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Determining Employer Size under The Families First Coronavirus Response Act

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On March 18, 2020, the president signed into law the Families First Coronavirus Response Act (FFCRA). As summarized in the Council's previous Benefits Blueprint, *Summary Of Health Care and Leave-Related Provisions In Coronavirus Response Legislation*,[1] the FFCRA contains two leave-related provisions:

- "Expanded FMLA Leave Requirement": requires employers with fewer than 500 employees to provide up to 12 weeks of job-protected leave related to care for a child via an expansion of the Family and Medical Leave Act (FMLA) (with the first 10 days unpaid)

- "Emergency Paid Sick Leave Requirement": requires employers with fewer than 500 employees to provide up to 80 hours (generally two weeks) of emergency paid "sick" leave to full-time employees (with special rules for part-time employees)

The FFCRA also provides employers subject to the Expanded FMLA Leave Requirement and Emergency Paid Sick Leave Requirement with tax credits for the wages paid under the two new leave provisions. Beginning on March 24, 2020, the U.S. Department of Labor (DOL) issued a series of Q&As[2] ("DOL Leave Q&As") regarding the new leave requirements and stated that the requirements are effective on April 1, 2020. The requirements extend through December 31, 2020.

[1] Updated March 19, 2020, available at https://www.americanbenefitscouncil.org/pub/?id=25736F32-1866-DAAC-99FB-B8CDC0451954

[2] *Families First Coronavirus Response Act: Questions and Answers*, available at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

The Expanded FMLA Leave Requirement generally uses terms under the pre-existing FMLA rules. The Emergency Paid Sick Leave Requirement generally uses terms under the Fair Labor Standards Act (FLSA). Importantly, both the FMLA and the FLSA rules contain provisions regarding when related employers are treated as separate employers or aggregated employers – these provisions do not rely solely on whether the employers are in the same controlled group. The DOL Leave Q&As make it clear that certain of those rules apply for purposes of applying the 500-employee thresholds under the FFCRA. Under those rules, it is possible that an employer with less than 500 employees on its own could be subject to the new rules under the FFCRA, even if it is in a controlled group that together has 500 or more employees.

Notably, on March 24, 2020, the DOL issued[3] a non-enforcement period regarding the new leave requirements *through April 17, 2020*. The non-enforcement period only applies where the employer has made "reasonable" and "good faith efforts" to comply with the FFCRA. Among other requirements, this means that the employer's violations of the FFCRA were not "willful." This is obviously welcome news for employers, especially given the number of open questions that remain regarding the application of these new leave requirements.

This Blueprint is focused on helping private employers determine whether they may be subject to the new leave requirements – specifically, on how to apply the 500-employee threshold with respect to companies that may be part of larger controlled groups or otherwise have related companies.

Please note that the first part of this Blueprint addresses questions related to determining application of the 500 employee criteria to the Expanded FMLA Leave Requirement. The latter part of this Blueprint address questions related to its application to the Emergency Paid Sick Leave Requirement.

EXPANDED FMLA LEAVE REQUIREMENT

Q: Which employers are subject to the Expanded FMLA Leave Requirement generally?

The FFCRA provides that the Expanded FMLA Leave Requirement applies to an "employer," which is defined by reference to the FMLA. As amended by the FFCRA, the FMLA defines "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs fewer than 500 employees" and includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."

[3] DOL FAB 2020-1, available at https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1

Q: Do non-profit entities need to comply with the Expanded FMLA Leave Requirement?

There is no express carve-out in the FFCRA for non-profit entities with respect to the Expanded FMLA Leave Requirement. Thus, as confirmed by the DOL Leave Q&As, nonprofit entities, like for-profit private employers, will need to comply with the new Expanded FMLA Leave Requirement if they have fewer than 500 employees.

Q: Do governmental entities also need to comply with the Expanded FMLA Leave Requirement?

