

BURR ALERT

DOL Issues Third Round of Questions and Answers on Families First Coronavirus Response Act

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On March 28, 2020, the Department of Labor ("DOL") issued its third set of Question and Answer guidance on the Families First Coronavirus Response Act, updating some of its earlier answers and adding more than twenty additional questions and answers. The guidance is available at this [link](#). The Act is scheduled to take effect on April 1, 2020. Below are some of the important additions and modifications in the new guidance:

Integrated Employer Test: The guidance on the "integrated employer test" for coverage under the Emergency Family and Medical Leave Expansion Act ("Emergency FMLA") was revised to state: "If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act." Before the guidance from the Department of Labor indicated the integrated employer test would only be applicable under the Emergency FMLA, but the DOL guidance now states that the "integrated employer" test is applicable to the Paid Sick Leave Act as well. Therefore, under this guidance, employers which satisfy the "integrated employer" test and thus have over 500 employees will not be subject to the Paid Sick Leave Act.

Return to Work: The guidance clarified the "return to work" requirements under the Paid Sick Leave Act and the Emergency FMLA: "In most instances you are entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave." The guidance states that "key employees" who take child care leave under the Emergency FMLA may not be eligible for return to their position if four key hardship conditions exist.

Twelve Weeks Total of FMLA Leave: For the first time, the guidance also makes clear that an employee can only use 12 weeks of FMLA in the applicable measuring period, including Emergency FMLA. Therefore, the Emergency FMLA does not provide an additional 12 weeks of leave but provides new eligibility categories for the existing 12 weeks of leave. If an employee has already used all of his FMLA during the applicable period, he is not eligible for additional Emergency FMLA, but he would still be eligible for two weeks of paid sick leave. Depending on the timing of the use of two weeks of paid sick leave, an employee may be eligible for fourteen (14) weeks of leave under some circumstances. The existing qualifying events for leave under the FMLA, not covered by FFCRA, remain unpaid.

Additional to Other Available Paid Leave: Paid sick leave provided under the Paid Sick Leave Act is in addition to paid sick leave already provided under state or local law, company policy, or a collective bargaining agreement.

Full and Part-Time Employees: Under the Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week. A part-time employee is an employee who is normally scheduled to work less than 40 hours per week. The Emergency FMLA does not distinguish between full time and part time employees.

Date for Calculating Employees: Unlike the traditional Family and Medical Leave Act, whether an employer is covered by Emergency FMLA is calculated on the day the employee requests leave. Therefore, the determination if the employer has 500 or more employees and is covered by the Emergency FMLA is made based on whether or not the employer has 500 employees on the date the leave was requested. Therefore, for employees with a total number of employees under the Act close to the 500 threshold, a calculation will need to be made on each day that leave is requested by an employee. The same analysis is used for requests under the Paid Sick Leave Act.

Health Care Providers Who Can Quarantine: "Health Care Provider" under the Act for determining whose advice to self-quarantine can be relied on as a qualifying reason for paid sick leave includes a licensed doctor of medicine, nurse practitioner or other health care provider permitted to issue a certification for purposes of the FMLA.

Health Care Providers Excluded from Leave: Employers may exclude health care providers from the new leave laws. The Department of Labor defined "Health Care Provider" in its guidance to include, but not limited to, "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."

Small Business Exemption: The small business exemption applies to exclude a small business from providing paid sick leave or expanded family and medical leave to employees due to school or place of care closures or child care provider unavailability if doing so would jeopardize the viability of the small business as a going concern. To claim this exemption, the small business must have less than 50 employees and meet one of three criteria related to the ongoing viability of the employer.

We will continue to monitor DOL guidance and will continue to provide updates as new information is issued. For questions regarding this guidance, please contact the Burr & Forman attorney with whom you regularly work.

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