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DOL Issues Temporary Rule Promulgating Regulations on the FFCRA

On April 1, 2020 the U.S. Department of Labor (DOL) issued a temporary rule promulgating regulations on the Families First Coronavirus Response Act (FFCRA), which created two new emergency paid leave requirements in response to the COVID-19 pandemic. The Emergency Paid Sick Leave Act (EPSLA) entitles certain employees to take up to two weeks of paid sick leave. The Emergency Family and Medical Leave Expansion Act (EFMLEA) permits certain employees to take up to 12 weeks of expanded family and medical leave, 10 of which are paid, for specified reasons related to COVID-19.

In general, the FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with less than 50 employees may qualify from an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability if the leave would jeopardize the viability of the business. The DOL estimates there are almost six million employers with fewer than 500 employees, representing approximately 60.5 million employees. Of those six million employers, the DOL believes 96% have fewer than 50 employees and may qualify for an exemption.

A significant change from the previous DOL guidance is the rule's clarification that employees may qualify for paid leave due to a stay-at-home or other executive order, but only if two conditions are met: (1) the employee would have been able to perform work that is otherwise allowed or permitted by the employer; and (2) the employer has work for the employee. Of note, the rule allows employers to prospectively terminate any voluntary additional leave the employer provided as of April 1, 2020, or thereafter, provided that the employer had not already amended its leave policy to reflect the voluntary offering. While DOL informal guidance provides that any accrued, but unused, PTO may not be used concurrently with paid sick leave under the EPSLA, such accrued, but unused, PTO may be used after the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA.

The information below provides a summary of each topic addressed in the DOL's rule.

PAID LEAVE ENTITLEMENTS

The rule defines the reasons employees can take the paid leave entitlements, answering a number of questions that employers have had about how they apply:

1. **Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.** The rule clarifies that employees may qualify for paid leave due to a stay-at-home or other executive order, but only if two conditions are met: (1) the employee would have been able to perform work that is otherwise allowed or permitted by the employer; and (2) the employer has work for the employee. If a workplace is closed due to the order (or for other reasons), and the employer does not have work or telework for the employee, leave is not available under this reason.

2. **Employee has been advised by a health care provider to self- quarantine.** In addition to being advised to self-quarantine because the employee has or may have COVID-19, the rule also states that leave under the EPSLA is available if the employee has been advised to self-quarantine because the employee is "particularly vulnerable to COVID-19." The employee must also be unable to telework, if telework is offered.

3. **Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.** Leave is available for this reason if the employee is experiencing fever, dry cough, shortness of breath or other COVID-19 symptoms identified by the CDC. Employees must be taking affirmative steps to obtain a medical diagnosis, and are not permitted to self-diagnose.

4. **Employee is caring for an individual who is subject to a quarantine or isolation order, or has been instructed to self-quarantine.** The rule provides clarity regarding the "individuals" to whom care may be provided: an immediate family member a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation of care; this does not include a person with whom the employee has no personal relationship. The rule further requires that, in order to be eligible for leave, the individual depends on the employee to provide care for him or her, and that the employee is therefore unable to perform work (or telework) for the employer. Similar to the regulations regarding reason 1, the rule indicates that leave for this reason is unavailable if the employer does not have work for the employee.

5. **To care for a child or children whose school or care provider is unavailable due to COVID-19.** Leave is available for this reason, if the employee's child's school or place of care has been closed, and no suitable person (co-parent, co-guardian or regular care provider) is available to care for the child. The rule also states that such leave is available if the child is under 18, or if an adult child is unable to care for him or herself due to a mental or physical disability (contrary to the language of the statute).

6. **Employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.** At this time the rule does not define any other "substantially similar condition."

AMOUNT OF PAID LEAVE AND AMOUNT OF PAY PROVIDED

The rule describes how to determine the amount of paid leave available under the FFCRA, specifically addressing full-time and part-time employees, as well as determining the amount of leave available to employees with irregular schedules or who may work a schedule other than a standard five-day workweek. The principles applied by the rule endeavor to provide all employees with paid leave for a two-week period under the EPSLA, or a 10-week period under the EFMLEA, based on the number of hours the employee would typically work during that period.

The rule also confirms that the FMLA's limit of 12 workweeks of leave in a 12-month period is for all reasons, including Expanded Family and Medical Leave, and therefore employees may have less than 12 weeks of leave available under the EFMLEA.

