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## Three Key Takeaways from the U.S. Department of Labor's Latest Guidance on the Families First Coronavirus Response Act

By Chip Paternoster

Last week we updated you on the Families First Coronavirus Response Act (FFCRA), which was signed into law on March 18, 2020. The FFCRA contains several important provisions that apply to Oregon and Washington employers: providing a paid sick leave benefit to qualifying employees and amending the Family Medical Leave Act (the "FMLA") to allow an employee to care for a child under 18 if the child's school or care facility has been closed due to a "public health emergency."

Since that time, the U.S. Department of Labor has issued a series of bulletins and updated guidance for employers and employees about the new law. This guidance provides answers on several important topics, including the exemption in the law for small businesses and information related to employer reimbursement in refundable tax credits for payments made under the law.

The detail regarding these issues changes and is updated on an almost daily basis. For now, here are three important takeaways related to the new law:

### 1. The effective date of the FFCRA

The FFCRA's paid sick leave provisions took effect on April 1, 2020 and apply to qualifying leave taken between April 1, 2020, and December 31, 2020. It is important to note that the Act is not retroactive and does not apply to leave taken before April 1, 2020.

### 2. Exceptions for Small Businesses

The FFCRA covers all companies with up to 500 employees. When the FFCRA was passed, it granted the U.S. Department of Labor authority to exempt employers with fewer than 50 employees, if providing the benefit would jeopardize the viability of the business.

The Department of Labor's new guidance provides further detail on this exemption for small businesses. It provides that an employer, including a religious or nonprofit organization, with fewer than 50 employees, may be exempt from providing paid sick leave and expanded family and medical leave "when the imposition of such requirements would jeopardize the viability of the business as an ongoing concern." See EFMLEA § 110(a)(3)(B) and EPSLA § 5111(2).

To qualify for the exemption, an authorized officer of the business must determine that at least one of three conditions is satisfied:

- Providing 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;
- The absence of the employee or employees requesting paid sick leave or expanded medical leave would be a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities;

or

- 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.

At this point, the Department of Labor has not stated whether the documentation required for the small business exemption will need to be provided in any specific form. Employers contemplating seeking the exemption should work with counsel and think about the kinds of documentation available in order to demonstrate the conditions necessary to justify the exemption.

### **3. Tax Credits, Reimbursement, and Documentation**

The FFCRA also provides an employer can receive tax credits for what it pays out under the Act. The tax credit is equal to 100 percent of the amount the employer pays in emergency paid sick leave and emergency paid family and medical leave, and can also include a percentage of the costs of providing group health plan coverage allocated to such leave payments, up to the FFCRA limits.

In the last few days, the Department of Labor has provided additional information about how this tax credit will work. The good news is that the Department of Labor and the IRS have clarified that an employer can recoup FFCRA payments immediately by retaining a portion of the deposit they otherwise would pay as part of their employees' Federal, Social Security and Medicare taxes.

Typically, an employer must withhold from employees' paychecks federal income taxes and employees' share of Social Security and Medicare taxes. The employer deposits these taxes and files quarterly payroll tax returns (Form 941 series). Now, under the FFCRA, an employer who pays qualifying sick or child care leave can claim the tax credits on its quarterly Form 941, and retain a portion of the payroll taxes equal to the amount of qualifying sick and child care leave paid, rather than depositing those taxes to the IRS. If the amount of the credit exceeds the amount the employer is otherwise required to deposit with Form 941, a refund will be issued promptly.

Much like the small business exemption, employers making payments to employees under the FFCRA should be mindful of creating proper documentation to ensure that payments made under the Act are fully reimbursable. At bare minimum, that means employers must be able to show the amounts paid to employees for paid sick leave and paid family and medical leave, and also demonstrate that the use of leave was for qualifying reasons under the FFCRA.