The answer depends on whether the governmental entity is a *non*-federal or federal governmental entity. The DOL Leave Q&As confirm that the Expanded FMLA Leave Requirement applies to *non*-federal governmental employers *regardless* of how many employees they have. Thus, even larger-sized non-federal governmental employers (i.e., those with 500 or more employees) will need to comply with the new Expanded FMLA Leave Requirement.

The DOL Q&As also address federal government employers and state that such employers are generally not subject to the Expanded FMLA Leave Requirement. However, depending on the circumstances, some federal government employers are subject to the Expanded FMLA Leave Requirement.

Q: When applying the "fewer than 500 employees" analysis, does this include all common law employees regardless of full- or part-time status?

Neither the FFCRA nor the underlying FMLA appears to limit the test to only full-time employees. And, the DOL Leave Q&As state that the all employees are counted, including full-time and part-time employees, employees on leave, and temporary employees. Thus, each common law employee, regardless of part- or full-time status gets counted as a single employee when applying the "fewer than 500 employees" test.

Comment: When engaging in the "fewer than 500 employees" analysis, it appears that only common law employees are considered and that non-employee service providers (such as independent contractors) are disregarded. Of course, whether a given service provider is an employee versus an independent contractor is a highly factual determination. However, for most larger employers (i.e., 50+ employees), they should already be performing similar analyses with respect to many such service providers for purposes of compliance with the ACA employer mandate provisions.

Q: When applying the "fewer than 500 employees" analysis, can I disregard foreign employees or foreign entities?

The DOL Leave Q&As state that only employees "within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States" are counted when determining employer size.

Q: How should my company apply the "fewer than 500 employees" analysis when my company is part a larger group of companies? I've been assuming my company is not subject to the new Expanded FMLA Leave Requirement, is that a correct assumption?

The FFCRA itself provides no clarifying guidance on how to apply the test where a company is part of a larger group of companies. And the FMLA does not apply a controlled group test similar to that found in the Internal Revenue Code ("Code") or ERISA (i.e., which generally looks solely to whether there is a controlling ownership interest). Thus, there appears to be instances where entities that are aggregated for purposes of other federal laws will need to be considered separately when determining whether the Expanded FMLA Leave Requirement applies.

Comment: This is an aspect of the new Expanded FMLA Leave Requirement that may be confusing to many employers that are part of larger controlled groups. This is because under many federal laws – specifically the Code and ERISA – shared ownership is generally enough to mandate aggregation for purposes of counting employees, certain nondiscrimination testing, etc. However, for the reasons noted below, companies that are part of larger groups of companies may in some instances be considered separate and apart from their affiliates when determining whether the new Expanded FMLA Leave Requirements apply.

Where, however, the employer is an "integrated employer" or "joint employer" with another employing entity (whether or not part of the same controlled group), the recent DOL Q&As state that the employer will need to consider the employees of the other employing entity(ies) when determining employer size for purposes of the Expanded FMLA Leave Requirement. Specifically, the recent DOL Leave Q&As state the following (emphasis added):

> Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. ***Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining***

whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). ***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 expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.***

In light of this, an employing entity should consider application of both the integrated employer and joint employer test when determining whether it has "fewer than 500 employees" and is thus subject to the Expanded FMLA Leave Requirement. (See below for discussion of these tests.)

Comment: Notably, the DOL Leave Q&As do not mention the FMLA's joint employment test, so it does not appear that the FMLA joint employment test applies when determining employer size. Rather, the DOL Leave Q&As refer to the FLSA's "joint employer test" (discussed in the Emergency Paid Sick Leave Requirement section below) both in the context of the Expanded FMLA Leave Requirement and the Emergency Paid Sick Leave Requirement (and include a hyperlink to the DOL's FLSA joint employer test website). While it is not entirely clear why DOL applies the FLSA joint employer test in lieu of the FMLA joint employment test for purposes of the Expanded FMLA Leave Requirement, it appears that the FLSA joint employer test applies for purposes of analyzing whether a joint employment relationship exists for both the Expanded FMLA Leave Requirement and Emergency Paid Sick Leave Requirement. (For more information on how this test may be applied, please see below.)