The rule clarifies the rate of pay applicable to each reason for leave under the FFCRA, which is based on the greatest of the employee's "regular rate" of pay, the federal minimum wage, or any applicable state or local minimum wage.

The rule incorporates FLSA concepts with respect to calculating the "regular rate" for purposes of the statute, but states that such rate should be calculated over a period of six months preceding the leave (or for the entire employment, if shorter). Employers should pay careful attention to these principles, particularly with respect to employees who are paid in whole or in part based on commissions, tips and piece rates.

EMPLOYEE ELIGIBILITY

The rule provides that all employees of a covered employer are eligible for EPSLA paid sick leave, with two exceptions:

1. An employer may exempt employees who are health care providers or emergency responders

2. An employer with fewer than 50 employees that meets the requirements of § 826.40(b) (where providing paid leave would jeopardize the viability of the business) can elect an exemption from reason 5 in certain circumstances

Under the rule, employees are eligible for EFMLEA paid leave if they have been employed by the employer at least 30 days prior to the leave. If the employee was laid off or terminated on or after March 1, 2020 and is rehired before December 31, 2020, the employee is eligible if they were on the employer's payroll for 30 of the 60 days preceding the lay off or termination. Days worked by a temporary employee hired through an agency who is hired by the employer as a regular employee count towards the 30 days.

The rule permits employers to exclude employees who are health care providers or emergency responders from EPSLA and EFMLEA leave. The definition of health care providers is much broader than the definition of those health care providers who can provide certifications of a medical condition pursuant to § 825.102. For purposes of exclusion from EPSLA and EFMLEA leave, health care providers includes:

1. Any employee of any health care facility (*e.g.*, hospitals, clinics, nursing homes), laboratory, pharmacy or similar institution

2. Any employee of any business that contracts with any health care facility to provide services or maintain the operation of the facility where that employee's services support the operation of the facility

3. Any employee of any business that provides medical services, produces medical products; otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments

The rule's definition of emergency responder is similarly broad, and includes anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients, or others needed for the response to COVID-19. Such employees include:

1. Military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, 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. Any individual whom 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 response to COVID-19

EMPLOYER COVERAGE

The EPSLA and EFMLEA apply to private companies with fewer than 500 employees, and to public agencies regardless of the number of employees. The rule clarifies that the number of employees is counted **as of the date an employee's leave is to be taken**, which is different from how employees are counted under the FMLA traditionally. Only workers employed in the United States are counted.

The rule also clarifies which workers are and not counted in this calculation:

- **Are** counted: full-time employees, part-time employees, employees on a leave of absence, temporary employees jointly employed with another company, and day laborers supplied by a temp agency
- **Are not** counted: independent contractors, and employees who have been furloughed and not yet re-employed

One of the biggest coverage questions concerns small employers, particularly employers with fewer than 50 employees who are not otherwise covered by the FMLA. The rule is clear that there is no small business exception for any of the paid leave provisions except for the provision of paid leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19. There is no exemption for providing the other types of paid leave under the EPSLA. Employers with fewer than 50 employees can, however, be exempt from childcare-related paid leave if one of these three criteria are met:

1. Providing the leave would cause the small business's expenses and financial obligations to exceed available business revenue and cause the business to cease operating at minimal capacity

2. The absence of the employee(s) requesting the leave would pose a substantial risk to the financial health or minimal operational capacity of the small business because of the employee(s)' specialized skills, responsibilities or knowledge of the business

3. The small business cannot find enough other workers who are willing, able and qualified to perform its services, and the services are needed for operating at minimal capacity

Small businesses may only deny leave for employees whose absence would result in one of the above three circumstances – there may be situations where the business can function with some employees, but not others. It is critical that small businesses wanting to take this exemption **document** the facts and circumstances supporting why the small business denied leave.

INTERMITTENT LEAVE

The rule clarifies that a basic requirement for intermittent leave is that the employer and employee must agree on how FFCRA leave may be taken intermittently. If there is no agreement, then it cannot be taken intermittently. There is no requirement that it be reduced to writing or memorialized, but in the absence of such, there should be a clear and mutual understanding. For employees who telework, an agreement may be reached on taking EPSLA or EFMLEA leave intermittently on any agreed increment of time. For employees who must report to a worksite, intermittent leave may only be taken for EMFLEA or EPSLA for reason 5, taking care of a child under 18. When leave is taken intermittently, it must be tracked to ensure availability of the full leave amount.

