at the time an employee is going to take FFCRA leave. However, an employer cannot end an employee's FFCRA leave if, during the employee's leave, the employer is no longer covered by the FFCRA. For example, if, when an employee goes on leave, the employer has 498 employees, but a week later the employer has 502 employees, the employee who is already on leave may remain on leave despite the employer no longer meeting the fewer than 500 employee threshold.

Joint or integrated employers must combine employees in determining the number of employees each entity employs to determine coverage under the FFCRA. Whether two or more entities jointly employ an employee will depend on whether the second employer simultaneously benefits from the employee's work and actually exercises control over the employee. Whether two or more entities are an integrated employer depends on the following factors:

- Common management;
- Interrelation between operations;
- Centralized control of labor relations; and
- Degree of common ownership/financial control.

Whether two or more employees are joint or integrated employers is fact-specific and requires individual analysis.

If you have questions regarding the DOL's regulations, please contact your Reinhart attorney.