HOW TO DETERMINE IF AN EMPLOYER HAS "FEWER THAN 500 EMPLOYEES" FOR COVID-19 FEDERAL PAID SICK AND FAMILY LEAVE MANDATES

The Families First Coronavirus Response Act (H.R. 6201) became law on March 18, 2020. Among other things, the Act requires employers with "fewer than 500 employees" to provide two new benefits: (1) federal emergency paid sick leave and (2) federal emergency paid family and medical leave (FMLA). As a result, employers need to know immediately how to determine if they have "fewer than 500 employees."

Questions remain about how to calculate whether an employer has "fewer than 500 employees" and which measurement period or date should be used. These questions are particularly important, as many employers are currently making difficult decisions, which could lead to dramatic cuts to their employee headcount due to the COVID-19 pandemic.

Insight

Some employers may want their headcount to be fewer than 500 so that they can obtain assistance from the government to provide their employees with paid leave benefits. Those employers will benefit from a methodology that does not require employees of related companies or consolidated group members to be counted. Many small employers would like to assist their employees but cannot afford paid leave without federal assistance.

In contrast, other employers may prefer to avoid the mandatory paid leave requirements and would benefit from a more inclusive employee count.

Because these new mandates are grounded in two different federal laws, it seems that there are two different sets of rules for counting "fewer than 500 employees." Specifically, as described below, one method must be used for federal emergency paid sick leave while another method must be used for the federal emergency paid FMLA leave.

Counting Employees for Federal Paid Sick Leave

No controlled group concept. The Fair Labor Standards Act (FLSA) definition of "employer" applies for federal emergency paid sick leave. FLSA does not seem to have a controlled group concept. Likewise, the new legislation simply says "employer" and does not include references to any sections of the Internal Revenue Code that would require all entities under common control be treated as if they were a single employer. Often (but not always), the Code requires related employers to be treated as if they were a single employer (for example, see Sections 1563 and 414(b), (c), (m), etc.). Also, the Code often (but not always) imposes ownership attribution rules (for example, under Sections 267(b) or 318). Congress certainly knew about the controlled group and ownership attribution concepts, which were used most recently in the SECURE Act and the Tax Cuts and Jobs

Act, as well as many other laws. By not specifically including cross-references to any of those existing Code sections, it seems Congress did not intend for controlled group or ownership attribution concepts to apply when determining whether an employer has "fewer than 500 employees" for purposes of the new federal paid sick leave mandate. We have submitted this question to the IRS as needing priority guidance.

As of what date should the headcount be made? Since H.R. 6201 does not specify the date for the employee count and the FLSA applies to almost all employers all the time, guidance is needed to determine as of which date employers would be treated as having "fewer than 500 employees" for purposes of the new federal emergency sick leave benefit.

Counting Employees for Federal Paid FMLA Leave

Integrated employers. The FMLA definition of "employer" applies for federal emergency paid FMLA leave. That definition includes an "integrated employer" concept, which is similar to (but not the same as) the Code's "controlled group" concept. Employers would apply the following four factors to determine if common law employers are required to be aggregated for FMLA purposes:

- Common management
- Interrelation between operations
- Centralized control of labor relations and
- Degree of common ownership/financial control

FMLA regulations say that no single factor is determinative. Rather, the entire relationship must be reviewed in its totality. In other words, do the two entities work "hand in glove" so to speak? Do they share the same leadership? Ownership? The more intertwined, the more likely they are "integrated employers" for purposes of the new federal paid FMLA mandate.

For purposes of determining employer coverage under the FMLA, the employees of all entities making up the integrated employer must be counted.

Insight

Employers who use professional employer organizations, or PEOs, need to take special care to determine how FMLA applies. FMLA includes a "joint employer" concept, so each employer may have a separate duty to provide the FMLA benefits. FMLA rules also include a "successor employer" concept.

There is no "one size fits all" answer, since there is no bright-line, numerical ownership percentage test (like tax professionals are used to analyzing). It seems that FMLA may treat entities as employers, even if they are disregarded entities for tax purposes (such as partnerships or limited liability companies taxed as partnerships).

Who counts as an employee?
Employees who must be counted include:

- Any employee who works in the United States, or any territory or possession of the United States
- Any employee whose name appears on payroll records, whether or not any compensation is received for the workweek
- Any employee on paid or unpaid leave (including FMLA leave, leaves of absences, disciplinary suspension, etc.), as long as there is a reasonable expectation the employee will return to active employment
- Employees of foreign firms operating in the United States
- Part-time, temporary, seasonal, and full-time employees

Do not count:

- Employees with whom the employment relationship has ended, such as employees who have been laid off
- Unpaid volunteers who do not appear on the payroll and do not meet the definition of an employee
- Employees of United States firms stationed at worksites outside the United States, its territories, or possessions
- Employees of foreign firms working outside the United States

As of what date should the headcount be made? Generally, a private sector employer is subject to FMLA if it employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Although it is not clear, the same measurement period could be used to determine if an employer has "fewer than 500 employees" for purposes of the federal emergency paid FMLA leave. Guidance from the U.S. Department of Labor would be helpful in this regard, which hopefully would be more lenient, to take into account the rapid reduction in workforce that came without much warning for many employers, due to COVID-19.

Insight

Because the FMLA rules have been in existence for years, employers may want to ask their human resources department or employment legal counsel to determine how the employer has historically complied with these rules. Such past practice could be applied to interpreting the new federal FMLA mandate with respect to determining if the entities must be aggregated for the "fewer than 500 employees" rule.

Since enactment of the new law, in our discussions with clients, we are finding that the very low

FMLA threshold of 50 employees often did not require much analysis of “integrated employer” concept. For example, if there are 5 entities that have some of the characteristics of being “integrated” with each of them having at least 50 employees, they never had to make the determination about being integrated because the answer would not change. Look for any entity that had fewer than 49 employees to see if it extended FMLA to its employees. Now that the threshold is 500, this could be the first time that the “integrated employer” concept becomes relevant.