Q: How does the joint employer test apply for purposes of the Expanded FMLA Leave Requirement?

As mentioned above, the DOL Leave Q&As indicate that the FLSA's joint employer test applies for this purpose (and not the existing FMLA joint employment test). Very generally, the FLSA rules contemplate two different types of "joint employment": (1) the employee has an employer that suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work; and (2) one employer employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek.

Comment: For more information on the joint employer test, please see the discussion below with respect to how the test applies when determining employer size with respect to the Emergency Paid Sick Leave Requirement. The joint employer test would apply in the same fashion for purposes of the Expanded FMLA Leave Requirement and the Emergency Paid Sick Leave Requirement.

Q: How does the integrated employer test apply for purposes of the Expanded FMLA Leave Requirement?

This test generally looks at whether one employer is sufficiently connected with another employer in operations, management, and financial control, such that the two entities should effectively be considered as a single entity for purposes of determining employer size.

DOL and the courts have made clear that the determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship must be reviewed in its totality. Factors to be considered in determining whether two or more entities are an integrated employer include:

- common management, directors, and boards;
- interrelation between operations (i.e., common offices, common recordkeeping, and shared bank accounts and equipment);
- centralized control of labor relations and personnel (i.e., hire and fire employees); and
- degree of common ownership/financial control.

29 CFR § 825.104(c)(2); DOL, Wage & Hour Opinion Letter FMLA-111.

Comment: In light of the foregoing, employers will want to consider whether they are integrated with other companies when determining employer size for purposes of the Expanded FMLA Leave Requirement. In the event an entity is not an "integrated employer" with other affiliated entities (e.g., a holding company has a series of decentralized portfolio companies that tend to operate as separate and distinct companies), the employing entity would seem to disregard the controlled group member companies in applying the "fewer than 500 employees" test. If, however, the employing entity is "integrated" with other companies (such as a subsidiary that has shared HR, payroll, management, and is owned by a parent company), then it would seem that all employees of the integrated enterprise can be considered when applying

the "fewer than 500 employees" test. To the extent the entities are not integrated employers, the next step would be to consider the FLSA's joint employer test (described in the Emergency Paid Sick Leave Requirement section below).

Q: Are there any exceptions for small businesses?

The Secretary of DOL has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of Expanded FMLA Leave Requirement "would jeopardize the viability of the business as a going concern." The DOL Leave Q&As state that a small business may claim this exemption if an authorized officer of the business has determined that:

- the provision of Expanded FMLA 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 the Expanded FMLA 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**

- 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 Expanded FMLA Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Q: Are any employees exempt from the Expanded FMLA Leave Requirement?

Yes, an employer is not required to provide leave under the Expanded FMLA Leave Requirement to an employee who is a health care provider or an emergency responder. Such employees do count, however, for purposes of the under 500-employee threshold.

EMERGENCY PAID "SICK" LEAVE REQUIREMENT

Q: Which employers are subject to the Emergency Paid Sick Leave Requirement generally?

The FFCRA creates its own definition of "employer" that is subject to the Emergency Paid Sick Leave Requirement – for a private employer, generally "any person engaged in commerce or in any industry or activity affecting commerce" that "employs fewer than 500 employees." But, it also defines "employer" by reference to the FLSA by stating that "employer" also "includes any person acting directly or indirectly in the interest of an employer in relation to an employee (within the meaning of such phrase in section 3(d) of the [FLSA]."

Q: Do non-profit entities need to comply with the Emergency Paid Sick Leave Requirement?

There is no express carve-out for non-profits with respect to the Emergency Paid Sick Leave Requirement, and the DOL Leave Q&As confirm the rules apply to non-profits. Thus, these types of entities, like for-profit employers, will need to determine whether they are required to comply with the new Emergency Paid Sick Leave Requirement.

Q: Do governmental entities also need to comply with the Expanded FMLA Leave Requirement?

