

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

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March 23, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Secretary Scalia:

As our nation's employers do their part to reduce the spread of the coronavirus, there is an acute need for guidance on how to implement new requirements imposed on them by the Families First Coronavirus Response Act (FFCRA). We look forward to the Wage and Hour Division's upcoming regulations that, under the Act, will be issued in a direct to final manner consistent with the Administrative Procedure Act. To aid the Wage and Hour Division's process, below we submit some questions we have received from our members. These are grouped by questions that the WHD should be able to handle through guidance such as a series of FAQs, and questions that must be resolved through the upcoming rulemaking. To the extent possible we believe the WHD should use guidance which will allow information to be issued more quickly.

Key Questions from Our Members That Can Be Handled Through Guidance:

- How will the threshold 500 employees be counted, particularly with respect to subsidiaries or other business to business relationships?
- Relatedly, Fact Sheet #28 references joint employers for counting employees. How will joint employers be defined for FMLA purposes?
- At what point will the 500 employees be counted—some look back period, or at the time leave is requested?
- Can employers with more than 500 employees follow the traditional FMLA procedures in requiring employees to use other leave before taking FMLA leave?
- Will other provisions of the FMLA, not amended by the FFCRA, still be in place such as how intermittent leave can be used?
- If the employee has already taken FMLA leave will that amount of leave be replenished back to 10 weeks? Similarly, if an employee has already used employer provided paid sick leave, will that leave be replenished by the new requirements in the FFCRA?
- How will the new leave requirements work with state or local leave mandates? If an employer is already providing the amounts of paid leave specified in the FFCRA, will they

have to add the FFCRA amounts onto what they are already providing by law? If an employer is already providing two weeks of leave, on their own, will the emergency paid sick leave be in addition to that?

- If an employee takes FMLA leave for a purpose not related to COVID-19, does that reduce the amount of leave available for COVID-19 purposes?
- Will the new leave requirements apply to employees who are already on leave?
- How should employers determine if someone is “unable to telework?”
- What are the requirements to maintain paid health insurance for employees out of work?
- Can both parents working for same company take the emergency paid FMLA leave to care for the same child whose school has been closed or for whom childcare is no longer available?
- Can employers ask for medical documentation for someone taking paid sick leave?
- How should employers determine wages for someone who is paid the tipped minimum wage?
- Can employees be laid off prior to, or while using leave under the Act?
- Are individuals sent home on furlough eligible for the paid sick or family leave?

Key Questions that Need to be Addressed in the Upcoming Rulemaking

- How will small businesses demonstrate that complying with the paid leave requirements will jeopardize the viability of the business? Can the Department provide a blanket exemption based only on an employer having fewer than 50 employees? These employers will never have dealt with the FMLA so having to become familiar with it and providing paid leave will likely be enormously disruptive.
- Will small businesses be expected to start providing leave before being granted an exemption?
- How will health care provider be defined—broadly or narrowly? There are many different types of employees who could be considered under this term. The broader this term is defined, the more employees will not be eligible for these paid leave benefits.
- Will the exemption for employers with fewer than 50 employee be available to non-profits?

The questions above relate to Wage and Hour matters, but there are two other ways in which DOL can help, both of which are under the purview of the Employment and Training Administration (ETA). First, ETA should issue guidance clarifying that COVID-19 counts as an “unforeseen circumstance” for purposes of the WARN Act. And second, ETA should issue guidance stating that COVID-19 is considered a “natural disaster” for purposes of Disaster Unemployment Insurance. Without such a determination, the millions of Americans who work as independent contractors will have limited or no access to UI benefits.

The Chamber supported the FFCRA and believes providing paid leave to employees during this crisis is the right thing to do. We applaud the administration's efforts to put in place policies to reduce the spread of the Coronavirus and get on top of this problem as soon as possible. The sooner employers can understand clearly what is expected of them, the faster and more efficiently employers will be able to contribute to the overall effort.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley". The signature is fluid and cursive, with a large loop at the end.

Neil L. Bradley