FAQs on the Families First Coronavirus Response Act

April 2, 2020. Construction industry employers face complicated issues every day, but the COVID-19 (or, more commonly, the "coronavirus") pandemic is unprecedented in many respects. While ultimately employers should make decisions based on their businesses and the circumstances at hand, Indiana Constructors has teamed up with Faegre Drinker Labor & Employment Lawyers Stuart Buttrick, Susan Kline, Ryan Funk, and Angela Johnson to offer the following guidance.

Q1: Should an employer require certain information from an employee when considering a request for leave under the FFCRA?

A: Yes, the IRS requires that the employer collect and maintain certain information. Faegre Drinker has provided to ICI a template request form that employers can use.

Q2: If an employer grants an employee FFCRA leave, must the employer continue paying the hourly H&W contribution as if the person continued to work covered hours for the duration of the requested leave (which can be up to 12 weeks?)

A: Yes, if that is necessary for health benefits to continue during the leave period consistent with standard FMLA requirements. The Department of Labor (DOL) has taken the position that an employer must continue health coverage on the same terms as before the employee went on FFCRA leave.

Q3: If someone requests FFCRA leave in October 2020, and the 12 weeks of leave would run until late January 2021, would the employer be required to provide leave even past December 31, 2020?

A: No. Unless Congress changes the law before then, paid leave entitlements end as of December 31, 2020, and cannot be rolled over into 2021. No payments would be required for leave time taken in 2021 under the FFCRA.

Q4: Do employers have to pay fringe benefit contributions on top of wages for leave taken under the FFCRA?

A: This is a complicated issue. As discussed in Q2, employers will need to pay the amount necessary to maintain healthcare while the employee is on FFCRA leave. Beyond that, it will require analysis of the exact language of the CBA and plan documents.

Q5: If an employer develops new corporate/company policies to deal with coronavirus, must it bargain with the union over those things? For example, a policy that employees should not come to work if they think they have symptoms?

A: A unionized employer cannot unilaterally implement a new policy if it would directly contradict the CBA—for that it would need the Union's affirmative consent. If the employer seeks to make a policy change that

does not directly contradict the CBA, it needs to see whether the Union has "waived" its right to bargain over that kind of change. The management rights clause of the CBA could contain such a waiver, depending on its language. If the change does not directly contradict the CBA, and the Union has not waived its right to bargain about the change, the employer must give the union notice and the opportunity to bargain about the change before it decides to make the change. It does not need the Union's affirmative consent, but it does need to bargain in good faith before deciding to make the change. If the employer is faced with such an emergency that forces it to make a change without bargaining with the Union (also called an "exigent circumstance") it may be able to delay bargaining until after it makes the change.

Q6: If one of our crews is working on a job and we learn that a crew for another contractor on that same job had symptoms of coronavirus, and our crew was working in close proximity to that other crew, what should we do? The person may or may not have coronavirus, but we have people on our crew who are now scared and worried.

A: We would recommend a similar protocol to when you learn of one of your employees having been diagnosed or symptomatic. See if you can learn who may have had close personal contact. If it could have been anyone on the crew, notify the whole crew that a crew member for the contractor has symptoms; it is not yet known if the person actually was carrying the virus; everyone should be diligent about monitoring themselves for symptoms including taking their temperature before coming to work and not report onsite if they are experiencing COVID-19 symptoms; extra sanitization measures are being taken including disinfecting surfaces such as equipment handles and controls and tools; and of course, the person who is symptomatic will not be coming onsite or into contact with the contractor's other workers until the threat of infection has passed. If union-represented employees are involved, follow the procedures outlined in Q5, but keep in mind that this may be an exigent circumstance in which you can act quickly.

Q7: Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." Is the Indiana Governor's "Directive for Hoosiers to Stay at Home" such an order?

A: The DOL recently reversed its direction on this and is now saying that employees who cannot work because of such an order do get FFCRA leave. But the DOL also says that employees do not get FFCRA leave if the real reason they cannot work is because *their employer does not have work for them* because of such an order. In practice, then, it seems that the only way an employee could get FFCRA leave because of such an order is if the employee lived in a state or community where the government ordered the employee to stay home, but worked across the border in a different state/community where the employer could still have work for the employee.

Q8: Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or, unable to "telework") due to a need for leave because the employee is "subject to a Federal, State, or local quarantine or isolation order related to COVID-19." But, what if my business is an "essential business" under Indiana Governor Holcomb's "Directive for Hoosiers to Stay at Home" – is the employee, working for an essential business, entitled to paid leave under FFCRA?

A: If the employees can report to work because it is an "essential business" under the Indiana or other local order, while they could get FFCRA leave for one of the other qualifying reasons, they are not entitled to leave just because they live in a community with a stay at home order in place (because they are exempt from that order).

Please note that the issues surrounding the pandemic are fast-evolving. If you have questions concerning these issues or other employment concerns, contact a member of Faegre Drinker's Labor & Employment Practice Group.