DOL RELEASES NEW Q&A PROVIDING SIGNIFICANT GUIDANCE: A BIG RELIEF FOR HEALTH CARE EMPLOYERS AS "HEALTH CARE PROVIDERS" AND "EMERGENCY RESPONDERS" DEFINED BROADLY

As we previously posted, the U.S. Department of Labor ("DOL") has been releasing guidance documents regarding the Families First Coronavirus Response Act ("FFCRA"). You can find our prior article here. One of the guidance documents included Questions and Answers ("Q&A") that the DOL has been revising and expanding over the last few days, providing significant guidance to employers. Late Saturday, March 28, 2020, the DOL addressed what health care employees have been clamoring to know: who may be considered to be "health care providers" or "emergency responders." Health care employers have been anxiously waiting on clarity, as employees who meet these definitions can be excluded by employers from eligibility under the FFCRA for purposes of paid leave.

Below is a brief summary of some of the key takeaways from the most recent DOL guidance. You can also find the updated Q&A document here. Please remember that there are still unanswered questions and that the Q&A is considered informal guidance. While an employer may rely on the DOL guidance in good faith, we are still waiting for formal regulations from the DOL in April 2020.

[Note: In light of this new DOL guidance broadly defining the terms "health care providers" and "emergency responders," Hall Render is no longer taking orders for its Paid Sick Leave Compliance Toolkit, as we recognize many health care employers will be re-evaluating its need and desire to offer such paid leave to employees. Employers who remain interested in the content being developed for the toolkit may click here for further direction.]

"HEALTH CARE PROVIDERS" AND "EMERGENCY RESPONDERS" DEFINED BROADLY

Who Is a Health Care Provider?

The FFCRA provides that employers of health care providers and emergency responders may exclude such employees from the Emergency Family and Medical Leave Expansion Act ("EFMLA") and the Emergency Paid Sick Leave Act ("EPSLA"). Until this new DOL guidance, the term "health care provider" appeared as though it would have the same very narrow definition as in the Family and Medical Leave Act ("FMLA"). This would have meant that many health care workers, including nurses, certified nurse assistants, respiratory therapists, other clinicians and most other workers would be eligible for paid leave under the FFCRA.

The DOL, in Question 56 of its Q&A document, explains that anyone employed by a health care employer (or entities that contract with a health care provider to provide services or to maintain the operation of the facility) or employed by an entity that provides medical services, produces medical products or is involved in making COVID-19 related equipment, tests, drugs, vaccines, diagnostic vehicles or treatments may be exempted from both the EFMLA and EPSLA, should the employer so choose. It also provides that a health care provider means "any individual that 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."

As for what is a health care employer, the DOL provided the following equally broad list - 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. This also includes any permanent or temporary institution, facility, location or site where medical services are provided that are similar to such institutions.

Who Is an Emergency Responder?

The term emergency responder was not defined in either the EFMLA or EPSLA. The DOL, in Question 57, explains that an emergency responder is "an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19." It also includes but is not limited to "military or national guard, law enforcement officers, correctional institution personnel, firefighters, 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."

Like the meaning of health care provider, the DOL also said that an emergency responder includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's, that territory's or the District of Columbia's response to COVID-19.

What Should Health Care Employers Do Now?

Covered health care employers under FFCRA will need to decide whether they wish to exempt all of their employees from eligibility under EFMLA and/or EPSLA, or exempt only certain employees (perhaps based on the job function). Understandably, covered health care employers may determine that all employees, regardless of job function, are critical at this point in time.

Regardless of the decision, covered health care employers should formally memorialize the decision and record what employees will be exempted or not exempted from eligibility for the paid leave under EFMLA and/or EPSLA.

If a covered health care employer decides not to exempt all of its employees from eligibility for paid leave under EFMLA and/or EPSLA, then that employer will need to comply with all aspects of the law as it pertains to those remaining eligible employees. This would include posting the required poster and taking the advisable steps of implementing policies, designation notices and appropriate management training. It should also develop an appropriate communication strategy for informing those employees who it has determined to exempt from the paid leave.

If, on the other hand, a covered health care employer decides to exempt all of its employees from eligibility (i.e., none of its employees will be granted the paid leave), then it will also want to consider what approach makes the most sense for communicating that decision with employees. The health care employer should anticipate employees beginning to request such leave, so a communication plan will likely be necessary. Additionally, because the health care employer is still technically a covered employer under the FFCRA, it will want to consider the pros and cons of complying with the poster requirement.

