

7 Takeaways From Labor Dept.'s COVID-19 Paid Leave Rule

By **Vin Gurrieri**

Law360 (April 8, 2020, 11:35 PM EDT) -- The U.S. Department of Labor has moved quickly to implement new emergency paid sick leave laws, but the speed by which the new federal mandates were put in place may leave employers struggling to comply.

The Families First Coronavirus Response Act is one of several legislative packages that Congress passed in response to the health and economic calamities caused by the COVID-19 pandemic. The law created the first-ever federal mandate that employers with fewer than 500 employees provide workers with short-term paid sick time for various reasons tied to COVID-19, and long-term paid leave to care for kids whose schools or childcare facilities are closed.

On April 1, the day the law took effect, the DOL issued a lengthy "temporary rule" that fleshed out various aspects of the law. The rule also took effect on April 1 and expires at the end of the year. The Labor Department's regulation codified and expanded upon several tranches of guidance that the agency issued in the weeks after the law was signed by President Donald Trump, including an expanding Q&A document that tackles key questions about the law as they came up.

Jennifer Baldocchi, a partner at Paul Hastings LLP, said that from a high-level standpoint employers are struggling to figure out the new regulations.

"There's a lot of information coming out from the government very quickly and ... it's a matter of trying to understand what the government is trying to do, understand what the rights and the obligations are and follow those rules as closely as we can," Baldocchi said. "It's a lot of information, and everybody's doing their best to process it and do the right thing under difficult circumstances."

Emergency Measures

Under the FFCRA, employers with 500 or fewer workers must provide them with up to two weeks of sick leave at full pay up to a \$511-per-day cap if they're directly affected by COVID-19, and at partial pay up to \$200 a day to care for affected family members.

The law lays out six "qualifying reasons" that let workers use the two-week paid sick leave benefit, including if they can't work because of a quarantine or isolation order or have COVID-19 symptoms and are seeking a diagnosis.

The law also amends the Family and Medical Leave Act to provide workers with up to 10 weeks off at partial pay up to \$200 per day to care for children whose schools or childcare centers have closed due to

the virus, after two unpaid weeks. Employers covered by the law can seek reimbursement of any qualifying FFCRA leave through tax credits.

The existing FMLA allows eligible employees to take up to 12 weeks of job-protected, unpaid time off over a yearlong period for a variety of family and medical reasons, including if a worker has a serious health condition that prevents them from performing key parts of their job or if they need to take care of a sick family member. The law applies to all public agency employers and private companies with more than 50 employees.

Under the FFCRA, businesses with fewer than 50 employees can be exempted from having to provide leave to workers whose kids' schools or child care providers are closed because of COVID-19, a carve-out that depends on the extent to which workers' absences would disrupt companies' operations.

Chai Feldblum, a former EEOC commissioner who now practices at Morgan Lewis & Bockius LLP, said that it was difficult for practitioners at first to advise clients about the law since their were portions of the statute that "were just not particularly clear," but that the DOL's rule was "very important for a number of reasons."

"We all know how quickly this law came together," Feldblum said. "When that happens there are items that are just not addressed in the statute itself, and one absolutely needs a federal agency like DOL to fill in the gaps and that's their job."

Important Clarifications

Among them, Feldblum said the DOL's rule made several important clarifications, including that the FFCRA's 10-day emergency paid sick leave allotment could be taken on top of any existing paid leave that an employer already provides and that employees can use existing paid leave to top off the amount they are paid under the new law.

"Those caps are very low for some employees, and so it is to the mutual advantage of the employee ... to make an agreement for higher pay," Feldblum said. "So here's an example of something where the regulated community, the employers subject to this law, absolutely needed DOL guidance. They got that guidance initially in the FAQs, but they have it clearly set out in the regulation with more context around it, which helps."

Additionally, even though the DOL's rule didn't go through a period of public comment, Feldblum said it is important procedurally because it gets more deference from courts than a FAQ guidance document from the agency would.

'Policy' Decisions by DOL

In addition to clarifying certain details about the FFCRA, the DOL made what Feldblum says were essentially "policy decisions" regarding areas of the law that could reasonably be interpreted in different ways.

In some instances, the DOL interpreted the FFCRA in ways that were broad and in others more narrowly. One example of an expansive interpretation is in the definition of children who entitle workers to leave, she said.

While the statute says that people are eligible if they have to be home to care for a child who is under 18 years old because the child's school or child care provider is shuttered due to COVID-19, the DOL in

its regulation said the law can also cover children who are over 18 but have a physical or mental disability that requires care that isn't available because of COVID-19 related shutdowns.

"The regulation says, 'Yeah, it seems to be pretty plain language the child has to be under 18,' but in order to carry out the purpose of the law, they expanded it," Feldblum said.

On the flip side, while the law itself says that workers can qualify for sick leave to take care of an individual who is affected by COVID-19, Feldblum noted that the DOL's regulation "pulls that back to just a family member, someone residing in the same household, or someone else with that level of personal relationship that there would be an expectation that the employee would care for that individual."