The FFCRA's definition of "employer" specifically includes a public agency, or any other entity that is not a private entity that employs *one or more* employees. The DOL Leave Q&As confirm that both non-federal and federal governmental entities will be subject to the Emergency Paid Sick Leave Requirement. The DOL Leave Q&As note, however, that OMB has the authority to exclude some categories of federal employees from the leave requirements.

Q: When applying the "fewer than 500 employees" analysis, does this include all common law employees regardless of full- or part-time status?

The FFCRA does not include any detail regarding whether all common law employees must be counted for purposes of the 500-employee analysis, or whether some categories of employee may be disregarded, such as part-time employees. Notably, the FFCRA defines an "employee" for purposes of the Emergency Paid Sick Leave Requirement by reference to Section 3(e) of the FLSA, which defines employee to

generally mean "an individual employed by an employer," with no reference to full-time or part-time status.

The DOL Leave Q&As state that all employees are taken into account, including full-time and part-time employees.

Q: When applying the "fewer than 500 employees" analysis, can I disregard foreign employees or foreign entities?

The DOL Leave Q&As state that only employees "within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States" are counted when determining employer size. Thus, it appears that foreign employees and foreign entities can be disregarded.

Q: How should my company apply the "fewer than 500 employees" analysis when my company is part of a larger group of companies? I've been assuming my company is not subject to the new Emergency Paid Sick Leave Requirement, is that a correct assumption?

With respect to the Emergency Paid Sick Leave Requirement, the FFCRA creates its own definition of "employer" that is generally not defined by reference to the FLSA (or FMLA) except that it incorporates the phrase "person acting directly or indirectly in the interest of an employer in relation to an employee" from the FLSA's definition. It also incorporates the definition of "employ" from the FLSA, which means "to suffer or permit to work." 29 U.S.C. § 203(g).

The FFCRA itself provides no specific controlled group test or clarifying guidance on how to apply the "fewer than 500 employees" analysis where a company is part of a larger group of companies. And notably, the FLSA and its implementing regulations do not apply a controlled group test similar to that found in the Code or ERISA (i.e., which generally looks solely to whether there is a controlling ownership interest). Thus, there would appear to be instances where entities that are aggregated for purposes of other federal laws will need to be considered separately when determining whether the Emergency Paid Sick Leave Requirement applies.

Comment: This is an aspect of the new Emergency Paid Sick Leave Requirement that may be confusing to many employers that are part of larger controlled groups. This is because under many federal laws – specifically the Code and ERISA – shared ownership is generally enough to mandate aggregation for purposes of counting employees, certain nondiscrimination testing, etc. However, as stated above, and absent future guidance to the contrary, it appears that companies that are part of larger

groups of companies likely would be considered separate and apart from its affiliates when determining whether the new Emergency Paid Sick Leave Requirements apply.

The DOL Leave Q&As do, however, provide that entities will need to take account of any employees for whom it has a "joint employment" relationship when determining employer size. Specifically, the Q&As state (emphasis added):

> Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. ***Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act*** and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

For a discussion of how the joint employer test applies, please see below.

Q: Does the FLSA's existing "joint employer" test apply for purposes of determining whether an employer is subject to the Emergency Paid Sick Leave Requirement?

Yes. The DOL Leave Q&As specifically state that the FLSA's joint employment test applies when considering whether an employer has "fewer than 500 employees" for purposes of the Emergency Paid Sick Leave Requirement.

The FLSA rules generally contemplate two different types of "joint employment": (1) the employee has an employer that suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work; and (2) one employer employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek. The first scenario (which will likely be the more common issue/question with regard to large companies with smaller affiliates and/or operating companies) is subject to a 4-factor test to help determine joint employer status (i.e., where the joint employer "is acting directly or indirectly in the interest of the employer in relation to the employee"). These four factors look at:

- whether the entity hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

- determines the employee's rate and method of payment; and

- maintains the employee's employment records.

