

COMPLIANCE ALERT

U.S. DEPARTMENT OF LABOR ANNOUNCES TEMPORARY FFCRA NON-ENFORCEMENT PERIOD

March 26, 2020

The U.S. Department of Labor (DOL) has issued Field Assistance Bulletin 2020-1 (FAB) to its Wage and Hour Division (WHD) field staff. The FAB advises that WHD should observe a temporary non-enforcement period for employer responsibilities under the Families First Coronavirus Response Act (FFCRA). The FAB does not delay the FFCRA's April 1, 2020, effective date; but it should give employers some peace of mind that inadvertent compliance failures in the short-term will not also lead to DOL penalties.

The FFCRA became law on March 18, 2020, and generally requires employers with fewer than 500 employees to pay emergency sick leave and expanded emergency FMLA leave to qualified employees beginning April 1, 2020. The FFCRA has employers scrambling to digest and understand complicated new rules with limited and rapidly changing guidance.

Thus, to help public and private employers who are covered by the FFCRA to get compliant with its requirements, WHD will observe a temporary period of non-enforcement from March 18 through April 17, 2020. During this period the DOL will not bring enforcement actions against any public or private employer for violations of the FFCRA provided that an employer has made reasonable, good faith efforts to comply.

The FAB explains that, for purposes of the non-enforcement position, the DOL will deem that an employer found to have violated the FFCRA acted reasonably and in good faith when an employer:

- Cures any violations, including by making all affected employees whole as soon as practicable¹;
- Did not violate the FFCRA willfully, meaning it either knew the FFCRA prohibited its conduct, or it showed reckless disregard for whether the FFCRA prohibited its conduct; and
- Gives the DOL a written commitment to comply with the Act going forward.

¹ For purposes of this non-enforcement policy, employers who are eligible for tax credits but who have insufficient cash flow should pay sick leave or family leave wages required under the FFCRA as soon as possible, but not later than seven calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer's Federal payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.

COMPLIANCE ALERT

The DOL specifically reserved its right to exercise its enforcement authority if a public or private employer willfully violates the FFCRA, fails to provide written commitment to future FFCRA compliance, or fails to cure – including by making all affected employees whole as soon as practicable – a violation upon either DOL notice or an employee (or his or her representative) seeking payment.

The DOL will lift its stay of enforcement after April 17, 2020, and will begin to fully enforce FFCRA violations.

Conclusion

The DOL recognizes the challenge employers face in understanding and meeting the new rules imposed on them under the FFCRA. Further, the DOL understands that employers also face uncertainty regarding cash flow and business operations. The FAB addresses these circumstances and is giving employers time to fully consider their responsibilities and take reasonable steps to meet them. Mistakes are bound to happen, but the non-enforcement announcement gives employers a chance to make things right without worrying about additional DOL enforcement and penalties while all of the rules are still fresh.

We will continue to update our clients and friends as we learn more about the new laws and regulations that will impact them as we all work through the current crisis. Stay safe and be well.

EPIC Employee Benefits Compliance Services

For further information on this or any other topics, please contact your EPIC benefits consulting team.

EPIC offers this material for general information only. EPIC does not intend this material to be, nor may any person receiving this information construe or rely on this material as, tax or legal advice. The matters addressed in this document and any related discussions or correspondence should be reviewed and discussed with legal counsel prior to acting or relying on these materials.