April 13, 2020

Submitted via electronic mail

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue
Washington, DC 20210

Re: Families First Coronavirus Response Act (FFCRA) Leave Provisions

Dear Administrator Stanton,

We write on behalf of the American Benefits Council ("the Council") regarding the leave provisions of the Families First Coronavirus Response Act (FFCRA).

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

We very much appreciated the willingness of your staff from the Wage and Hour Division (WHD) to speak with Council representatives on March 26, 2020, regarding some of the questions that many of our employer members have raised regarding the new FFCRA paid leave requirements. The additional Q&A guidance issued by the WHD, as well as the issuance of the temporary regulations, as published in the Federal Register on April 6, 2020 ("FFCRA Paid Leave Regulations"), were very helpful in providing clarifying guidance on certain interpretive issues, including:

- The application of the FMLA integrated employer test for purposes of determining employer size with respect to not only the expanded FMLA ("eFMLA") leave requirement, but also the emergency paid sick leave ("ePSL") requirement;

- Which employees are counted for purposes of determining employer size and when/how to perform such counting;

- What types of orders will qualify as "quarantine" and "isolation" orders for purposes of the eFMLA and ePSL leave requirements;

- The interaction between these new leave requirements and FMLA leave more generally; and

- The need for relief from existing FMLA notice requirements given that employers and employees may not be permitted to be present in the workplace at this time in light of state and local quarantine and isolation orders.

Before addressing remaining open questions, we wanted to highlight one issue for consideration regarding the WHD's issuance of Q&A guidance. We understand that the WHD recently amended FAQ No. 2 of the Families First Coronavirus Response Act: Questions and Answers (as posted on the WHD website, and as hereinafter referred to as "FAQs") (as well as possibly other FAQs). We certainly appreciate the WHD issuing clarifying subregulatory guidance. However, to ensure the regulated community is fully apprised of updated Q&A guidance, it would be very helpful if, on a going-forward basis, the WHD announced the addition of new FAQs as well as any modifications to *existing* FAQs. This will help ensure that employers are made aware of any changes in existing FAQs so that they can properly reflect the changed guidance in determining the scope and administration of their FFCRA paid leave programs.

As follow-up to our prior phone call, please find below a list of questions and requests regarding the new FFCRA leave provisions, which we believe remain outstanding and for which we are hopeful that the WHD may provide additional guidance. We very much appreciate the continued willingness of the WHD to work with the Council and the broader employer community to provide timely guidance regarding these new leave requirements.

SAFE HARBOR REQUESTED FOR APPLYING 500-EMPLOYEE THRESHOLD

The statutory language of the FFCRA provides that employers "with fewer than 500 employees" are subject to the new leave requirements. The FFCRA Paid Leave Regulations and FAQ No. 2 state that the 500-employee threshold is determined "at the time your employee's leave is to be taken." While we understand the intent of such a rule, it imposes material administrative burdens for employers – especially those that may fluctuate above and below the 500-employee threshold over the course of the calendar year. Additionally, such an approach makes it very difficult for employers to

provide clear and consistent guidance and education to employees regarding whether FFCRA leave may be available. Accordingly, we request the provision of safe harbor rules or other relief that would allow employers to determine with greater certainty, for the duration of the leave requirements, whether they are subject to the leave requirements.

Related to the issue of determining which employers are subject to the new paid leave requirements, our members continue to raise numerous questions regarding whether any special rules apply to federal contractors with respect to determining whether an entity is subject to the new FFCRA leave requirements. Clarifying guidance regarding the application of the new leave requirements to federal contractors would be helpful.

SCOPE AND MEANING OF "QUARANTINE" AND "ISOLATION" ORDERS

The terms "quarantine order" and "isolation order" are relevant terms for purposes of administering the new FFCRA paid leave requirements – both the eFMLA leave, as well as the ePSL requirement. A variety of terms are being used by federal, state and local authorities, such as "stay at home," "shelter in place" or "safer at home." We appreciate the clarification that "[q]uarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility" (66 Fed. Reg. 19326, 19329). We also recognize the clarifying guidance that an employee is generally not eligible for eFMLA or ePSL where there is no work for the employee to perform, even if as a result of COVID-19. *See id*. Our understanding is that this analysis regarding the availability of work applies on an employee-by-employee basis. Nonetheless, employers, continue to have questions regarding how these rules would apply in instances where only portions of a business may be closed due to COVID-19 (*e.g.*, where the non-essential portions of a business are closed). Clarification on how the rules apply in these instances would be helpful.

Additionally, while we appreciate the clarifying guidance to date, to the extent an employer misunderstands what constitutes a predicate "quarantine order" or "isolation order," there is the real potential for employers to be left without access to the resulting tax credit. Accordingly, we urge the WHD to work with the Department of Treasury and the Internal Revenue Service (IRS) to provide that so long as an employer had a good faith belief that it had an obligation to provide ePSL or eFMLA leave, the employer will be permitted to claim the corresponding payroll tax credit with respect to paid leave provided accordingly.

