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US COVID-19: NEW FFCRA Q&A – RETURN TO WORK ISSUES

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On July 20, as part of a barrage of new guidance relating to the Families First Coronavirus Response Act ("FFCRA"), Family and Medical Leave Act ("FMLA"), and Fair Labor Standards Act ("FLSA"), the federal Department of Labor ("DOL") issued four new FFCRA Q&As relating to "return to work" issues.

Three of the new Q&As (95-97) explain the **interconnection between FFCRA leave and furlough**:

- Hours of FFCRA leave taken prior to furlough count against an employee's total FFCRA leave entitlement (i.e., the fact that an employee took FFCRA leave and subsequently was furloughed does not mean that the employee's FFCRA entitlement starts over upon return to work);
- Hours/weeks on furlough do not count against an employee's FFCRA entitlement;
- Post-furlough requests for FFCRA leave should be treated as "new" requests for FFCRA leave (i.e., employees should be required to provide appropriate documentation in support of post-furlough leave requests); and
- Employers may not make furlough decisions (such as which employees to recall from furlough) based on a desire to avoid providing FFCRA leave.

The remaining new Q&A (94) relates to **the "reinstatement" obligation under the FFCRA**. While recognizing that employees who take protected FFCRA leave are, generally, entitled to be restored to their same or equivalent position when returning from leave, the DOL clarifies that employers may take certain steps to reduce potential exposure of employees in the workplace.

Specifically, in regards to an employee who took Paid Sick Leave under the FFCRA to care for a family member who was advised to self-quarantine due to symptoms of COVID-19, and who was thus potentially exposed to COVID-19, the employer may: (1) require the employee to temporarily work from home or reduce interaction with co-workers; and (2) require the employee to comply with non-discriminatory return to work job requirements (i.e., rules that apply to all employees regardless of whether they have taken FFCRA leave).

Thus, for example, if the employer has a generally-applicable policy that any employee who has interacted with an individual who has COVID-19 must either telework or take leave until he or she has personally tested negative for COVID-19, the employer may require an employee who took FFCRA leave to care for a sick family member to comply with that policy before returning from leave.

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