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EMPLOYMENT LAWSCENE ALERT: WHEN ARE MY EMPLOYEES ENTITLED TO LEAVE UNDER THE FFCRA BECAUSE THEIR CHILDREN ARE HOME FROM SCHOOL OR DAYCARE?

As we previously covered here, the Families First Coronavirus Response Act ("FFCRA") requires that, with certain exceptions, employers with 500 or fewer employees must provide employees with leave in certain circumstances pursuant to the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLA"). Both the EPSLA and the EFMLA require leave if an individual is unable to work or telework because they need to care for their son or daughter under the age of 18 if the child's school or place of care has been closed or if the childcare provider of such child is unavailable due to reasons related to COVID-19.

The Department of Labor ("DOL") has issued some additional guidance regarding leave under the FFCRA. Included is guidance specific to the need for leave to care for a child whose school or place of care has been closed or whose childcare provider is unavailable, further clarifying that (i) such leave is not available if another suitable person is available who can care for a child; (ii) such leave is not available to the extent that an employee can telework while caring for the child; (iii) such leave may be taken intermittently if the employee and employer agree to do so; and (iv) such leave may be taken for a child over the age of 18 if he or she has a disability and cannot care for him or herself due to that disability. The DOL also stated that employers should keep the following records for leave to care for a child whose school or place of care is closed: (i) the employee's name; (ii) the date(s) for which leave is requested; (iii) the reason for leave; (iv) a statement from the employee that he is she is unable to work or telework because of this reason; (v) the name of the child being cared for; (vi) the name of the school, place of care, or childcare provider that has closed or become unavailable; and (vii) a statement from the employee that no other suitable person is available to care for the child. This documentation will be necessary for employers who provide FFCRA leave to receive reimbursement of the costs of that leave through tax credits from the Internal Revenue Service ("IRS"). The DOL also stated that employers should consult IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to support the credit.

The guidance published by the IRS for a leave requested based on a school closing or childcare provider unavailability includes all of the DOL information and also requires that the employee provide the **age** of the child. Additionally, if an employee claims that they are unable to work or telework because of a need to provide care for a child older than 14 during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care. Although there is no specific guidance regarding what is considered a "special circumstance," a reasonable interpretation would be that it requires some specific reason outside of typical circumstances, such as a disability or medical condition, that the child is not able to care for him or herself. If additional guidance becomes available, we will provide updates.

Employers must request accurate and complete documentation from employees requesting leave under the FFCRA. If that leave is to care for a child over the age of 14 because his or her school or place of childcare is closed, special circumstances must exist in order for the employer to grant such leave. If such leave is granted without proper documentation and appropriate special circumstances, the IRS will deny the employer tax credit for the amount paid for such leave.

O'Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to leave under the FFCRA.