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MEMORANDUM

TO: Employer Clients
FROM: MPL Law Firm, LLP
DATE: April 9, 2020
RE: DOL Guidance – COVID-19 Paid Leave Provisions

This article provides updates from prior articles posted regarding the Families First Coronavirus Response Act signed into law on March 18, 2020 (the “*Act*”). Per the Act, additional paid leave were required for employers under the updated Family and Medical Leave Act (the “*FMLA*”) and the Emergency Paid Sick Leave Act (the “*EPSLA*”). The IRS provided a guidance memo related to the tax credits. The Department of Labor (“*DOL*”) has also issued guidance on some specifics and exemptions of the respective paid leave programs.

The EPSLA and the updated FMLA took effect April 1st. The DOL guidance provided some clarification on employer exemptions to the requirements to provide employees with leave for reasons related to COVID-19. The temporary regulations clarifyied the exemptions for small businesses with fewer than 50 employees and also clarified that in order for eligible employees to request the leave under the updated FMLA or EPSLA, they must be working in some capacity.

Most private businesses with fewer than 500 employees are required to [comply with the requirements](#) to provide the emergency paid leave and expanded FMLA to eligible employees. There are two optional exemptions that the DOL further clarified April 1st through the [temporary regulations](#): (1) the exemption for businesses with fewer than 50 employees and (2) the exemption for health care providers, which is specifically defined and, at this time, does not include dental offices. CDA is seeking further insight from the DOL on the dentist exemption.

Small Business Exemption

According to the regulations, employers can consider claiming the small-business exemption from complying with the EPSLA an FMLA if they determine that one of the following apply:

- The provision of paid sick leave or expanded FMLA would cause the business’s expenses and financial obligations to exceed available business revenues and cause the business to cease operating at a minimal capacity; or

- The absence of the employee or employees requesting paid sick leave or expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or
- There are no sufficient workers who are able, willing and qualified to perform, when and where needed, the labor or services of the employee or employees requesting paid sick leave or expanded FMLA, and the labor or services are needed for the small business to operate at minimal capacity.

Any exemptions should be carefully considered. Employers who are considering the small-business exemption may find it difficult to “prove” that providing this emergency leave or paid sick leave would jeopardize the viability of the business given that the wages provided will be refunded dollar for dollar as a tax credit. Businesses must currently be operating at a minimal capacity to claim the small-business exemption. Many businesses in Pennsylvania have closed temporarily to comply with the statewide stay-at-home order and therefore will not be able to claim the small-business exemption.

Documentation required for employer reimbursement

Employers who are required to comply with the emergency leave will qualify for a dollar-for-dollar reimbursement through tax credits for all qualifying wages (including health care premiums) paid to an employee who takes leave under the act for a qualifying reason up to the appropriate per diem and aggregate payment caps. In order to obtain that reimbursement, employers must obtain from employees any documentation related to the requested leave, such as a notice of school closure from the school administration, a doctor’s note or communication from a childcare provider. Read the labor department’s [temporary regulations](#) and [latest Q&A](#) for complete details. The DOL published a [required workplace notice](#) and also has a [fact sheet for employers](#) that covers qualifying reasons for leave, duration of leave, calculation of pay and more.

While our office will remain closed pursuant to Governor Wolf’s shutdown order, our attorneys will remain available via cell phone and email. If you have any questions, please contact your MPL attorney to discuss the above, or other questions about the effect of COVID-19 on your operations. *Email contacts: Andy Miller (amiller@mpl-law.com); James Sanders (jsanders@mpl-law.com); and Christian Miller (cmiller@mpl-law.com).*