

COVID-19 Update: Additional Guidance and Developments for Employers

As the COVID-19 pandemic and ensuing widespread shutdown of workplaces around the country continues (and for New Yorkers is expected to continue through at least May 15), government agencies have been busy issuing guidance relating to the many new laws that have been passed. To read our prior alerts relating to those new laws (including the Families First Coronavirus Response Act (“FFCRA”) and the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), please see our COVID-19 Resource Center (available [here](#)). Below, we kick off the week ahead by providing an update on several recent regulatory and other developments related to those laws that may be relevant for employers.

Updated Guidance on the Federal Pandemic Unemployment Compensation Program

On April 4, 2020, the U.S. Department of Labor (“DOL”) issued new [guidance](#) related to the CARES Act’s Federal Pandemic Unemployment Compensation (“FPUC”) program, which provides eligible individuals with \$600 per week on top of the weekly unemployment benefit that they already receive under existing state unemployment programs. This guidance provides two updates relevant to employers:

1. The guidance clarifies who is eligible for the benefit. Per the clarification, eligible employees include not only those who qualify under the newly formed Pandemic Emergency Unemployment Compensation and Pandemic Unemployment Assistance programs, but also those who qualify under certain existing federal-state programs that predate the CARES Act. Qualifying programs include the following:
 - Extended Benefits program;
 - Short-Time Compensation program;
 - Trade Readjustment Allowances program;
 - Disaster Unemployment Assistance program; and
 - Payments under the Self-Employment Assistance (SEA) program
2. The DOL guidance also instructs that states must issue payments of FPUC benefits as soon as administratively feasible. If a state is “unable to immediately pay benefits the week following the execution of the agreement with the DOL to operate the program,” then it “must provide retroactive payments to individuals eligible for FPUC for the weeks they would have been entitled.”

Employers who are faced with the difficult decision of having to furlough or lay off employees sometimes consider potential unemployment benefits (in particular the enhanced unemployment benefits available under the CARES Act) in determining any severance or transition package that they may offer to their employees. This guidance on retroactivity—which ensures that furloughed or laid-off employees will ultimately receive the maximum benefit even if payments are delayed—may be relevant to employers considering making bridge payments to furloughed or laid-off employees who are awaiting their first \$600 payment.

New York Attorney General Challenges FFCRA Implementing Regulations

On April 1, 2020, the DOL issued temporary regulations¹ to implement provisions of the FFCRA. On April 14, 2020, the New York State Attorney General (“NYAG”) filed a [lawsuit](#) seeking a declaratory judgment that the implementing regulations exceed the DOL’s authority and unlawfully restrict coronavirus-related paid sick leave. Should the NYAG prevail, employers may have to adjust their policies and practices in implementing leave benefits under the FFCRA to account for any changes to the DOL’s guidance that might result from this litigation.

The NYAG disputes the legality of several aspects of the implementing regulations:

- 1. Work Availability Exemption.** Under the temporary regulations, an employer’s determination that it does not have work for certain employees disqualifies those employees from taking expanded family and medical leave. In the complaint, NYAG argues that this “work availability requirement” has no statutory basis and “unlawfully authorizes employers to deny workers their statutory right” to leave under the FFCRA.
- 2. Health Care Providers Exemption.** The FFCRA provides exemptions to deny leave benefits to certain “health care providers,” which the DOL has defined broadly. NYAG argues the regulation should adopt the same, narrower definition of “health care provider” used in the FMLA, per Congress’s explicit direction. She further argues that the DOL regulations impermissibly expand the definition and by extension, the exemption, without identifying a statutory basis for doing so.
- 3. Documentation Requirements.** The NYAG argues that the DOL lacks authority under the FFCRA to condition an employee’s use of paid sick leave or emergency family leave on providing documentation to an employer.
- 4. Intermittent Leave.** The NYAG argues that the DOL lacks authority under the FFCRA to require employer consent before employees are able to take intermittent or partial-day leave (as opposed to taking the leave in “one continuous period”).

The NYAG filed a motion for summary judgment concurrently with its Complaint. We will closely monitor the progression of this case.

Updated Guidance from the DOL on OSHA Recording Requirements

On April 10, 2020, the DOL provided interim [guidance](#) for certain employers on their duties to record work-related occurrences of COVID-19. Under the guidance, only certain employers are required to record cases of COVID-19 infections that occur at work, including those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions. This subset of employers must follow the applicable OSHA (“Occupational Safety and Health Administration”) recording requirements with respect to any cases which are work-related.

Due to the difficulties of determining whether COVID-19 cases are work-related, the DOL has clarified that outside of the industries listed above, it will enforce recordkeeping requirements with respect to employers only where: (1) there is objective evidence that a case may be work-related (e.g., a number of cases have developed among workers who work closely together without an alternative explanation), and (2) the evidence was reasonably available to the employer, which is determined by reference to what information an employer learns directly from its employees, as well as information that an employer learns in the ordinary course of managing its business and employees. OSHA recordkeeping requirements apply only to employers who still have employees working on-site.

¹ See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020) (to be codified at 29 C.F.R. Part 826).

Employers ordinarily must record the employee's name and job title when recording workplace incidents in accordance with OSHA guidelines. However, because COVID-19 is categorized as an illness under OSHA, triggering confidentiality obligations, the employer must, upon an employee's request, omit an employee's name from any recordkeeping logs. Other applicable laws and regulations further require employers to strictly segregate any medical information it collects from employees from other personnel files.

FFCRA Employee Rights Posters Now Available in Different Languages

As a reminder, employers subject to the FFCRA must place FFCRA posters in a conspicuous place on their "premises." Given the current remote work environment, this requirement may be met by circulating the posters through email, direct mail, or posting the notice on an employee information website. The DOL has recently made the Employee Rights posters available in Chinese, Polish, Portuguese, Hmong, Korean, Russian, Spanish, Tagalog, Thai, and Vietnamese, in addition to English. Those posters can be found [here](#). While employers are not yet required to post the notice in other languages,² it may be best practice to do so, especially if the primary language of many employees is not English.

We will continue to closely monitor federal, state, and local guidance and requirements related to COVID-19 and the implementation of these complex new provisions.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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²Families First Coronavirus Response Act Notice – Frequently Asked Questions, Department of Labor, <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions> (last visited April 17, 2020).