LEAVE TO CARE FOR CHILD DUE TO SCHOOL/PLACE OF CARE UNAVAILABILITY (EPSLA AND EFMLEA)

The rule clarifies that leave is not available to care for a son or daughter when another suitable individual (co-parent, co-guardian or the usual child care provider) is available to provide care. The phrase "son and daughter" has the same definition as the term used in the FLMA—meaning children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability. Generally, when an employee qualifies for such leave under both acts, the employee may first use the two weeks of paid leave provided by the

EPSLA (or employer-provided earned and accrued paid leave) which will run concurrently with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is then paid under the EFMLEA. Because the subsequent 10-week period is paid under EFMLEA, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where federal and state law permits, to have accrued paid leave supplement the two-thirds pay under the EFMLEA so that the employee receives the full amount of their normal pay.

LEAVE TO CARE FOR CHILD DUE TO SCHOOL/PLACE OF CARE UNAVAILABILITY (EFMLEA AND FMLA)

The rule provides that as a general matter, the FMLA definitions apply to EFMLEA unless specific definitions were included in the EFMLEA. However, eligibility requirements for employees to take expanded family and medical leave under the EFMLEA differ from standard FMLA leave. Not all employees who are eligible to take expanded family and medical leave will be eligible to take FMLA leave for other reasons. In particular, employees only need to have been employed for 30 calendar days in order to be eligible for expanded family and medical leave to care for their child due to school or place of care closure or child care unavailability under the EFMLEA.

Employer coverage also differs under the EFMLEA and FMLA. Notably, employers of health care providers and emergency responders can be excluded from the EFMLEA's leave requirements, but not the FMLA.

Under the rule, where an employee has already taken some FMLA leave in the current 12-month leave year, the maximum weeks of EFMLEA leave is reduced by the amount of FMLA leave entitlement taken in that year. If an employee had exhausted his or her 12 workweeks of FMLA, he or she may still take EPSLA leave for a COVID-19 qualifying reason. Additionally, employees are limited to a total of 12 weeks of expanded family and medical leave under the EFMLEA, even if the applicable time period spans two 12-month leave periods under the FMLA.

EMPLOYER NOTICE

Under the rule, covered employers must post and keep posted a notice of the FFCRA requirements. The DOL has created a model notice for this purpose (WHD1422 REV 03/20) which can be downloaded from the Wage and Hour Division website. Employers are not required to use this form, as long as they post or distribute the information provided in the model notice in an accurate and readable format. Translation of the form into different languages is not required; however, the DOL has issued a Spanish language version of the poster as well.

The rule provides that to satisfy the posting requirement, employers must post the notice in a conspicuous place where employees or job applicants at a worksite may view it or employers may also:

- Distribute the notice to employees by email or post the notice electronically on an employee information website
- Directly mail the required notice to any employees who are not able to access information at the worksite, through email or online

Unless an employer is covered by other provisions of the FMLA, posting this notice satisfies their FMLA general notice obligations.

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EMPLOYEE NOTICE OF NEED FOR LEAVE

The rule provides that employers may require their employees to follow reasonable notice procedures of the need for leave. Whether a procedure is "reasonable" will depend on the facts and circumstances of each particular case. Generally, and as set forth in the rule, notice may not be required in advance. It may only be required *after* the first workday (or portion thereof) for which an employee takes Paid Sick Leave or Expanded Family Medical Leave. Following the first workday, it will be reasonable for an employer to require notice as soon as is practicable under the facts and circumstances. If an employee takes Expanded Family Medical Leave or Paid Sick Leave for purposes of caring for a son or daughter whose school or place of care is closed, and the need for the leave was foreseeable, the employer may require that an employee provide notice as soon as is practicable in those circumstances.

