

## Department of Labor Issues First Round of Guidance on Families First Coronavirus Response Act

**March 25, 2020**

### **Client Advisory**

March 25, 2020 by Leonardo Trivigno and Melissa J. Erwin

*This advisory supplements the firm's March 20, 2020 Client Advisory discussing the paid sick leave provisions of the Families First Act, which can be read [here](#).*

On March 24, 2020, the Department of Labor ("DOL") issued its "first round of public guidance" on the Emergency Paid Sick Leave provisions of the Families First Coronavirus Response Act ("Families First Act").<sup>[1]</sup> The Families First Act goes into effect on April 1, 2020 and applies to leave taken between April 1, 2020 and December 31, 2020. DOL's guidance provides useful information on, among other things, (i) the calculation of the 500-employee threshold, (ii) the calculation of an employee's "regular rate" of pay, and (iii) the calculation of the hours of paid leave a part-time employee is entitled to receive.

### **Calculation of the 500 Employee Threshold**

Employers with fewer than 500 employees must provide the paid sick leave mandated by the Families First Act. Pursuant to the guidance issued by the DOL, an employer has fewer than 500 employees if, at the time the employee's leave is to be taken, it employs fewer than 500 full-time and part-time employees within the United States, which includes the District of Columbia and any Territory or possession of the United States. In making this determination, the employer should include (i) employees on leave, (ii) temporary employees who are jointly employed by two employers (regardless of whether the jointly-employed employee is maintained on the employer's payroll), and (iii) day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act ("FLSA") are not considered employees for purposes of the 500-employee threshold. 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 joint employers, all of their common employees must be counted.

### **Calculation of an Employee's "Regular Rate" of Pay**

The Families First Act requires covered employers to pay paid sick leave at the employee's "regular rate" or the applicable minimum wage (whichever is higher), or at two-thirds of the employee's "regular rate" of pay or two-thirds of the applicable minimum wage if the employee takes paid sick leave to care for an individual who is subject to an order of quarantine or isolation, has been advised by a healthcare professional to self-quarantine, or is experiencing any other substantially-similar condition. Pursuant to the guidance issued by the DOL, an employee's "regular rate" of pay is the average of that employee's regular rate of pay over a period of up to six months prior to the date on which leave is taken. If the employee has worked for his or her current employer for less than six months, the regular rate used to calculate paid

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leave is the average of the employee's regular rate of pay for each week worked for the employee's current employer. If an employee is paid with commissions, tips, or piece rates, these wages must be incorporated into the calculation. An employer can also calculate the regular rate of pay for each employee by adding all compensation that is part of the regular rate over the period set forth above and divide that sum by all hours actually worked in the same period.

### **How to Calculate the Average Number of Hours for Part-Time Employees**

The Families First Act provides that a part-time employee is entitled to paid leave totaling his or her average number of work hours in a two-week period. Pursuant to the guidance issued by the DOL, a part-time employee is entitled to receive the number of hours that that employee is normally scheduled to work. If the normal scheduled hours are unknown or if they vary, a six-month average may be used to calculate the average daily hours. If an employee has been employed for less than six months, the employer should use the number of hours that the parties agreed upon when the employee was hired. If there was no such agreement, the employer 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.

### **Tax Credits**

The Families First Act provides a refundable tax credit for employers equal to 100% percent of qualified paid sick leave wages required to be paid. Qualifying wages are those required to be paid to employees who take leave under the Families First Act for a qualifying reason, up to the per diem and aggregate and payment caps. Tax credits also extend to the amounts paid or incurred to extend health insurance coverage.

### **Answers to Common Questions**

*Can employees take more than 80 hours of paid sick leave? For example, can an employee take 80 hours of paid sick leave at their regular rate of pay because the employee has been advised to self-quarantine, then take an additional 80 hours of paid sick leave at two-thirds pay to care for the employee's child who is experiencing symptoms of COVID-19 and awaiting a diagnosis?*

No, the Families First Act only allows employees to take up to 80 hours total of paid sick leave for any combination of qualifying reasons.

*Can an employee combine paid sick leave and the expanded family and medical leave provided by the Families First Act?*

Yes, an employee may take both paid sick leave and expanded family and medical leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. Under the Families First Act employees are eligible for up to twelve weeks of expanded family and medical leave, the first ten workdays of which are unpaid and the following ten weeks are paid at two-thirds of the employee's regular rate of pay. An employee may use Families First Act paid sick leave to cover the first ten workdays of expanded family and medical leave (unless the employee elects to use existing vacation, personal, or medical or sick leave under your employer's policy). After the first ten workdays have elapsed, an employee will receive two-thirds of his or her regular rate of pay for the hours he or she would have been scheduled to work in the subsequent ten weeks, up to \$200 per day and \$12,000 over the aggregate twelve-week period.

*Can an employer require employees to any existing accrued paid leave before using emergency paid sick leave under the Families First Act?*

No, emergency paid sick leave under the Families First Act is sick leave provided to employees on top of accrued paid leave that they are entitled to under their employer's existing policy. Additionally, the Families First Act prohibits employers from altering their current policies to reduce the amount of paid sick leave employees are entitled to as a result of the Families First Act.

### **Conclusion**

The DOL is expected to issue regulations in April 2020. Given the rapid developments and the ever-evolving legal landscape, including the forthcoming DOL regulations, organizations are encouraged to consult legal counsel to assist in assessing the applicability of the various statutes and regulations and in evaluating compliance. The Carter Ledyard team is monitoring developments in this area and will issue updates as the situation evolves.

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[1] The DOL guidance is available at <https://www.dol.gov/newsroom/releases/whd/whd20200324>. The DOL also issued a Factsheet for Employers (available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>), a Factsheet for Employees (available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>) and a Questions and Answers sheet (available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>).

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*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, [boxer@clm.com](mailto:boxer@clm.com)), **Judith A. Lockhart** (212-238-8603, [lockhart@clm.com](mailto:lockhart@clm.com)), **Bryan J. Hall** (212-238-8894, [hall@clm.com](mailto:hall@clm.com)), **Alexander G. Malyshev** (212-238-8618, [malyshev@clm.com](mailto:malyshev@clm.com)), **Melissa J. Erwin** (212-238-8622, [erwin@clm.com](mailto:erwin@clm.com)), and **Leonardo Trivigno** (212-238-8724, [trivigno@clm.com](mailto:trivigno@clm.com)). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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