**MEMORANDUM**

**To: Clients**

**From: Shawn D. Twing,**

**Partner Mullin Hoard Brown LLP, Board Certified Labor and Employment Law Texas Board Legal Specialization**

**Date: March 29, 2020**

**Re: 25 Points of Summary on the Recent DOL Guidance on Conronavirus Response Act**

The following is not a complete summary of the guidance that was release Sunday afternoon, but covers most of the more common questions that to which our office has been responding. For a more complete copy please go to [www.DOL.gov/whd/pandemic/ffcra-questions](http://www.DOL.gov/whd/pandemic/ffcra-questions)

1. The CRA provides for (1) emergency sick leave and (2) expanded FMLA Leave. The provisions in the CRA will expire on December 31, 2020, unless otherwise extended.
2. Only employees are covered under the CRA. The usual rules concerning intendent contractors apply.
3. Certain employees are excluded such as health care providers and emergency responders.
   1. Health care provider includes:
4. individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed Doctor of Medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.
   * 1. For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is ***anyone employed*** at ***any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.***This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
     2. This definition includes ***any individual em***ployed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. ***This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.***
     3. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.
   1. Emergency responder includes:
5. For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the CRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19.
   * 1. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
     2. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.
6. There is a brief period in which employers who in good faith wrongfully deny CRA leave will not be liable under the Act. Presumably this period of time will be between 2 – 3 weeks after it goes into effect on April 1, 2020. Intentional violations or violations that are shown not to be made in good faith – a reasonable effort to understand the Act and make judgment calls on the information available – will be held liable.
7. Employers under 500 employees are required to make the CRA leave available. Employers must consider **joint employment** with other entities. Also, the guidance provides that “a corporation (including its separate establishments or divisions) is considered a single employers” . . . “in general, two or more employers are separate employers unless they meet the **integrated employer** test under the FMLA. . . .” if two employers are integrated for FMLA purposes they are integrated for the purposes of CRA coverage.
8. If you are an employer under 50 employees and providing CRA leave would jeopardize the viability of your business:
   1. You must send a request to the DOL seeking an exemption setting forth the exact reasons for the exemption. Submissions should be sent to the DOL Wage and Hour District office of your location. The Texas panhandle is in the Dallas Region.
   2. At this time, you are not to send any supporting documentation.
   3. There will be more detailed regulations of this issues forth coming.
9. Paid sick leave for part-time employees is based on the average number of hours the employee has worked in the preceding two-week period. If there this calculation cannot be made the employer and employee may agree on a number or the employer may refer to the hours of a similarly situated group of employees.
10. Employers must use any relevant overtime in their calculation.
11. The number of hours of paid sick leave for self-quarantine is 80 hours for full-time employees and the average number of hours for part-time employees. The CRA caps the paid sick leave at this level. Full-time employees are defined as those normally scheduled to work 40 or more hours per workweek. Part employees are those regularly scheduled to work less than 40 hours.
12. The expanded FMLA and paid sick leave (assuming the employee qualifies for both) is capped at 12 weeks.
13. An employee banked leave before April 1, 2020 that was used does not count towards the 80 hours of paid sick leave.
14. Only the expanded FMLA leave is paid. Non-CRA qualifying FMLA is treated as normal.
15. Neither the CRA paid sick leave or expanded FMLA is retroactive (applying to leave take before April 1, 202) and neither carries over after December 31, 2020. Moreover, it has no cash value.
16. For the expanded FMLA leave – not regular FMLA – the employee must have been employed for 30 days prior to the request for leave.
17. Documentation for paid sick leave and/or expanded FMLA must meet the requirements set forward by the IRS. Regular FMLA and employer provided leave maintains the same requirements.
18. Teleworking is permitted during CRA leave.
19. Intermittent may be taken unless the leave falls into the category of
    1. Quarantine or isolation order;
    2. Dr. ordered quarantine;
    3. Leave based on Convid-19 symptoms;
    4. Caring for a person subject to a quarantine or isolation order, Dr. ordered quarantine or leave based on symptoms; and/or
    5. You have related symptoms of infection as designated by the Secretary of Health and Human Services.
20. If an employer closed its worksite prior to April 1, 2020, the employees affected are ***not*** eligible for paid sick leave or expanded FMLA but may qualify for unemployment benefits.
21. If an employer closes on or after April 1, 2020 only employees already on leave qualify for paid sick leave or expanded FMLA. Employees employed at the time of the closure will not be qualified but may be eligible for unemployment benefits.
22. If an employer says open on or after April 1, 2020, employees who are furloughed due to lack of work will not be qualified but may be eligible for unemployment benefits. This applies even if the employer intends to re-open or rehire the furloughed employees.
23. Employers on paid sick leave or expanded FMLA must maintain group health benefits. Employees who have contributions to their health coverage must maintain those payments.
24. Employers may not require employees to use accrued unused paid time off before receiving CRA qualifying leave.
25. The expanded FMLA leave counts towards the regular FMLA benefit of 12 weeks within a 12-month period, but it does not add to this amount.
26. The expanded FMLA, unlike the paid sick leave, does not distinguish between Full-time and Part-time employees.
27. The existing FMLA definition of “son” or “daughter” applies to the CRA.