



Arrow COVID-19 Communication

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ANALYSIS UPDATE ON COVID-19 & FFCRA

Friends and Clients:

Please find below our analysis of the initial multi-agency guidance on the FFCRA released late last Friday, 3/20, including the federal agencies' announcement of a non-enforcement position during the first 30 days of the FFCRA, provided an employer is attempting to comply with FFCRA in "good faith." Additionally, DOL released this afternoon its first round of employer guidance on FFCRA. Here is a link to that information page, which includes FAQs:

<https://www.dol.gov/agencies/whd/pandemic>

A few key items of note in the DOL guidance released today:

- DOL has confirmed that joint employer/integrated employer analysis will be used to determine whether an employer has greater than 500 employees and is therefore not subject to the requirements of FFCRA. In other words, commonly controlled businesses with some integration of operations may aggregate their employees for the purpose of claiming exemption from the FFCRA's application to employers with fewer than 500 employees.
- Although the FFCRA's paid sick leave benefit includes an eligibility provision for employees subject to a governmental (federal, state, or local) "quarantine" order, DOL is treating "isolation" orders as synonymous with "quarantine," despite very different definitions of those two terms in CDC guidelines. This suggests to us that DOL is taking the position that an employee's inability to work or telework due to a government isolation order will be sufficient to qualify for the benefit. On this basis, we think DOL is likely to conclude that a shelter-in-place order is also synonymous with a "quarantine" order. This is a significant development, because so far none of the federal, state, or local government orders have been "quarantine" orders as contemplated by the express language of FFCRA.
- DOL pledges to release a model employee notice for these benefits by tomorrow, 3/25, at which time it will be posted to the link provided above.
- Although the interplay of both the emergency FMLA and emergency paid sick leave provisions is addressed in the FAQs and guidance released today, DOL still has not addressed the interplay between emergency FMLA and traditional FMLA.
- We have seen various interpretations of the health care provider exclusion rules under FFCRA. It is our opinion that FFCRA does not exempt health care provider employers, but rather allows health care employers to exclude from FFCRA coverage certain "health care provider" employees as defined in the FMLA to include employees who are state licensed health professionals. Nothing in the FAQs addresses this issue at this time.

We will continue to keep you informed as further guidance is issued.