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# Some Clarity to the Murky: Temporary Rules Relative to the Families First Coronavirus Response Act Have Been Issued

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The U.S. Department of Labor (the "DOL") issued, effective April 6, 2020, temporary rules ("Rules") relative to the Families First Coronavirus Response Act (the "FFCRA"). The Rules focus on the "Small Employer Exemption" (defined below). Importantly, the DOL's guidance answers several questions that have been the topic of debate among many business owners, tax advisors and commentators.

Background

As discussed in prior posts, the FFCRA went into effect on April 1, 2020. The legislation contains a number of tax provisions that fund the FFCRA's mandatory paid leave provisions.

Two significant provisions of the FFCRA are:

- Eligible employees can take up to 12 weeks of FMLA leave to care for a child under 18 years of age if the child's school or child care provider has been closed by a federal, state or local authority due to a COVID-19 health emergency and the employee is unable to work or telework; and
- Employers with fewer than 500 employees must provide all employees with two weeks of Paid Sick Leave if the employee is unable to work or telework for a number of reasons, including when the employee is caring for a child of such employee if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions.

**Small Employer Exemption:** The FFCRA authorizes the DOL to issue regulations to exempt a small business with fewer than 50 employees from the imposition of the expanded FMLA provisions discussed above, as well as the paid sick leave provisions in the case of place of care and school closures or child care provider unavailability, if such imposition would "jeopardize the viability of the business as a going concern" (the "Small Employer Exemption").

The Rules

Pursuant to the legislative authority granted by the FFCRA, the DOL issued the Rules, and several accompanying questions and answers. Again, the Rules focus on the Small Employer Exemption.

These Rules recite the Small Employer Exemption: An employer with fewer than 50 employees is exempt from providing: (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons; and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons, when doing so would jeopardize the viability of the small business as a going concern.

A small business may claim the Small Employer Exemption if an authorized officer of the business has determined that one of the following applies:

- Providing paid sick leave or expanded family and medical leave would result in the 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 specific 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 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 available at the time and place needed, to perform the work of the employees requesting paid sick leave or expanded family and medical leave, and that work is needed for the small business to operate at a minimal capacity.

Importantly, the Rules allow an employer to deny paid leave to some employees, but not others, based on the foregoing framework, so long as the employer has determined that one of the three conditions is met as to the affected employees.

Additionally, the Rules provide the following:

- To elect the Small Employer Exemption, the employer must document that an authorized officer of the business has determined that at least one of the three conditions described above is satisfied.
- The employer should not send its documentation to the DOL, but rather retain the records in its files.
- Regardless of whether a small employer chooses to exempt one or more employees, the employer is still required to post the required FFCRA notice issued by the DOL.

**Practice Alert:** Presumably, a good faith determination is adequate. The determination is highly subjective. So, employers that decide to elect the Small Employer Exemption should have a reasonable basis for their determination and, as stated above, need to document the basis for their determination.

The Rules are quite broad, but they are clearly employer-friendly. Effectively, employers get to "self-certify" that they qualify for the Small Employer Exemption even though the legislation expressly provides that employers apply for the Small Employer Exemption with the DOL.

The language of the FFCRA focuses on whether providing leave would "jeopardize the viability of the business as a going concern." The Rules again appear to go beyond that and focus on whether the employer can operate at "minimal capacity."

Practice Alert: What constitutes "minimal capacity?" Is that 20 percent, 25 percent, 30 percent, 35 percent or some other percentage of normal capacity? Neither the FFCRA nor the Rules answer this fundamental question. **Be careful!**

Interestingly, the language of the FFCRA also frames the Small Employer Exemption in terms of exempting the entire business-thus, creating an "all or nothing" approach for employers and employees. By contrast, the Rules are framed in a way that allows an employer to deny paid leave only to those otherwise eligible employees whose absence would cause the small employer to operate at less than minimum capacity. This framework sets up a "pick and choose" situation that allows employers to provide paid leave to some employees, but not others. Although this may seem beneficial to employers on the surface, it could be damaging to morale and potentially set up the employer for discrimination claims, based on favoring some employees over others. **Employers should be cautious.**

We have heard reports that some members of Congress did not appreciate that the DOL took such an employer-friendly stance, particularly given that the intent of the law was to provide paid leave to employees at no effective cost to employers due to the tax credits allowable under the FFCRA.

Comment: Did the DOL overstep its rulemaking by going beyond the express language of the legislation? That is an interesting academic question that may not be determined for years, if ever.

We will continue to provide updates regarding the tax aspects of the COVID-19 laws.

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