The rule clarifies that oral notice of the need for leave, accompanied by sufficient information for the employer to determine whether the leave requested is covered by the EPSLA or the EFMLEA, may be sufficient to meet the notice requirement. However, employees must also provide documentation sufficient to substantiate the need for leave as requested by their employer and as discussed further below. Notice may be given by the employee's spokesperson if the employee is unable to do so personally. A spokesperson may include, for example, a spouse, adult family member or other responsible party. If an employee fails to give proper notice, an employer must give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

DOCUMENTATION OF NEED FOR LEAVE

Employees are required to provide documentation to support paid leave under EPSLA and the EFMLEA. The rule clarifies that documentation must include the following: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Additional documentation is also required as follows:

- An employee seeking paid leave under EPSLA for quarantine purposes, whether for his or her own quarantine or to care for a family member under quarantine, must provide the name of the government entity that issued the quarantine or isolation order or the name of the health care provider who advised the individual to self-quarantine.
- An employee requesting paid leave under EPLSA or the EFMLEA to care for his or her child must provide the following information: (1) the name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) **a statement representing that no other suitable person is available to care for the child during the period of requested leave.**
- For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's family member with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.

The rule also permits the employer to request an employee to provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. **The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.** For more information, please consult https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

HEALTH CARE COVERAGE

The rule requires that employers maintain the coverage of any employee who is taking leave pursuant to the EPSLA or the EFMLEA under the employer's group health plan on the same terms and conditions as such coverage would have been provided had the employee been continuously employed during the entire leave period. This requirement to maintain coverage under group health plans applies to every employer subject to the EPSLA or the EFMLEA.

The same group health plan benefits provided to an employee before the employee is on leave pursuant to the EPSLA or the EFMLEA must be maintained during the employee's leave. In addition, if during the course of an employee's leave, the employer offers a new benefit or changes existing benefits offerings, the employee on leave is entitled to the new or changed benefits to the same extent as if the employee were not on leave; and any other plan changes (such as premium and deductible increases or decreases) that apply to an employer's workforce generally must also apply to an employee on leave under the EPSLA or the EFMLEA.

Under the rule, employees on leave are entitled to receive notice of any opportunity change the group health plan or benefit options in which the employee participates. If the employee elects to change his or her group health plan coverage, the employer must honor the request.

While an employee is on leave pursuant to the EPSLA or the EFMLEA, the employee remains responsible for paying his or her portion of any premiums the employee was required to pay before going on leave. The employee's premiums must be paid by the method normally used during any paid leave (i.e., payroll deduction). However, in the case of an unpaid leave or if the employee's pay during the leave is not sufficient to cover the employee's share of the premiums, the employee may obtain payment of the employee's portion of the premium from the employee by any of the methods for collecting premiums during an unpaid leave of absence allowed under the FMLA (e.g., allowing employees to prepay premiums).

The rule also permits an employee taking a leave under the EPSLA or the EFMLEA to elect not to retain group health plan coverage during the leave period. However, when the employee returns from leave, the employee must be reinstated to the coverage the employee had before the leave, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc. An employer's obligation to maintain group health plan coverage for an employee taking leave under the EPSLA or the EFMLEA (other than COBRA continuation coverage) ends when the employment relationship between the employer and the employee would have ended but for the leave.

MULTIEMPLOYER PLANS

Under the rule, an employer that is a signatory to a multiemployer collective bargaining agreement may, in accordance with its existing collective bargaining obligations, satisfy its obligation to provide leave under the EPSLA or the EFMLEA by making contributions to a multiemployer fund, plan or other program. With respect to leave provided under the EPSLA, contributions to the multiemployer fund, plan or other program must be based on the hours of leave to which each employee is entitled under the EPSLA according to each employee's work under the multiemployer collective bargaining agreement. With respect to leave provided under the EFMLEA, contributions to the multiemployer fund, plan or other program must be based on the hours of leave to which each employee who has been employed for at least 30 calendar days is entitled under the EFMLEA according to each such employee's work under the multiemployer collective bargaining agreement. In order to comply with the FFCRA, the multiemployer fund, plan or other program to which the contributions are made must allow employees to secure payments for leave under the EPLSA and EFMLEA.

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RETURN TO WORK

The rule clarifies that in most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid leave under EPLSA or the EFMLEA in the same manner that an employee would be returned to work after normal FMLA leave. However, like the FMLA, the FFCRA does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave.