Other Considerations for Health Care Employers

In addition to working through the steps outlined above with regard to determining which employees will or will not be exempted, there are a few other key points to note. First, in the Q&As, the DOL encourages employers to be judicious when applying these definitions of health care provider and emergency responder. That does not mean a health care employer is prohibited from excluding all of its employees, but it is something to note.

Secondly, to be clear, a health care employer will not be able to take tax credits for any employees who it decides to exempt from eligibility for paid sick leave under EFMLA and/or EPSLA.

Finally, the DOL has yet to release its regulations, which we expect sometime in April 2020. While it seems unlikely that the DOL would issue regulations that conflict with this recently released guidance, generally the regulations would take precedence over this guidance if there are any differences.

OTHER KEY ISSUES CLARIFIED IN THE UPDATED Q&A

Intermittent Leave Is Permitted under EFMLA and EPSLA at Employer's Discretion

Under the new guidance (Questions 20 and 21), employers are permitted, but are not required, to offer employees intermittent leave under EFMLA and EPSLA. The Q&A provides examples of how an intermittent schedule might work for an employee who needs time off to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19.

Although the employer and employee may agree on an intermittent work schedule, there are restrictions.

Under EPSLA, unless the employee is teleworking or caring for a child whose school or daycare is closed, or whose child care provider is unavailable because of COVID-19 related reasons, leave must be taken in a full-day increment. Specifically, the DOL states that intermittent leave cannot be taken because:

- The employee is subject to a quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who either is subject to a quarantine order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless the employee is teleworking, once an employee begins paid sick leave for any of the above reasons, the employee must continue to take paid sick leave each day until either (1) the employee has utilized the full amount of paid sick leave; or (2) the employee no longer has a qualifying reason for taking the leave. Additionally, if the employee no longer has a qualifying reason for taking paid sick leave before he or she exhausts their paid sick leave, until December 31, 2020, they may take any remaining paid sick leave at a later time, if another qualifying reason occurs.

The DOL highly encourages employers and employees to collaborate to achieve flexibility and meet mutual needs through teleworking and intermittent paid sick leave.

Business Closure, Furloughs or Layoffs Are Not EFMLA or EPSLA Eligible

The DOL's guidance confirmed that employees who are not working due to business closures, furloughs or layoffs because of financial reasons (e.g., lack of clientele) or because the business is ordered closed or limited as a non-essential business, are not eligible for EFMLA or EPSLA. However, the employee may qualify for unemployment insurance benefits and ought to be directed to consult with the state's workforce agency.

It should be noted, if an employer closes while an employee is on paid sick leave or expanded family and medical leave, an employer must pay for any paid sick leave or expanded family and medical leave used before the employer closed. Nevertheless, as of the date an employer closes, the employee is no longer entitled to paid sick leave or expanded family and medical leave.

Criteria for Small Business Exemption Related to Leave for Child Care Described

Businesses with fewer than 50 employees have been eager to learn what criteria they must meet to be exempted under the EFMLA and EPSLA obligations to provide paid leave due to a child's school or place of care closures or child care provider unavailability for COVID-19-related reasons. The DOL provides that if offering such leave would jeopardize the viability of the small business as a going concern, then it need not do so if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or
3. There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Clarification on Definition of "Son or Daughter"

In Q&A 40, it seems the DOL has clarified not only the definition of "son or daughter" but also its application under both EFMLA and EPSLA. The DOL states that "Under the FFCRA, a 'son or daughter' is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child." It then cites to its FMLA Fact Sheet #28B for additional information.

It goes on to say that because Congress directed that the leave provisions be interpreted consistently with one another, the definition of

"son or daughter" includes not only a minor son or daughter but also an adult son or daughter (i.e., one who is 18 years of age or older) who (1) has a mental or physical disability; and (2) is incapable of self-care because of that disability. It then cites to its FMLA Fact Sheet #28k for additional information.

Importantly, this answer would suggest that an employee could take EFMLA if the employee's child in need of care was 18 or older, had a mental or physical disability and was incapable of self-care due to that disability.

Leave Taken Prior to April 1 Is Inconsequential to EFMLA or EPSLA

Contrary to earlier information from the DOL and Department of Treasury, there is no voluntary compliance permitted prior to the April 1 effective date. Leave time taken prior to April 1 cannot be charged against an employee's EFMLA or EPSLA entitlement.

STILL MORE TO COME

While this additional guidance from the DOL is welcomed, employers still await the regulations. It is also still very possible we will see more Q&As from the DOL in the days ahead.

If you have any questions or require any assistance, please do not hesitate to contact:

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Special thanks to Claire Bailey, Law Clerk, for her assistance in drafting this article.