The FLSA rules specify that the potential joint employer must ***actually exercise*** (directly or indirectly) one or more of these factors, and the regulations go on to state that "[a]dditional factors may be relevant for determining joint employer status . . . , but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." 29 C.F.R. §§ 791.2(a)(3)(i) and (b). The FLSA regulations also identify certain factors that do ***not*** make joint employer status more or less likely, including:

- operating as a franchisor or entering into a brand and supply agreement, or using a similar business model;

- the potential joint employer's contractual agreements with the employer requiring the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of its employees or the public;

- the potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation; and

- the potential joint employer's practice of providing the employer with a sample employee handbook, or other forms, allowing the employer to operate a business on its premises (including "store within a store" arrangements), offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer, jointly participating in an apprenticeship program with the employer, or any other similar business practice.

Notably, the FLSA joint employer rules are very recent – DOL issued them on January 16, 2020, and they were effective on March 16, 2020. *See* 85 Fed. Reg. 2820 (Jan. 16, 2020).

Comment: The DOL Leave Q&As indicate that the FLSA joint employer test applies on an employee-by-employee basis. Thus, it is possible that two affiliated employers are joint employers with respect to some, but not all, employees. For example, a parent has 1,000 employees, and its subsidiary has 400 employees. The subsidiary is a joint employer with respect to 10 of the parent's employees. Based upon the DOL Leave Q&As, it appears the parent would be considered to still have 1,000 employees, but the subsidiary would be considered to have 410 employees for purposes of the Emergency Paid Sick Leave Requirement (because it is required to take into account the ten "common employees" of the two entities by reason of the subsidiary's joint employer

status over 10 of the parent's employees). Because the subsidiary continues to have fewer than 500 employees after application of the joint employer test, the subsidiary (but not the parent) would remain subject to the leave requirement.

Given the amount of control that one employer must have over another employer's employees, it seems unlikely that in many cases the FLSA joint employer test will result in an affiliated company with less than 500 employees being exempt from requirement. But, it may be possible.

Q: Are there any exceptions for small businesses?

The Secretary of DOL has the regulatory authority to exempt employers with fewer than 50 employees from the requirement to provide leave due to school closings or child care unavailability if the provision of Emergency Paid Sick Leave Requirement "would jeopardize the viability of the business as a going concern." The DOL Leave Q&As state that a small business may claim this exemption if an authorized officer of the business has determined that:

- the provision of Expanded FMLA 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 the Expanded FMLA 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***

- 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 Expanded FMLA Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Q: Are any employees exempt from the Emergency Paid Sick Leave Requirement?

Yes, an employer is not required to provide leave under the Emergency Paid Sick Leave Requirement to an employee who is a health care provider or an emergency responder. Such employees do count, however, for purposes of the under 500-employee threshold. Note that the FFCRA gives the DOL the authority to issue regulations for "good cause" to exclude such employees from the definition of "eligible employee."

CONCLUSION

Determining whether an entity employs fewer than 500 employees is a critical determination for determining whether the entity is subject to one or both of the new paid leave requirements. As the above discussion illustrates, the analysis is not as straightforward as it may first appear. Additionally, forthcoming guidance may continue to clarify the determination.

As mentioned at the start of the Blueprint, the DOL issued a non-enforcement safe harbor until April 17, 2020, for employers acting "reasonably" and in "good faith" with the leave requirements. This non-enforcement period may be helpful to employers that are struggling with concluding whether they are subject to one or both of the new paid leave requirements and whether they qualify for the related federal tax credits.

Employers should be mindful that we are in a very dynamic legislative and regulatory environment and that the leave requirements and tax credits, including eligibility/coverage rules, are subject to change. Efforts continue to expand the application of the emergency paid leave requirements to larger employers. Even if an employer may not be subject to the new federal requirements, existing or new state and local paid leave laws may still apply. Thus, it will be important for companies to stay abreast of these new leave laws as they consider their compliance obligations and workforce/leave strategies during these uncertain times.

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