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Employment Question of the Day: April 17, 2020**Legal Update**

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By Anne M. Radolinski and Erin M. Edgerton

Question

How do your PTO policies interact with furloughs, Emergency Paid Sick Leave (EPSL) and expanded FMLA (EFMLEA) under the Families First Coronavirus Response Act (FFCRA)?

Answer

An employer who provides employees with PTO will want to pay special attention to how PTO is used during the COVID-19 pandemic. Here are six common questions we have received from employers regarding PTO use.

1. Can employees voluntarily take PTO during a furlough or temporary layoff?

Yes, if your PTO policy allows them to do so. PTO use should be addressed in the written communication to the employees regarding the terms of the furlough/temporary layoff to ensure that employees understand their options. PTO use will affect the timing and/or availability of unemployment compensation benefits.

2. Can I require employees to take PTO during a furlough and/or temporary layoff?

Yes, if the applicable state law and your PTO policy allow you to do so. PTO use should be addressed in the written communications to the employees regarding the terms of the furlough/temporary layoff.

3. Can employees voluntarily use PTO during an EPSL under the FFCRA?

Yes, *if the employer and employee agree*, the employee may use any available PTO to make up for the difference between the amounts the employee is entitled to receive for the EPSL and the employee's regular wages/salary for the two-week period of the leave. If an employer is going to deny employees the use of PTO during Emergency Paid Sick Leave under the FFCRA, it is advisable to inform the employees in writing to avoid confusion and to ensure consistency across the employee population.

If an employee is receiving the full value of his or her wages/salary via the EPSL pay, the employee does not receive PTO in addition to the EPSL payments.

4. Can employers require employees to use PTO during an EPSL under the FFCRA?

No, unless the employee voluntarily agrees. Employers should also be careful not to be viewed as coercing the employee to take PTO during an EPSL.

5. Can employees voluntarily use available PTO in addition to the payments they receive for an EFMLEA under the FFCRA?

Yes. The regulations allow employees to choose to use PTO in addition to EFMLEA so that they can receive a full day's wages/salary during the leave period, provided that the employee has available PTO under employer policies.

If the first two weeks of the EFMLEA *do not overlap with ESPL*, the employee may use any available PTO during the two-week period.

If the first two weeks overlap with ESPL, the employee may use available PTO to make up for the difference between payments received for the EFMLEA and his or her regular wages/salary during the first two weeks if the employer and employee agree. *See question 3, above, for more details.* Thereafter, the employee may choose to use available PTO to make up the difference for the remainder of the EFMLEA leave period. The employee would in essence receive two-thirds of his or her pay by way of the EFMLEA and the remainder by way of PTO use for the EFMLEA period. Note however that the employer is eligible for tax credits only with respect to the EFMLEA payments.

6. Can employers require employees to use available PTO while on EFMLEA under the FFCRA?

The regulations allow an employer to require employees to use PTO during an EFMLEA with one caveat. If the first two weeks of the EFMLEA overlap with an ESPL, the employer and the employee must agree to PTO use during those first two weeks; the employee may not be required to use PTO during those first two weeks. *See question 4, above.*

If you have any questions, contact your Fredrikson & Byron Employment & Labor attorney.

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