Takeaways from the DOL's Latest FFCRA FAQs

By Laurent Badoux and Arthur Chinski

April 22, 2020

Earlier this week, the US Department of Labor (DOL) added to their long list of Frequently Asked Questions (FAQs) to the Families First Coronavirus Response Act or FFCRA. These latest additions raises the total of FAQs from an already robust 79 to a staggering 88. Combined with the DOL's first FFCRA enforcement action in Arizona, this is the latest warning for employers to get fully prepared.

What Is In The New Guidance?

How much more guidance was needed, one might ask? Most of the new FAQs deal with how to compensate an eligible employee in terms of typical calendar and effective rate. FAQs 80-85. These FAQs adhere closely to the methodology the DOL employs for similar calculations, for instance in regulations determining an employee's regular rate of pay or for acceptable rounding practices.

Two other provisions were more eye-catching. FAQ 87 reiterates, albeit with greater clarity, that "for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority." As is sometimes overlooked, the qualifying order must be the reason why the employee seeking to receive leave under the FFCRA provisions is unable to perform work for the employer. An employee furloughed is not eligible as it is the unpaid leave that results in the absence of work.

New Guidance: The Leave Overlap Between Federal Leave & PTO.

Perhaps the most impactful among the new FAQs is number 86. A rough description for FAQ 86 is the pecking order for an employee eligible for multiple leave provisions. As a brief recap, the FFCRA provides relief to employees in two forms: Emergency Paid Sick Leave Act (EPSL) and Emergency Family or Medical Leave Expansion Act (referred to here as FMLA+). In addition to these two leaves, regular FMLA and state leave laws (including paid and or unpaid leave in all four western states where Buchalter has offices, Arizona, California, Oregon and Washington, whether at the state or local level) may apply to qualified employers. FAQ 86 provides guidance, directly and indirectly, on how these types of leave interplay. For purposes of this article, in addition to EPSL, FMLA+ and FMLA, we will use the term SPSL, for state-specific leave.

FAQ 86 asks when an employer can "require" an employee's use of "existing leave under a company policy [PTO] and when does the choice belong to the employee." The DOL emphasizes that FFCRA-provided leaves supplement "any form of paid or unpaid leave," and reiterates that an employer is not at liberty to force an

employee to use PTO concurrently with EPSL. Those were known principles, and the DOL expands the guidance from here.

An employer has the right to require that an employee use FMLA+ concurrently with PTO (assuming the employee had to be absent for a qualifying reasons, e.g. to care for a child because of a COVID-19 school closure). PTO would be paid out in full until it runs out but the employer can only seek federal employment tax credit under FFCRA for 2/3 of the employee's regular rate of pay. This does not apply for circumstances in which an employer has separate plans for medical and sick leave (as opposed to a combined PTO plan), as those could not run concurrently.

What happens when the employee exhausts available PTO but needs to be out? The employee will receive whatever remaining paid benefit is available under FMLA+, up to the $200/$10,000 limits), but the employer and employee can agree that PTO can supplement the 2/3 pay amount of the FMLA+, so that the employee receives 100% of normal compensation.

The DOL then throws another new elective option in the mix by providing that an employee may elect but cannot be forced to accept to take EPSL or PTO for the first two weeks of unpaid FMLA+, but not both. If the employee has already used some or all available EPSL, the employee has the right to use any remaining PTO to cover the unpaid portion of FMLA+. Regardless of how much may be available to an employee, the DOL is clear that there is no obligation or right to fill the unpaid portion of FMLA+ with another paid leave.

The Interplay With State Leave Laws

FAQ 86 leaves open the question of where state leave laws (SPSL) fit in the FFCRA emergency leave provisions. If state or local leave laws provide for accrual of paid leave and for its use by an employee during a public health crisis, an employer is likely required to allow the employee to use the SPSL whenever the employee deems fit in lieu of the federal provisions. Thus, because the FFCRA leave scheme is supplemental in nature it is possible that an employee with accrued SPSL could request to have it run concurrently with the unpaid portion of the FFCRA, but it is unclear whether the employer could invoke the federal tax credit for the SPSL payments.

Enforcement

The last of the additional FAQs, number 88, is a timely reminder of how much money an employee can claim for a violation of the FFCRA. The measure of damages for non-compliance is not a minimum wage violation but the value of the benefit the employee would have received under the paid leave provision. FAQ 88 is particularly timely because it comes days after the end of the DOL's so-called 30-day non-enforcement period. The DOL stated that it would not enforce the FFCRA for 30-days while affected parties grappled with the terms of the new law. But that 30-day window did not start upon the effective date of the Act, April 1, but instead on March 18, when the Act became law. The DOL reminded us of that fact last week, with a press release announcing that enforcement would start as of April 18, and again today, April 22, 2020, when the DOL issued a press release

about its first enforcement action for an electrical contractor in Tucson, AZ, who had to pay $1600 to one employee for improper denial of EPSL.

Takeaways

The DOL's interpretation of the impact of the FFCRA on other forms of leave still leaves question marks but it is becoming clearer that the employee is provided with multiple options that will require significant explanation when they occur and that need to be reduced to writing, including via email, once agreed upon with the employer. Employers should not expect the emergency leave process to become more streamlined as a result of this guidance, nor the DOL to provide latitude for non-compliance.

Buchalter is committed to helping clients navigate through these challenging and rapidly changing times. We have attorneys experienced in adapting and navigating clients through these trying environments and are here to help however you need. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

Laurent Badoux
Labor & Employment
(480) 383-1867
lbadoux@buchalter.com

Arthur Chinski
Labor & Employment
(213) 891-5060
achinski@buchalter.com