Families First Coronavirus Response Act Leave
Department of Labor Temporary Regulations – Part I

The U.S. Department of Labor (DOL) has released temporary regulations implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) provisions under the Families First Coronavirus Response Act (FFCRA). The EFMLEA provides qualifying employees with paid sick leave during the COVID-19 crisis to care for a child absent from school due to school closure or childcare unavailability. The EPSLA provides employees with paid sick leave for self-care and family care due to possible COVID-19 contraction and exposure, as well as paid childcare leave.

The regulations are effective April 1, 2020, through December 31, 2020, which corresponds to the effective and sunset dates for the FFCRA. The temporary regulations were issued by the DOL to provide immediate guidance prior to the publication of the FFCRA final regulations, and have the force of law. For an overview of the requirements of the EFMLEA and EPSLA, please review our UBA Advisor entitled "Families First Coronavirus Response Act" and the Advisor dedicated to the Coronavirus Aid Relief, and Economic Security Act.

On August 3, 2020, the U.S. District Court for the Southern District of New York (court) invalidated certain provisions of the temporary regulations implementing the EPSLA and EFMLEA.

Under the temporary regulations, an employee can only take leave under the FFCRA if the employee has a qualifying reason for leave and the employer has work available for the employee. The court invalidated this work-availability requirement with respect to the qualifying reasons for taking leave under the FFCRA. Under the court's holding, an employer is not required to have work available for an employee as a condition for an employee to be eligible for leave. This potentially opens the door for employees to claim eligibility for leave even if they are furloughed, temporarily laid off, or are not working because the employer has temporarily ceased operations.

Under the FFCRA, an employer may exclude health care providers from being eligible for leave. The court invalidated the DOL's definition of a "health care provider" which is defined as "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[,]" as well as any "individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] 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."

The court also invalidated the requirement that an employer consent to an employee seeking to take leave intermittently when allowed under the temporary regulations.

Finally, the court invalidated the requirement for employees to submit documentation to the employer prior to taking leave. The court did not invalidate the documentation requirement in totality, just the requirement that an employee provide the documentation prior to taking leave.

The court's decision did not specifically limit the scope of its ruling, so employers nationwide should consult with their attorneys regarding providing and denying leave for employees under the FFCRA that does not comply with the court's ruling.

In response to the court's decision, the DOL released additional temporary regulations that reaffirm certain portions and revises certain portions of its regulations described in Part I, Part II, and Part III of this Advisor series on the FFCRA leave regulations. The DOL reaffirms that paid sick leave and expanded medical leave may only be taken by an employee when the employer has work for the employee to perform. The DOL also reaffirms that when intermittent leave is permitted under the FFCRA regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently. The DOL revises its definition of "health care provider" to mean employees defined as health care providers under the Family and Medical Leave Act of 1993 and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care. The DOL clarifies that the information the employee must provide to the employer to support the employee's need for leave should be provided as soon as practicable, not necessarily prior to when leave is taken. Finally, the DOL clarifies when an employee may be required to give notice of expanded family and medical leave to his or her employer.

The additional temporary regulations will become effective on the date of publication in the Federal Register, currently scheduled for September 16, 2020.

The following highlights important information reflected in the regulations, which provide much needed clarity to the meaning of operative terms and to the employer mandates contained in the FFCRA.

Covered Employers

The FFCRA provides that employers subject to the leave provisions of the EFMLEA and EPSLA, include employers with fewer than 500 employees (or public agencies no matter what size). The regulations provide that the employer is required to count full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency when making the coverage determination. Independent contractors do not count toward the 500-employee threshold. Further, employees who have been laid off or furloughed and have not subsequently been reemployed are not included in the count. Employees must be employed within the U.S., including U.S. territories, to be included in determining employer coverage under the FFCRA.

Small Employer Exemption

Small employers with fewer than 50 employees may qualify for an exemption from the leave requirements for employees who need to care for a child absent from school due to school closure or childcare unavailability. In order to be exempt from the childcare leave requirements, one of the following circumstances must be present:

1. Leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity.
2. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities.
3. The employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the employer to operate at a minimal capacity.

A small business claiming exemption for one of these reasons must meticulously document the basis of the decision by an authorized officer, and retain the information for at least four years. No application is required to be filed with the DOL.

Compensating Teleworkers

The regulations clarify that employees who are teleworking during the COVID-19 crisis must be compensated for all hours actually worked, including overtime, in accordance with the Fair Labor Standards Act (FLSA). Employees that are teleworking may be working flexible schedules (for example: 7:00 a.m. - 9:00 a.m., 12:30 p.m. - 3:00 p.m., and 7:00 pm. - 9:00 p.m. on weekdays). In cases where teleworkers have flexible schedules, they must be compensated for

the hours actually worked, but not for the entire time from when they first started work to when they ended (in this example, the employee would be compensated for 6.5 hours, not 14 hours). A teleworker cannot be paid less while teleworking than the employee would otherwise receive when working at the business location.

