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What Employers Need to Know About the New DOL Temporary Rule Implementing the Families First Coronavirus Response Act

Legal Update
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On April 1, 2020, the U.S. Department of Labor issued temporary regulations implementing the Families First Coronavirus Response Act (FFCRA). The temporary regulations–expiring on December 31, 2020–clarify some of the statute's ambiguities and formalize certain DOL commentary set forth in the Q&As issued to date concerning the FFCRA, but the puzzle of this statute is far from solved. Here, we focus on some of the key areas addressed in the regulations.

Clarification of Emergency Paid Sick Leave Act Triggers

The regulations provide clarification about five of the six triggers for taking leave under the Emergency Paid Sick Leave Act (EPLSA).

A. EPSLA Triggers

The EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons related to COVID-19, specifically where the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);
5. is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or
6. 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.

B. Guidance on EPLSA Triggers

The temporary rules provide guidance on several key points regarding the Paid Sick Leave triggers above, including the following:

a. Federal, state or local quarantine or isolation orders.

The regulations clarify that an employee is entitled to sick leave in the instance where **but for** the quarantine or isolation order, the employee would be able to perform the work allowed or permitted by the employer.

The term "**quarantine or isolation order**" is defined broadly to include a quarantine, isolation, containment, shelter-in-place or stay-at-home order issued by a federal, state or local government authority that causes the employee to be unable to work. The term also includes when a federal, state or local government authority has advised categories of citizens (for instance those of a certain age or having certain medical conditions) to shelter in place, stay at home, isolate or quarantine, thus causing those employees to be unable to work.

To clarify, the employee is not entitled to paid sick leave:

- If the employer does not have work for the employee to perform, regardless of the order (i.e. the company has ceased its operations or ceased portions of its operations affecting the employee, or the employee is on layoff or furlough, etc.).
- If in any circumstance, the employee is able to telework while complying with a quarantine or isolation order (and work is available and the employer permits the employee to telework).

b. Health care provider advises self-quarantine

The regulations confirm that the term **"health care provider"** in this instance carries the same meaning as under the federal Family and Medical Leave Act. They also specify that the employee is entitled to paid sick leave only if the health care provider advises the employee to self-quarantine based on the belief that:

- the employee has or may have COVID-19; or
- the employee is particularly vulnerable to COVID -19; and
- following the advice of the health care provider to self-quarantine prevents the employee from being able to work.

c. Employee is experiencing symptoms and seeking medical diagnosis

The regulations specify that the term **“experiencing symptoms of COVID-19”** means the employee is experiencing any of the following symptoms:

- Fever;
- Dry cough;
- Shortness of breath; or
- Any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.

The Paid Sick Leave in this instance is limited to the time the employee is taking affirmative steps to seek a medical diagnosis, such as making, waiting for or attending an appointment for a test for COVID-19.

d. Caring for individual who is quarantined or subject to quarantine or isolation order

The regulations define the phrase **“caring for an individual”** quite broadly to mean caring for an immediate family member, a person who regularly resides in the employee’s home or a person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. However, the definition does not include a person with whom the employee has no personal relationship.

e. Caring for son or daughter whose school or place of care closes

The temporary rules clarify that EPSLA leave is available only where no other suitable person is available to care for the son or daughter during the period of the leave. Key terms are also defined including the following**:**

- **“son or daughter”** means a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing *in loco parentis*, who is under 18 years of age; or is 18 years of age or older and incapable of self-care because of a mental or physical disability.
- **“place of care”** means a physical location in which care is provided for the employee’s child while the employee works for the employer and includes day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs and respite care programs.

The employee is *not* entitled to paid sick leave if:

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  - the employee is able to telework, despite having to be absent because a son or daughter's school or place of care has been closed, etc. (provided work is both available and the employer permits the employee to telework).
  - the employer does not have work for the employee to perform (i.e. the employee is placed on a layoff or furlough).

C. Upper Limit

An employee is entitled to a maximum of 80 hours of EPLSA leave. If an employee has taken 80 hours of paid sick leave and then starts employment with a new employer, the employee is not eligible for a new round of paid sick leave.

D. Sequencing of Paid Sick Leave

An employee may first use Paid Sick Leave before using any other leave to which he or she is entitled under any other federal, state, or local law, collective bargaining agreement or employer policy that existed prior to April 1, 2020.

