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April 8, 2020

*Via Online Filing*

Ms. Amy DeBisschop  
Director, Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: **Families First Coronavirus Response Act**

Dear Ms. DeBisschop:

I am the National Practice Group Leader for the Labor and Employment Group at Ballard Spahr LLP. Our attorneys are closely following workplace legal developments related to COVID-19, including the Department's regulations and Q&A under the Families First Coronavirus Response Act ("FFCRA"). I am writing to seek clarification about certain provisions of the FFCRA regulations and FFCRA Questions and Answers ("Q&A") causing confusion for covered employers, many of which are attempting to design, adopt, and implement FFCRA leave policies.

The three issues are as follows:

**1. Concurrent Usage of Expanded Family and Medical Leave Act Leave ("EFMLA") with other forms of Paid Time Off ("PTO")**

Please clarify the regulations with respect to concurrent usage of PTO, such as employer-sponsored leave, and EFMLA Leave. The regulation at Section 826.70(f) provides:

Because this period of Expanded Family and Medical Leave is not unpaid, the FMLA provision for substitution of the Employee's accrued paid leave is inapplicable, and neither the Eligible Employee nor the Employer may require the substitution of paid leave.

However, the regulations in two other locations allow concurrent usage of EFMLA. Section 826.23(c) states:

Section 2612(d)(2)(A) of the FMLA shall be applied, provided however, that the Eligible Employee may elect, and the Employer may require the Eligible Employee, to use only leave that would be available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's existing policies, such as personal leave or paid time off. Any leave that an Eligible Employee elects to use or that an Employer requires the Eligible Employee to use would run concurrently with Expanded Family and Medical Leave taken under this section.

And, Section 826.160(c)(1) similarly states:

Consistent with section 102(d)(2)(B) of the FMLA, 29 U.S.C. 2612(d)(2)(B), an Eligible Employee may elect to use, or an Employer may require that an Eligible Employee use, provided or accrued leave available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave.

These two latter provisions comport with the Department's Q&As 31 and 33, but appear to conflict directly with Section 826.70(f). It would be helpful to know which regulatory provision(s) is the controlling principle on concurrent usage of EFMLA Leave with PTO.

## **2. Concurrent Usage of Emergency Paid Sick Leave with Employer-Provided PTO Leave**

The DOL Q&As contain what appears to be conflicting information on when an employee is permitted to use employer-provided PTO time concurrently with emergency paid sick leave. On the one hand, Q&As 31 and 32 seem to state that paid sick leave under the FFCRA only may be used concurrently with PTO if the employer agrees to allow the employee to supplement the FFCRA leave with preexisting PTO (*i.e.* yielding normal earnings for the days in question).

On the other hand, Q&As 7 and 10 suggest that the employee may opt to use PTO concurrently with emergency paid sick leave. Q&A 7 states that an employee "may substitute any accrued vacation leave, personal leave, or medical or sick leave" under the employer's policies. Q&A 10 also refers to the fact that an employee may "elect to use existing vacation, personal, or medical or sick leave under [the] employer's policy."

Please clarify whether an employee may opt for (or an employer may require) concurrent usage of PTO with emergency paid sick leave and, if so, under what circumstances.

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### **3. FFCRA Leave for Employees of Staffing Agencies**

Q&As 38 and 74 discuss joint employment situations involving staffing agencies, but leave unanswered important questions about which entity in a joint employment situation is responsible for providing FFCRA leave and which entity may take the payroll tax credits.

Q&A 38 explains that joint employees are eligible for FFCRA leave. Joint employees include those working on the host employer's site temporarily and/or through a temporary agency. Q&A 74 states that, regardless how the agency classifies or counts internal or staffed workers, it must provide paid sick leave and EFMLA to workers who are the agency's "employees" for purposes of the emergency paid sick leave and the EFMLA Leave.

Assuming that the host employer and staffing agency are joint employers of temporary employees, please clarify which entity, if either, is responsible for providing FFCRA leave to these workers. In these situations, it is common for the staffing agency to maintain payroll and benefits for the temporary employees, not the host employer which pays a fee to the agency for the employee's services. These arrangements are frequently the subject of a contract between the two entities, which will have pre-dated the FFCRA's passage.

If both the host employer and staffing agency are covered employers under FFCRA, then both could be responsible and could contractually allocate the responsibility between them. However, if only one entity is a covered employer, the answer is unclear. For example, if the host employer is covered, but the staffing agency is not, must the host employer provide FFCRA leave to the temporary employees? If so, how does the host employer track the "leave wages" and receive the payroll credit if the agency handles payroll, provides the wages, pays for the health care coverage, etc.? Conversely, if the agency is covered but the host employer is not, must the host employer provide FFCRA leave to the temporary employees? If so, must the host employer pay the agency for leave time incurred, even though the host employer is not covered by the FFCRA? Again, how does the host employer qualify for the payroll tax credits if it is not a covered employer?

Thank you for your assistance in resolving these questions.

Very truly yours,



Brian D. Pedrow