Intermittent Leave

The regulations provide that employees may take intermittent child care leave during EFMLEA and EPSLA leave, if permitted by the employer. The employer and employee must also agree on the increments of time in which leave may be taken. The agreement, which is not required to be in writing, must be reflective of a clear and mutual understanding between the employer and employee as to the material terms of the arrangement. If an employee is teleworking, the employer can allow the employee to take intermittent leave in any agreed increment of time and for any qualifying reason. Intermittent leave is not available for the first, second, third, fourth, and sixth qualifying reason for paid sick leave noted below if the employee is reporting to the employer's worksite. These rules were reaffirmed by the DOL's additional temporary regulations. The additional temporary regulations also note that when schools implement a hybrid schedule where students only go to school on particular days of the week, each day the student does not go to school would be a separate reason for FFCRA leave that ends when the child goes back to school; an employee would not use intermittent leave in this specific circumstance.

Reasons for Paid EPSLA Leave

Although the FFCRA statute contained clear language regarding the eligibility requirements for paid sick leave, there was still a lack of substance surrounding the qualifying reasons for leave and any possible special circumstances and exceptions to an employer's obligation to provide paid leave. For example, the regulations confirm than an individual cannot take paid sick leave if the employer has no work for them to perform. In addition, the regulations provide other much needed clarity regarding the conditions under which an employee is entitled to paid sick leave.

The first qualifying reason for leave is if the employee is unable to work because he or she is subject to a federal, state, or local COVID-19 quarantine or isolation order (includes a broad range of governmental orders such as shelter in place, stay at home, and quarantine). An employee that is subject to one of these orders will not be eligible for paid sick leave if the employer does not have work for the employee to perform, because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. This work-availability requirement was reaffirmed in the additional temporary regulations.

- "Coffee Shop" Example: If a coffee shop has temporarily closed due to lack of business as a result of COVID-19, a coffee shop employee would not be entitled to leave because the employee would not be able to work even if the employee was not required to stay home. An individual that is not eligible for paid sick leave under these facts may be eligible for unemployment insurance.

- Teleworkers: An employee that is able to telework cannot take emergency paid sick leave if 1) the employer has work for the employee to perform, 2) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated, 3) there are no extenuating circumstances that prevent the employee from performing that work. An example would be an employee teleworking from home due to a stay-at-home order. An extenuating circumstance that could cause this employee to be eligible for paid sick leave is a power outage that prevents the employee from being able to telework.

The second qualifying reason for leave is if the employee is unable to work because he or she has been advised by a health care provider to self-quarantine for a COVID-19 reason. Advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. Self-quarantining must prevent the employee from working. See the above elements to determine if an employee can telework.

The third qualifying reason for leave is if the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. Symptoms that could trigger this leave include fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Emergency paid sick leave for this reason must be limited to the time the employee is unable to work because he or she is taking steps to obtain a medical diagnosis (such as, time spent making, waiting for, or attending an appointment for a test for COVID-19). An employee cannot take paid sick leave to self-quarantine without seeking a medical diagnosis.

An employee that is waiting for testing results cannot take paid sick leave if 1) the employer has work for the employee to perform, 2) the employer permits the employee to perform that work from the location where the employee is waiting, and 3) there are no extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work. An employee can take paid sick leave while waiting for a test result if he or she is unable to telework and can continue to take leave after testing positive for COVID-19, regardless of their symptoms if a health care provider advises the employee to self-quarantine.

The fourth qualifying reason for leave is if the employee is unable to work because he or she needs to care for an individual who is either subject to a federal, state, or local quarantine or isolation order; or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. An employee caring for an individual cannot take paid sick leave if the employer does not have work for the employee to perform. The individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for this person.

The fifth qualifying reason for leave is if the employee is unable to work because the employee needs to care for his or her son or daughter if the child's school or place of care has closed or the child care provider is unavailable due to COVID-19 related reasons. An employee cannot

take paid sick leave if the employer does not have work for the employee. If another individual, such as a co-parent, co-guardian, or usual child care provider, is available to care for the child, paid sick leave cannot be taken.

The sixth qualifying reason for leave is if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-Time and Part-Time Employees

Under the regulations, the DOL defines a full-time employee as an employee who works at least 40 hours each work week. The regulations further clarify the calculation of hours when the part-time employee's hours vary from week to week. The DOL has indicated that employers can use 14 times the number of hours that the employee was scheduled to work per calendar day (including hours for which the employee took leave of any type), averaged over the six-month period preceding the leave (in order to calculate the two weeks of paid sick leave).

An employer may also use two times the number of hours that an employee was scheduled to work per week, averaged over the six-month period. If the part-time employee has been employed for fewer than six months, the employee is entitled to 14 times the expected number of hours the employee and employer agreed at the time of hiring that the employee would work each calendar day on average. If the employer and employee did not agree on the expected number of hours the employee would work, the employer must use the actual average number of hours the employee was scheduled to work each workday (including hours for which the employee took leave of any type) over the entire period of employment.

Employee Rate of Pay

If an employee's regular rate of pay is lower than the federal, state, or local minimum wage, the employee taking emergency paid sick leave for the first three qualifying reasons must be paid the highest of the minimum wage amounts. If an employee is taking emergency paid sick leave for the other qualifying reasons, the employee must be paid at least two-thirds of the highest applicable minimum wage.

Due the voluminous nature of the regulations, the Advisors discussing these important rules will be issued in multiple editions.

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