ARIZONA
EMPLOYMENT LAW LETTER
Part of your Arizona Employment Law Service

June 2020

FFCRA: DOL nonenforcement period doesn't mean you need not comply

by Jodi R. Bohr
Tiffany & Boscoe, P.A.

The Families First Coronavirus Response Act (FFCRA) was passed on March 18, 2020, with an effective date of April 1. Subsequent (and sometimes conflicting) guidance left employers and employment lawyers scrambling to ensure compliance while navigating the unprecedented and uncertain times brought about by the COVID-19 pandemic. Soon thereafter, the U.S. Department of Labor (DOL) notified employers that "violations of the Act occurring within 30 days of the enactment" (through April 17) would not result in enforcement actions.

With that proclamation, employers let out a collective sigh of relief. Many believed the 30-day period gave them additional time to comply and/or figure out what they were supposed to do. Were they correct in their belief? Was that sigh premature? You be the judge.

FFCRA penalty enforced retroactively

On April 23 (six days after the nonenforcement period ended), the DOL issued a press release citing what appears to be its first enforcement action taken against an employer under the FFCRA.

Investigators determined a Tucson, Arizona, employer had "failed to pay [its] employee for what qualified as paid sick leave covering the hours he spent at home after the company received documentation of his doctor's instructions to self-quarantine." The employer must pay $1,600 ($20 per hour for 80 hours of leave) in back wages to the employee.

What happened to nonenforcement period?

Under the circumstances, it's hard to say whether the DOL went back on its 30-day period of nonenforcement. The agency had qualified the announcement by stating it wouldn't file an enforcement action against employers for FFCRA violations during the period "provided . . . the employer has made reasonable, good faith efforts to comply with the Act."

Much later guidance clarified that while the DOL wouldn't file an enforcement action before April 17 against employers making a good-faith effort to comply, it would retroactively enforce violations back to April 1 if an employer hadn't already remedied the violation.

What if you discover FFCRA violation?

Suppose you discover an employee's absence (after April 1) actually qualified for leave under the Emergency Paid Sick Leave Act (EPSLA) or the Emergency Family and Medical Leave Expansion Act (EFMLEA), which are both part of the FFCRA. If that happens, you should pay back wages to the employee for the previously unpaid leave.

If the leave was paid but taken from the employee's paid leave bank offered by your company, you should replenish the individual's leave account.

Best practices

With the DOL's guidance ever-changing (and sometimes in conflict), employers confronted with a situation that doesn't have a straightforward application under the FFCRA should contact employment counsel for guidance.

With DOL and IRS guidance potentially in conflict with respect to how an employee may request leave and what documentation your business must produce to claim the payroll tax credit, you should work with the individual to get the necessary information and not place too many hurdles in the way of allowing the leave.

During all the uncertainty created by the COVID-19 pandemic, one thing has been consistent: The DOL continues to initiate and conduct investigations. It's clear the agency intends to swiftly and fully enforce any FFCRA violations.

Employers violating the Act will be subject to enforcement and penalties under the Fair Labor Standards Act (FLSA), including back wages and liquidated damages. Remaining vigilant is necessary to ensure a DOL audit won't result in a back-pay assessment.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jrb@tblaw.com or 602-255-6082.