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Reply to Charleston

Roberta F. Green
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April 2, 2020

Executive Director Tasha Anderson
West Virginia Nonprofit Association
Post Office Box 1452
Lewisburg, WV 24901

Dear Tasha:

As we focus on FFCRA and the CARES Act, we have been asked recurring questions about the necessary documentation, the tax credits, the exemption for small (less than 50 employees) businesses from the FFCRA, the stacking of leave periods, to name just a few. With the caveat that we're all sorting this out as we go, reading law and regulations (and informal guidance from DOL) and understanding that each of your members will have their own particular situations, I thought it might be helpful to share the information we have gathered, in case this could be of help to your members.

In terms of the **FFCRA documentation** your members should require from their employees who elect leave under either the sick leave portion or the child care portion of FFCRA, the DOL has just issued regulations that provide specific guidance:

§ 826.100 Documentation of Need for Leave.

(a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA:

- (1) Employee's name;
- (2) Date(s) for which leave is requested;
- (3) Qualifying reason for the leave; and

- (4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.
- (b) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(i), an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.
- (c) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(ii) an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.
- (d) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(iii) an Employee must additionally provide the Employer with either:
- (1) the name of the government entity that issued the Quarantine or Isolation Order to which the individual being care for is subject; or
 - (2) The name of the health care provider who advised the individual being cared for to self quarantine due to concerns related to COVID-19.
- (e) To take Paid Sick Leave for a qualifying COVID-19 related reason under § 826.20(a)(1)(v) or Expanded Family and Medical Leave, an Employee must additionally provide:
- (1) the name of the Son or Daughter being cared for;
 - (2) the name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and
 - (3) a representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.
- (f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-providedby-small-and-midsize-businesses-faqs>.

The regulations also address how employers are to balance requests for EFMLEA and FMLA, which approaches some of the stacking concerns (and includes discussions of events such as leave for birth of a child). As your members apply these regulations, they will want to keep in mind the caveat that FFCRA is supposed to help to flatten the curve while preserving the economy. Therefore, your members will want to review documentation with that in mind – COVID positive persons or those caring for positive persons will need documentation, but it makes no sense to set the bar so high that sick persons come into work. I know that makes sense – just mentioning it (as

the DOL has emphasized it). Also, your members will need to keep the following documentation for **four years** for tax credit and other purposes, as set out above:

- (1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;
- (2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;
- (3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;
- (4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941, and
- (5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-taxcredits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

The **exemption** from the terms of FFCRA for small businesses is relatively restrictive (here is the language from DOL):

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services

provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

DOL has asked that employers submit no documentation at this time but maintain their files and support documents at their offices. Also, DOL has provided a 30-day grace period before enforcement actions begin. Your members will want to conspicuously display the FFCRA poster and strive for functional notice. For instance, if no one is working in the office currently, it would not be effective notice to hang the poster there. Your members will want to email or otherwise ensure the employees' receipt of the poster.

DOL has not addressed the issue of **stacking** of leave at this time, but it appears that an employee could take sick leave, then childcare leave and then FMLA (unpaid leave) after that, with the FFCRA caps in place for each. The Regulations seem to specify that persons eligible for both the sick leave and child care portions will need to take them concurrently; we are reviewing these further now. The Regulations do specify that the FFCRA sick leave is a one-time event, maximum of 80 hours, but it may be taken intermittently (which is also described further in the regulations).

Here is a link to the regulations and a related discussion from DOL:

<https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>

We would expect that the **CARES Act** must be of great interest to your members. It appears (although the lending institutions will be best suited to advise your members) that the covered loan period begins February 15 and ends June 30. The Act has provisions for a \$10,000 emergency Economic Injury Disaster Loans for private non-profits (and sole proprietors/independent contractors), although it appears to function as a setoff against the other funds received. The loans themselves are usable for payroll support such as employee salaries (under \$100,000), paid sick or medical leave, insurance premiums, and mortgage, rent and utility payments. The loan amounts are tied to payroll costs (there's a formula), with eligibility tied to whether the entity was operational on February 15 and whether it meets some of the other factors like income. There appears to be a priority placed on small business concerns and entities in underserved and rural markets, which could be a boon. The loan forgiveness provisions appear to be tied to the amount spent by the borrower during an 8-week period this year compared to last year for that period, for specific payments (payroll, interest on mortgage, etc.) and further limited to the extent that the employer reduced workforce/pay (although the Act encourages re-hiring of laid-off employees). The Act is voluminous – but the upshot is that your members will want to act now and start the process. They will want to contact their banks directly, now.

Please keep us in mind as a resource. We are reviewing more regulations each day and look forward to an opportunity to serve. We will wait to hear what we may do to help.

Thank you.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Roberta F. Green". The signature is fluid and cursive, with a large initial "R" and a long horizontal stroke at the end.

Roberta F. Green

Enclosures