The rule clarifies that the restoration provision of the FMLA does not apply to under the amended EFMLEA to an employer who has fewer than 25 employees if all four of the following conditions are met:

1. The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable

2. The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.*, due to COVID-19 related reasons) during the period of the employee's leave

3. The employer made reasonable efforts to restore the employee to the same or an equivalent position

4. If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the employee's leave began, whichever is earlier

In addition, as these provisions amend the FMLA, the existing limitation to job restoration for "key" employees is applicable to leave taken under the EFMLEA.

RECORDKEEPING

The rule requires employers to retain documentation pertaining to employees' FFCRA leave for four years, whether leave was granted or denied. When oral statements are supplied by employees, employers should create a record of such statements. And when small employers assert an exemption from paying paid leave, they should maintain the required supporting documentation for four years as well.

In support of their claim for tax credits, employers must also document and maintain the amount of paid leave each eligible employee was entitled to, including records of work, telework and amount of paid leave. Employers should also document how they determined the amount of health benefits allocated to wages. In addition, IRS rules pertaining to the tax credit must be followed, and employers should maintain IRS forms and other required tax credit documentation.

PROHIBITED ACTS AND ENFORCEMENT

The rule provides that an employer cannot discharge, discipline or discriminate against and employee for (1) taking sick leave under the EPSLA or (2) because the employee filed a complaint, brought some kind of proceeding (such as an enforcement proceeding), or testified/will testify in a proceeding. An employer who violates this law is subject to the same enforcement provisions for violations of the Fair Labor Standards Act.

With respect to the EFMLEA, an employee has the same protections as given under the FMLA. An employer cannot interfere with, restrain or deny the exercise of rights to take leave. An employer cannot discharge or discriminate against an employee for taking leave or attempting to take leave. An employee has the same rights to bring suit and recover damages under the EFMLEA as the employee has under the FMLA, but only if the employer is subject to the FMLA.

Alleged violations of the EPSLA or the EFMLEA may be filed with the Wage and Hour Division of the DOL.

FFCRA'S EFFECT AND INTERPLAY WITH OTHER LAWS, EMPLOYER PRACTICES AND CBAS

FFCRA Leave is Independent of Accrued and Unused PTO Banks. The rule clarifies that use or request of paid sick leave under the EPSLA should not count against any employee's accrued, but unused, vacation or PTO. Employers also may not deny an employee paid sick leave or expanded family medical leave under the FFCRA because the employee may have taken leave under other employer policies even if such leave was taken for COVID-19-related reasons. Regardless of how much other leave an employee has taken, the employer must permit the employee to immediately take any paid sick leave and expanded family and medical leave under the FFCRA to which the employee is entitled. However, this does not apply to or affect FMLA's 12 workweeks within a 12-month period cap.

Voluntarily-Given Leave Pre-April 1, 2020 May Not Be Counted Against FFCRA Leave. The rule also clarifies that any employer's prior offer of voluntary leave to help employees before the enactment of the FFCRA may not be used to count against the leave required under the FFCRA. Employers may prospectively terminate any voluntary additional leave the employer provided as of April 1, 2020, or thereafter, provided that the employer had not already amended its leave policy to reflect the voluntary offering. While DOL guidance provides that any accrued, but unused, PTO may not be used concurrently with paid sick leave under the EPSLA, such accrued, but unused PTO, may be used after the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA. The rule further clarifies that employees do not have any right or entitlement to use paid sick leave or expanded family and medical leave retroactively for any leave taken before April 1, 2020.

Leave Sequencing. Under the rule, employees have the right to choose to use paid sick leave prior to using any other type of paid leave to which the employee is entitled as a matter of law, CBA, or policy in existence before April 1, 2020. Employers cannot require or influence the employee's sequencing of leave. However, an employer may require that an employee use leave the employee has available under employer policies to care for a child (vacation, PTO, etc.) concurrently with expanded family and medical leave. If it is used concurrently, the employer has to pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken, even if that amount is greater than $200 per day or $10,000 in the aggregate. But the employer's eligibility for tax credits is still limited to the cap of $200 per day or $10,000 in the aggregate.

Unused FFCRA Leave Does Not Become a Vested Benefit. The rule provides that employers have no obligation to financially compensate or reimburse employees, or former employees, for any unused paid sick leave or expanded family and medical leave to which the employee may be entitled. Last, the rule clarifies that the 80-hour paid sick leave maximum is per person and not per job.

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