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Labor and Employment Law

April 1 Update: U.S. Department of Labor Issues Regulations on FFCRA Sick/Family Leave Enhancements

On April 1, the US Department of Labor issued a new regulation to implement coronavirus-related paid sick and family leave benefits under the Families First Coronavirus Response Act (“FFCRA”). The law and regulations are effective today, April 1, and apply to employers with 1-500 employees. The regulation and other related information can be found at www.dol.gov/agencies/whd/pandemic.

The law requires employers with fewer than 500 workers to provide two weeks of paid sick leave to employees unable to work or telework due to specified Coronavirus-related issues. Those companies also must offer up to 10 weeks of partially paid leave (in addition to the two weeks of paid leave) under expanded Family and Medical Leave Act coverage to care for a minor child (or child who is 18 or older and incapable of self-care due to a disability) whose school or daycare is closed from the pandemic. Some employers with less than 50 employees may be able to qualify for an exemption to the requirements for childcare leave, and many healthcare providers and emergency responders will be excluded from the rules entirely. Also, when businesses temporarily close operations or furlough employees they will not be required to provide paid sick leave and family leave.

The leave expires on December 31, 2020.

The Department of Labor says that it will not take enforcement action for employers engaging in “good-faith” efforts to comply until April 18, but that does not mean that individual employees may not take action sooner. The Department also said that it will post a recorded webinar on Friday, April 3, 2020, to provide more information.

Of particular interest for Hawaii employers is language in the regulation stating that employees may be eligible for the paid sick leave at their full regular rate of pay if they cannot work due to one of five reasons, including that they are subject to a federal, state, or local quarantine or isolation order related to Covid-19. Quarantine or isolation orders triggering coverage include a “broad range of governmental orders” such as those that advise some or all citizens to shelter in place, stay home, quarantine, or “otherwise restrict their own mobility,” the rule says. However, employees are only eligible for the paid sick leave if they could perform work or telework were it not for the order. In an effort to clarify this situation, the regulations state that employees subject to such an order may **not** take paid sick leave if the employer “does not have work for the employee as a result of the order or other circumstances,” such as if a business closed or laid off workers “due to a downturn in business related to COVID-19,” or if a business was required to close by the order (e.g., a non-essential business or a business whose clientele is required to stay at home).

Other qualifying reasons for paid sick leave include that the worker has been advised by a health-care provider to self-quarantine due to Covid-19; is experiencing Covid-19 symptoms and seeking a diagnosis; is caring for someone who's been ordered to stay home by the government or a health-care provider; or is caring for a son or daughter—including a biological, adopted, or foster child, stepchild, a legal ward, or child of a person deemed the legal guardian—whose school or place of care is closed. This applies to children under 18 or people with disabilities who are older than 18 and incapable of self-care.

Regarding documentation for the leaves, the regulations state:

§ 826.100 Documentation of Need for Leave.

(a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA:

- (1) Employee's name;
- (2) Date(s) for which leave is requested;
- (3) Qualifying reason for the leave;
- (4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

(b) To take Paid Sick Leave for a qualifying COVID-19 related reason [for those under quarantine or isolation order], an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.

(c) To take Paid Sick Leave for a qualifying COVID-19 related reason [related to advice to self-quarantine] an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.

(d) To take Paid Sick Leave for a qualifying COVID-19 related reason [for COVID-19 symptoms and seeking a diagnosis] an Employee must additionally provide the Employer with either:

- (1) the name of the government entity that issued the Quarantine or Isolation Order to which the individual being cared for is subject;
- (2) The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.

(e) To take Paid Sick Leave for a qualifying COVID-19 related reason . . . or Expanded Family and Medical Leave, an Employee must additionally provide:

- (1) the name of the Son or Daughter being cared for;
- (2) the name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and
- (3) a representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

(f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

We continue to believe that further guidance or clarifications will be issued by the Department of Labor and the Internal Revenue Service regarding FFCRA leave issues and credits.