ARONBERG GOLDGEHN

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Employment Law *Trending Now*

New Department of Labor Guidance on the Families First Coronavirus Act

Over the weekend, the Department of Labor (DOL) issued new guidance on the Families First Coronavirus Response Act ("FFCRA"). See Question and Answer #38-59, which can be found **HERE**. For the first time, the DOL has expounded upon how an employer with less than 50 employees can qualify for the exemption under the FFCRA.

Below is a summary of the small business exemption and other information gleaned from this round of guidance:

- A small business is exempt from providing paid leave under the FFCRA only if: (A) the employer employs fewer than 50 employees; (B) leave is requested because the child's school or place of care is closed, or child care provider is unavailable due to COVID-19 related reasons; and (C) an authorized officer of the business has determined that at least one of the following three conditions are satisfied:
    1. The provision of paid 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 requesting paid 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

Contact

Amy M. Gibson
312.755.3154
agibson@agdglaw.com

Nathan H. Lichtenstein
312.755.3148
nlichtenstein@agdglaw.com

Timothy R. Nelson
312.755.3149
tnelson@agdglaw.com

Robert N. Sodikoff
312.755.3155 •
rsodikoff@agdglaw.com

Maryam H. Arfeen
312.755.3185
marfeen@agdglaw.com

330 N. Wabash Ave.
Suite 1700
Chicago, IL 60611
T: 312.828.9600
F: 312.828.9635
www.agdglaw.com

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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 leave, and these labor or services are needed for the small business to operate at a minimal capacity (Q & A #58-59).

- Based on the guidance above, the small business exemption does not apply and small businesses remain required to provide paid sick leave (not expanded FMLA) under the FFCRA to eligible employees for the following reasons: (a) the employee is subject to federal, state or local government quarantine or isolation order (this does not include shelter-in-place orders); (a) the employee is recommended to quarantine by a health care provider; (c) the employee has Coronavirus symptoms/needs medical attention; (d) the employee must care for an individual subject to a mandatory quarantine or a recommendation to quarantine; or (e) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
- All employees working in the United States are eligible for paid sick and FMLA leave under the FFCRA, including full-time and part-time employees (Q & A #38);
- The DOL expanded on an exception to the definition of "employee" for healthcare providers. For purposes of employees who may be exempted from paid sick leave or FMLA leave under the FFRCA, 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. Notably, this definition includes anyone employed by any entity that contracts with any of the above institutions, employers or entities to provide services to maintain the operation of the facility, including those that produce medical products, or that are otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments (Q & A #38, 56);
- A full-time employee for purposes of the paid sick leave portion of the FFCRA is an employee who is normally scheduled to work 40 hours or more per week. Correspondingly, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week (Q & A #48-49);
- In counting employees for purposes of determining whether an employer is covered by the FMLA Expansion Act under the FFCRA, employees are counted as of the day the employee's leave would start. It should be noted that the FMLA Expansion Act does not use the FMLA's method of determining if an employer is covered by counting employees "for each working day during each of the 20 or more calendar workweeks in the current or proceeding calendar year" (Q & A #50);
- After taking sick or FMLA leave under the FFCRA, employers must return the employee to the same (or nearly equivalent) job. The employer is prohibited from firing, disciplining, or otherwise discriminating against the employee for taking leave. The DOL clarified that the employee is not protected from employment actions, such as layoffs, that would have affected the employee

regardless of whether the employee took leave. This means that the employer is permitted to lay off an employee for legitimate reasons, such as closure of a worksite. The employer may also refuse to allow the employee to return to work in the same position if the employee is deemed to be a "key employee" as defined by the FMLA (Q & A #43);

- Even if an employee has previously taken some or all his or her leave under the FMLA, the employee is entitled to paid sick leave under the FFCRA, if eligible. However, the amount of FMLA the employee would be entitled to under the FFCRA would be reduced by the amount previously taken. The employee is entitled to a total of 12 weeks of leave in a 12-month period under the FMLA, including leave taken under traditional FMLA or the FFCRA (Q & A #44-45);
- Paid sick leave under the FFCRA is in addition to other leave provided under federal, state or local law, any applicable collective bargaining agreement, or an employer's existing company policy (Q & A #46);
- If an employee has elected to take paid sick leave under the FFCRA, but they are in a waiting period for health coverage, the days during which the employee is on paid sick leave would count toward satisfaction of the waiting period (Q & A #51);
- A son or daughter for purposes of paid sick or FMLA leave under the FFRCA includes the employee's own child, including a biological, adopted, foster child, stepchild, legal ward, or a child for whom the employee is standing in loco parentis (someone with day-to-day responsibilities to care for or financially support a child). The DOL clarified that a son or daughter may also include an adult son or daughter who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability (Q & A #40);
- The DOL defined who is considered a "health care provider" for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied upon as a qualifying reason for paid sick leave. The term means a licensed doctor of medicine, nurse, or other healthcare provider permitted to issue a certification for purposes of the FMLA (Q & A #55).

Please let us know if you have any questions about this guidance and how it applies to your business.

Amy M. Gibson
312.755.3154
agibson@agdglaw.com