Employers Must Ensure Compliance with the Families First Coronavirus Response Act as they Re-Open and Recall Employees from Furlough

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The U.S. Department of Labor recently issued new Questions and Answers regarding its interpretation of the Families First Coronavirus Response Act ("FFCRA").

In relevant part, the DOL made clear that if an employer is calling employees back from furlough, the employer may not use either (a) the fact that an employee requested leave under the FFCRA prior to the furlough; or (b) an assumption that an employee may request leave under the FFCRA if called back, in making the decision as to which employees to recall from furlough. Employers also may not use an assumption that a prospective employee may request leave under the FFCRA in determining whether or not to hire such prospective employee.

To illustrate, assume Employee A requested FFCRA leave when her daughter's school was closed in March 2020. Employee A was granted the leave request and was on leave until the employer conducted furloughs in May 2020. If the employer is bringing employees back from furlough, the employer cannot use the fact that Employee A was on leave at the time of furlough and/or the employer's assumption that Employee A may again request FFCRA leave in making the determination as to whether to call back Employee A from furlough.

The DOL's guidance also confirmed that an employee's entitlement to leave under the FFCRA does not "restart" when an employee is called back from furlough. For example, if an employee used 10 hours of Emergency Paid Sick Leave prior to the furlough, the employee is entitled to use the remaining 70 hours (for a qualifying reason) after being returned, but is not entitled to use 80 hours as if they were a new

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employee.

In addition, the time an employee spent furloughed does not count toward the employee's leave entitlement under the Emergency Family and Medical Leave Act. To illustrate, assume a full-time employee is entitled to 480 hours of EFMLA (40×12), used 100 hours of EFMLA leave prior to the furlough, and was then furloughed for 5 weeks (which would correlate to 200 hours). The 200 hours of furloughed time does not count against the employee's EFMLA entitlement. Accordingly, if/when the employee is recalled, the employee is entitled to use the remaining 380 hours of EFMLA (if qualified) upon his or her return.

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