DOL Issues First Guidance on Families First Act

By: Debbie Sandler
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Yesterday, March 24, 2020, the Wage and Hour Division (WHD) of the Department of Labor (DOL) issued its first guidance for the new Families First Coronavirus Response Act (the Act). Among the details offered, the WHD states that the Act will go into effect on April 1, 2020. Most of the new guidance confirms initial interpretations of the statute, but there are also some additional clarifications.

Counting Toward 500

To determine if an employer has fewer than 500 employers (therefore, covered by the Act), companies must count full-time and part-time employees within the United States (which includes any territory or possession of the United States). This calculation includes employees on leave; temporary employees who are jointly employed by with another employer (regardless of whether the jointly-employed employees are maintained on only one employer's payroll); and day laborers supplied by a temporary agency. Importantly, independent contractors under the Fair Labor Standards Act (FLSA) do not count toward the 500-employee threshold.

For companies with fewer than 50 employees who believe that providing the paid leave (under the Act's expanded FMLA or paid sick leave) will jeopardize their ability to stay in business, the new guidance is not terribly helpful. It says that such business should "document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations." The DOL is clear that, for now, it does not want businesses to send it any of that documentation.

Counting Hours Worked by a Part-Time Employee

Under the Emergency Family and Medical Leave Expansion Act, a part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you should calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a 6-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Overtime

The Emergency Family and Medical Leave Expansion Act also requires an employer to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the rate of pay does not need to be at time-and-a-half, or any other premium rate.

The Emergency Paid Sick Leave Act also requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

If the employee's schedule varies from week to week, the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

Not All FMLA Is Paid

The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons.

Retroactivity

The guidance makes clear that the new requirements are not retroactive (*i.e.* do not impose any new obligations on employers until April 1, 2020).

Calculating 30 Days Tenure

An employee is considered to have been employed for at least 30 calendar days if they were on the company's payroll for the 30 calendar days immediately prior to the day leave would begin. For example, if an employee wants to take leave on April 1, 2020, they would need to have been on payroll as of March 2, 2020.

If an employee had been working as a temporary employee, and is later hired on a full time basis, any days previously worked as a temporary employee count toward this 30-day eligibility period.

We expect additional regulations and guidance to be forthcoming in the next several weeks.

If you have any questions, please contact Debbie Sandler (sandlerd@whiteandwilliams.com; 215.864.6203) or another member of the Labor and Employment Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.