ENSURING ACCESS TO PAYROLL TAX CREDIT WHERE PAID LEAVE IS PROVIDED IN GOOD FAITH

We very much appreciate the WHD's issuance of a 30-day non-enforcement period. It has been essential to protecting employers against potential regulatory and litigation risk as they seek in good faith to understand and operationalize their paid leave programs to comply, as applicable, with the ePSL and eFMLA leave requirements.

While we appreciate the issuance of the 30-day non-enforcement period, we request that this, or a similar rule, be made indefinite. Given the fact-intensive nature of determining whether a leave obligation exists (including when and to whom), employers are very concerned that they could proceed as if they are subject to the paid leave requirements but later learn they are ineligible for the tax credits after providing paid leave to one or more of their employees. Accordingly, we urge the WHD to issue a good faith non-enforcement rule, which would ensure that employers who provide leave based upon a good faith interpretation of the then existing guidance are not left without access to the corresponding payroll tax credit if it is later determined by a reviewing agency that the paid leave was not required.

NEED FOR CLARIFYING GUIDANCE REGARDING THE INTERPLAY BETWEEN AN EMPLOYER'S OTHER PAID LEAVE PROGRAMS

The Council has received numerous questions from employer members with regard to whether an employee must generally first use ePSL prior to using the eFMLA and/or whether an employee may be required to use other paid leave available to himself or herself under the employer's existing paid leave programs prior to utilizing ePSL or eFMLA leave.

These questions appear to be based, in part, in what appears to be conflicting guidance in the FFCRA Paid Leave Regulations. More specifically, the preamble to the Regulations states that, "***an employee may choose to use*** paid sick leave prior to using any other type of paid leave to which he or she is entitled under any other Federal, State, or local law; collective bargaining agreement; or employer policy that existed prior to April 1, 2020" (66 Fed. Reg. at 19,341, emphasis added). Elsewhere, the preamble states that, "[n]o employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking expanded family and medical leave. However, an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off, concurrently." But then the actual language of Section 826.160(c) of the FFCRA Paid Leave Regulations provides as follows:

> … an Eligible Employee may elect to use, ***or an Employer may require that an Eligible Employee use***, provided or accrued leave available to the Eligible Employee for the

> purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, ***concurrently*** with Expanded Family and Medical Leave. (66 Fed. Reg. at 19,357, emphasis added).

We believe the intent is for the word "use" to be read together with "concurrently" such that Section 826.160(c) is read to only allow an employer to require *concurrent use* of other paid leave. Nonetheless, given the construction of the regulatory language, we understand questions persist. Thus, additional clarification is requested.

EXEMPTIONS

FFCRA includes two important exemptions – one exemption for qualifying small employers with fewer than 50 employees and a second exemption for employers of "health care providers." Several questions/requests have arisen regarding these two exemptions.

With respect to these small employer exemptions, questions have arisen regarding whether the joint employer and integrated-employer tests apply in determining whether an employer may be a qualifying small employer. We suspect the answer is in the affirmative; nonetheless, given the importance of the answer to employers understanding their compliance obligations, we request clarifying guidance on if and how these two tests apply for purposes of determining whether an employer is a qualifying small employer.

Regarding the second exemption, per the statute and as reflected in the FFCRA Paid Leave Regulations, an employer may exempt itself from the ePSL and/or eFMLA leave requirements with respect to a "health care provider." We very much appreciate the clarifying guidance regarding who will qualify as a "health care provider" for purposes of the exemption. Nonetheless, given the fact intensive analyses required for the application of both this exemption, as well as the small employer exemption, employers remain concerned they could face both regulatory enforcement and/or litigation risk where they nonetheless act in good faith and in reasonable reliance on existing guidance. Accordingly, related to the above more general request, we urge the WHD to promulgate a safe harbor rule by which employers will not face liability for not failing to provide ePSL or eFMLA leave where they have otherwise acted in good faith and reasonably interpreted the existing guidance at the time the employer's determination was made.

COORDINATION WITH TAX CREDITS REGARDING PAID LEAVE TO CARE FOR TEENAGE CHILDREN

The leave requirements under the FFCRA Paid Leave Regulations require paid leave where an employee needs to care for a son or daughter under 18 if the child's school or child care center is closed as a result of COVID-19. This would appear to include children from age 14 up to age 18. Notably, Question No. 44 of the IRS FAQs regarding COVID-19-related tax credits for required paid leave provided by small and midsize businesses suggests that the tax credit may only be available for leave to care for a son or daughter from age 14 up to age 18 if "special circumstances exist requiring the employee to provide care." This inconsistency between the FFCRA Paid Leave Regulations and IRS guidance could result in some employers having to provide leave but not being eligible for the corresponding payroll tax credit. Accordingly, we urge the WHD to work with the IRS to ensure that if an employer is otherwise required to provide paid leave, it will be able to access the corresponding payroll tax credit with respect to such leave.

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We commend you for your efforts to address the COVID-19 epidemic and understand the immense amount of work ahead. We greatly appreciate your attention to this request among the many other essential matters before you. We will continue to notify you of related areas where guidance is needed as we become aware.

Thank you for considering these comments and questions. If you have any questions regarding the above, or if we can be helpful to the WHD regarding its ongoing work in implementing the FFCRA leave provisions, please contact us at (202) 289-6700.

Sincerely,

Ilyse Schuman
Senior Vice President, Health Policy