Of that portion of the DOL's rule, Barnes & Thornburg LLP partner Scott Witlin offered a similar outlook.

"The language is fairly broad in the statute," he said. "The DOL has tightened it up somewhat to require that there be some personal relationship between the employees and the individual."

Eligibility 'Surprise' for Workers

In its guidance, the DOL has said that workers won't be able to avail themselves of any of the leave options made available in the FFCRA during any period where their employers are closed, whether for lack of business or because of an order by public officials. But workers in those situations can potentially claim unemployment benefits, according to the agency.

If a business remains open but furloughs workers, those individuals similarly won't be entitled to leave under the FFCRA but also can seek unemployment.

Carrie Hoffman of Foley & Lardner LLP said that eligibility criteria might come as a "surprise to individuals who thought they were going to have job-protected leave," potentially leaving it to employers to have to break the bad news.

"The issue as you read through the regs, and even frankly the previous guidance, is that if your worksite is closed down, meaning you don't have work available, then people aren't eligible for this," Hoffman said. "Meaning 'it's OK if I can't come to work, but there has to be work available for me to be eligible for the benefit under Families First.' That I guess was surprising and has been surprising to numerous of my clients. ... I don't think individuals understand that, and it's leaving HR folks with a lot of explanation to provide."

Workers Might Be Short on FMLA Time

Hoffman also said that it's surprising that the DOL adopted the position that the emergency FMLA leave isn't separate from the 12 weeks of FMLA time workers usually get under normal circumstances. So, if a worker took FMLA leave for, say, surgery before the pandemic struck, that time would count against the amount of leave they are entitled to because of COVID-19.

"That's a difficult thing again to communicate because this wasn't planned," Hoffman said. "So if you're an employee who's already taken advantage of FMLA for whatever reason, you're not going to then be able to take [expanded] FMLA, which is paid."

If employees who are short on FMLA time ask their employers for time off due to child care issues during the pandemic, Hoffman said some of her clients have resigned themselves to potentially just

granting them expanded FMLA anyway without being able to later ask the federal government for tax credit reimbursement for it, noting that it might be a "tough sell" from an employee relations point of view if an employee who isn't getting paid because of child care problems sees a colleague in a similar situation getting paid.

But other businesses may not be able to afford that and may take the position that a worker who has exhausted their FMLA leave doesn't get any more, with Hoffman saying it'll be a business-by-business assessment for how those situations will be handled.

Witlin raised a similar concern, saying the DOL's rule and guidance "don't seem to contemplate that the 12 weeks could have already been exhausted."

"The structure of the law seems to be that that 12 weeks is part of the same bucket of [FMLA] leave, but the regs don't speak to it in those terms," he said. "So that's a question I think that still needs to be answered."

Manageability Problem When Workers Return

Laura Lawless of Squire Patton Boggs LLP said one major issue she sees on the horizon is how the FFCRA's job restoration requirements will be interpreted by businesses when they don't know exactly what their workforce will look like in a few months when people start coming back from leave en masse.

"Those are definite hazards that I think are going to present tremendous problems and trip up a lot of employers as they deal with this," Lawless said.

Lawless noted that traditional issues employers face when it comes to restoring workers' jobs when they return from FMLA leave are "usually dealt with in the scenario of one or maybe a couple of people seeking FMLA leave at one time" and not a large chunk of the workforce.

"So it's much more manageable to have someone return to work after it's only been one or two people out at any given point in time," she said. "It's very different when you've got huge segments of the workforce that are all going to need to take time off to attend to child care issues."

Intermittent Leave Will Remain Tricky

Another aspect of the new law is that it allows workers under certain circumstances and by agreement with their employers to take intermittent leave, or leave for short periods. The DOL's rule explained that employers can make workers take accrued vacation days or other paid time off at the same time they take leave to care for a child.

The issue is one that has long befuddled employers when it has come up in the traditional FMLA context, and possibly even more so now, according to Denise Giraudo, a partner at Sheppard Mullin Richter & Hampton LLP.

"The ability to take intermittent leave under the FFCRA does pose the same issues that employers face with the intermittent leave under the FMLA generally, and it may be a little bit more amplified in the COVID-19 time," Giraudo said.

"For employees of essential businesses that are still open, predictability is of the utmost importance during these times or valued the most because they need to keep the doors open," Giraudo said. "So I

think it's going to present the same challenges, perhaps on a little bit more of an amplified level, because we are not only in a stressful environment but the need for a workforce and a healthy workforce that is able to come to work on a more predictable basis is needed more than ever at this point."

--Additional reporting by Braden Campbell. Editing by Emily Kokoll and Brian Baresch.

Stay tuned tomorrow for part two of this series looking at the FFCRA from the plaintiffs' bar's perspective.

--Clarification: This story was updated to better describe the FFCRA's requirements.