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# U.S. COVID-19: NEW FFCRA Q&A – KEY TAKEAWAYS REGARDING THE "NEED" FOR LEAVE, JOINT EMPLOYERS AND DOMESTIC WORKERS

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The federal Department of Labor ("DOL") is closing in on 100 informal "questions and answers" (the "Q&A") relating to the Families First Coronavirus Response Act ("FFCRA"), having issued Q&A #s 89-93. The new Q&A address steps employers may take when determining whether employees truly "need" FFCRA leave; issues relating to domestic workers; and a reminder for joint employers that prohibitions on adverse action, interference and retaliation may apply even to employers who are not covered by the FFCRA.

## DETERMINING WHETHER EMPLOYEES HAVE A QUALIFYING REASON FOR LEAVE

Three of the five new Q&A provide critical guidance for employers on permissible questions and documentation requirements to ensure that leave is being taken in appropriate circumstances.

In the first Q&A (# 91), the DOL posits a factual scenario in which an employee with children has been teleworking productively for several weeks despite school closings, but then requests FFCRA leave. The hypothetical employer wonders: ***"Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?"*** The DOL responds affirmatively, indicating that an employee may be asked "to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work."

Employers should "exercise caution" in this area, however, because, according to the DOL, the more questions asked, the greater "the likelihood that any decision denying leave based on that information is a prohibited act." There are many reasons why an employee may not have initially needed leave to provide child care, but later develops this need; employers should not wade too far into judging whether an employee truly "needs" the leave.

Despite this cautionary reminder, the DOL adds this important tip: "This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child." Employers thus may feel

confident, when questionable circumstances arise, in probing – again, to the extent necessary – to ensure that an employee's representations regarding the need for, and use of, leave are truthful.

In the second Q&A (# 92), an employee who "claims" to have COVID-19 symptoms seeks leave to obtain a medical diagnosis. The hypothetical employer asks: **"What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?"** The DOL indicates that employers are limited to a minimal documentation requirement given the goal of slowing the spread of COVID-19: "you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment." Formal certification along the lines of traditional FMLA health care provider certifications may not be required, unless traditional FMLA is requested. And, where an employee is using paid leave under an employer's paid leave policies concurrently with Paid Sick Leave under the FFCRA, employers may still apply "any documentation requirements relevant to that leave[.]"

In the third Q&A (# 93), the DOL takes on the issue of summer break from school. Here, a hypothetical employee asks: **"May I take paid sick leave or expanded family and medical leave to care for my children because their school is closed for summer vacation?"** "No," says the DOL, while providing a key "but": **"**the employee may be able to take leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason" and the employee is unable to work due to child care responsibilities.

Reading Q&A # 91 and # 93 together, it seems likely that employers can ask employees to explain why their anticipated summer child care provider is not available. However, a simple response indicating that this is due to concerns with COVID-19 (e.g., the park district isn't running summer day camp; the child's grandparent who was going to provide the child care is at high risk for contracting COVID-19 so we must social distance; etc.) will generally be sufficient. Additional probing, such as asking an employee whether all potential child care options have been exhausted, would likely go too far.

## KEY TAKEAWAYS AND BCLP RECOMMENDATIONS:

- Employers should take care in identifying the type(s) of leave an employee is seeking/using – FFCRA? FMLA? Paid leave under an employer policy? – and apply the appropriate documentation requirements based on the type(s) of leave.

- For FFCRA leave:
  - Employers may (and should) require employees to provide the basic information necessary for purposes of determining whether a qualifying reason for leave exists and supporting a request for tax credits.

- Employers may (and should) require employees to submit a written statement – preferably signed and dated by the employee – indicating that the employee is unable to work (including telework) due to the qualifying reason.
- For even more protection, employers should include in any FFCRA policy and on any "Request for FFCRA Leave" form a reminder to employees that: (1) they are obligated to be truthful with respect to both their request for leave and their use of leave, and (2) the submission of false information in support of a request for leave or the misuse of leave is grounds for discipline, up to and including termination.
- When employers have a legitimate reason to question the validity of the request for leave, they may ask follow-up questions, but should exercise caution and only inquire to the extent needed to make a determination.
- Employers may undertake appropriate investigations if they believe an employee is misusing FFCRA leave. However, employers should avoid assumptions about an employee's conduct; it is generally best to allow an employee the opportunity to explain any circumstances that appear questionable.

## LEAVE FOR DOMESTIC WORKERS

Q&A # 89 focuses on workers who perform certain domestic tasks, such as landscaping, cleaning and child care, at an individual's home. According to the DOL, the individual will be required to provide FFCRA leave to a domestic worker only if the individual is the worker's "employer" under the Fair Labor Standards Act ("FLSA"), which typically applies only if the worker is "economically dependent" on the individual for the opportunity to work. Per the DOL, as a general "rule of thumb," if a worker is not an individual's employee for federal tax purposes, then the individual would likely not be required to provide FFCRA leave.

## CONSIDERATIONS FOR TEMPORARY PLACEMENT AGENCIES AND "SECOND BUSINESSES"

Finally, Q&A # 90 poses the question of what rights apply to an individual who is employed by a temporary placement agency which has over 500 employees, and is placed at a "second business" which has fewer than 500 employees.

Because the temporary agency is not covered by the FFCRA, it is not obligated to provide leave to the individual. However, the second business, which is covered by the FFCRA, must provide leave if it is the individual's "joint employer." This will apply if the second business "directly or indirectly exercises significant control over the terms and conditions of your work." Sufficient "control" may exist if the second employer "exercises the power to hire or fire you, supervises and controls your schedule or conditions of employment, determines your rate and method of pay, and maintains your

employment records. The weight given to each factor depends on how it does or does not suggest control in a particular case."

The DOL notes that if the second business must provide leave to the individual, **then, even though the temporary placement agency is not otherwise covered by the FFCRA, it is still prohibited from**: (a) taking adverse action against the employee for taking Paid Sick Leave; and (b) interfering with the employee's ability to take Expanded FMLA leave, or retaliating against the employee for doing so.

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