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Department of Labor Issues Clarifications on Families First Coronavirus Response Act

By Anthony Zaller on March 24, 2020

The Families First Cornoavirus Response Act signed by President Trump last week on March 19, 2020 (click here for a detailed analysis on the law) tasked the Department of Labor with issuing regulations clarifying the parameters of the new law. Today, March 24, 2020, the Department of Labor provided its initial guidance on some common questions under the FFCRA:

1. The FFCRA is effective April 1, 2020.

2. Which workers count towards the 500-employee threshold?

The DOL states that employers should count the following workers to determine if they have 500 or more employees to be exempt from the law:

- Employees on leave
- Temporary employees who are jointly employed with another employer (regardless of whether the jointly-employed employees are maintained on only one or the other employer's payroll)
- Day laborers supplied by a temporary agency

Independent contractors who meet the classification under the FLSA are not considered employees for purposes of the 500-employee threshold.

3. How about separate companies, when will they be considered joint employers under the FFCRA?

The DOL provides the following explanation:

> **Typically, 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 found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion**

Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

4. How do companies with fewer than 50 employees qualify for an exemption from the law?

This is still a bit uncertain. The DOL instructs employers to "document why your business with fewer than 50 employees meets the criteria set forth by the Department." However, further details about the exemptions will be provided in forthcoming regulations. Currently, the DOL does not want any employers sending materials seeking this exemption.

Hopefully we will have further clarifying regulations published by the DOL this week.

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