

UPDATE | LABOR DEPARTMENT ISSUES BRIEF GUIDANCE ON FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On March 24, 2020, the U.S. Department of Labor (“DOL”) issued an initial and informal set of “Questions and Answers” (“Q&A’s”) to assist employers in complying with the recently enacted Families First Coronavirus Response Act (“FFCRA”). Below is a short summary of a few of the answers provided:

EFFECTIVE DATE: Most notably, the Q&A guidance announced that the leave provisions become effective April 1, 2020 – not April 2 as originally expected – and expire on December 31, 2020.

500 EMPLOYEE THRESHOLD: The Q&A’s also direct that the number of employees should be measured on the date the employee’s leave is to be taken and provides guidance on which individuals should be counted as “employees:”

You have fewer than 500 employees if, at the time your employee’s leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include –

- employees on leave;
- temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer’s payroll); and
- day laborers supplied by a temporary agency (regardless of whether you are 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), rather than employees, are not considered employees for purposes of the 500-employee threshold.

This could present a challenge for an employer whose headcount fluctuates above and below 500 during the period employees are seeking leave under the statute.

BUSINESSES WITH FEWER THAN 50 EMPLOYEES: The FFCRA provides that businesses with fewer than 50 employees may be able to obtain an exemption when offering these leave benefits would jeopardize the viability of the business. The Q&A’s do not offer any guidance on what this means, but advises employers to document why they believe the exemption applies. The DOL indicates that detailed regulations will be forthcoming.

PART-TIME EMPLOYEES: Under the law, part-time employees are entitled to leave for their average number of work hours in a two-week period. To determine this number, the DOL’s guidance requires employers to 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, the DOL's guidance allows employers to use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, the DOL instructs employers to use the number of hours that the company and employee agreed that the employee would work upon hiring. Finally, if there is no such agreement, an 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 employment.

RETROACTIVITY: The Q&A guidance clarifies that the benefits provided under the FFCRA are not retroactive and that paid leave provided prior to the April 1, 2020, effective date should not be counted towards an employees' FFCRA paid sick leave entitlement.

LEAVE RELATED TO SCHOOL CLOSURES: Many have questioned whether employees would receive two paid weeks of EPSLA which overlap two unpaid weeks of EFMLA, followed by ten weeks of paid EFMLA. The DOL has opined that if the employees leave involves caring for a child when their school or place of care is closed, then they are entitled to "both types of leave, but only for a total of twelve weeks of paid leave." The DOL indicated that the employee may utilize the EPSLA for the first ten workdays which are otherwise unpaid under the EFMLA. After the first ten workdays have elapsed, employee are entitled to ten weeks under the EFMLA.

The DOL will be generating more formal FFCRA guidance and regulations in the near future. Bodman will continue to monitor the rapidly developing COVID-19 situation and provide updates as they become available. Please contact [Brent Scott](#) or any other member of Bodman's Workplace Law Group if we can be of any assistance during these difficult times.

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