Calculation of Paid Sick Leave under the EPLSA

Regardless of whether an employee is exempt or nonexempt, in no event is the employer required to pay:

- More than $511 per day and $5111 in the aggregate for EPLSA leave triggers 1, 2 and 3 above.
- More than $200 per day and $2000 in the aggregate per employee for EPLSA leave triggers 4, 5 and 6 above.

Employees may however, where applicable, use other paid time off to make up the difference between their regular pay and the paid sick leave amounts.

Clarification of Employee Eligibility Under the Emergency Family and Medical Leave Expansion Act

Employees employed by a covered employer are eligible for EFMLEA when they have been on the employer's payroll for 30 calendar days. If an employee is laid off on or after March 1, 2020, and is rehired on or before December 31, 2020, the employee will be eligible for EFMLEA leave upon being rehired if the employee was on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off.

Calculation of Emergency Family and Medical Leave

An eligible employee may take up to twelve workweeks of EFMLEA during the period April 1, 2020 through December 31, 2020. The first two weeks of EFMLEA are unpaid, except that they run concurrently with EPLSA leave.

EFMLEA leave counts against the regular leave entitlement under the FMLA. Thus, if the employee has no FMLA leave available in the applicable 12-month period due to prior use of FMLA leave, the employee will not be entitled to any EFMLEA leave. The employee, however, may be eligible for leave under other employer policies or other applicable law.

Regardless of whether an employee is exempt or nonexempt, in no event is the employer required to pay more than $200 per day and $10,000 in the aggregate per employee for the ten weeks of EFMLEA leave.

However, employees may use, and employers may require employees to use, other paid time off available under employer policies concurrently with EFMLEA leave.

Clarification of Teleworking

The temporary rules provide a helpful clarification of the parameters of teleworking for purposes of the FFCRA. Teleworking means work that the employer permits or allows the employee to perform at home or at a location other than the normal workplace.

An employee is generally not entitled to leave under either the EPSLA or EFMLEA if the employee is able to telework. The temporary rules clarify that an employee is able to telework if:

- The employer has work for the employee;
- The employer permits the employee to perform via telework; and
- There are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work.

Further Guidance on the Intersection of Statutory and Employer-Provided Leave

The regulations clarify a number of questions regarding the intersection of the various leaves including the following:

A. EPSLA and EFMLEA

The EPSLA and EFMLEA leave run currently. Thus, if an employee takes leave to care for a son or daughter whose school has closed, and the employee has 2 weeks of available EPSLA leave and 12 weeks of FMLEA leave for the time off, the first two weeks of leave are paid under the EPSLA and those two weeks are the unpaid leave under the EFMLEA. At the end of the two-week period, the employee still has 10 weeks of paid leave available under the EFMLEA.

B. EFMLEA and Classic FMLA

The EFMLEA is an amendment to the FMLA and yet differs from the classic FMLA provision in some important respects.

First, many more employers are covered for purposes of the EFMLEA leave than for classic FMLA leave. The eligibility requirement for potential EFMLEA leave, which requires only 30 days of employment, is also much more relaxed than the classic FMLA. Additionally, classic FMLA leave is unpaid, while the last 10 weeks of EMFLEA leave are paid at two-thirds of the employee's regular rate of pay and capped at $200 per day.

Leave under the EFMLEA is also unique in that, despite the 12-week availability of FMLA per year, employees are limited to a total of 12 weeks EFMLEA and FMLA leave altogether. Thus, for example, if an employee runs its FMLA leave year beginning on July 1 of each year, and an employee takes five weeks of EFMLEA leave in May and June, that employee will only have seven remaining weeks of available EFMLEA in the year beginning on July 1–even though the employee has a new allocation of 12 weeks of FMLA, generally.

C. EPLSA and FMLA

The EPSLA is not an amendment to the FMLA. It is a separate, stand-alone leave statute. Therefore, even if an employee has exhausted the 12 weeks of total leave available under the FMLA or EFMLEA, the employee may still take EPSLA leave for a qualifying reason. Additionally, if the employee has exhausted the EPSLA leave for a reason unrelated to the care of a son or daughter and has not taken any FMLA/EMFLEA leave, the employee will still have 12 weeks of FMLA/EFMLEA leave available, subject to the terms of the FMLA and/or EMFLEA.

D. EPSLA and EFMLEA, and Employer Paid Leave Policies

The paid leave available under the EPLSA and EFMLEA are separate from, and in addition to, any earned leave an employee may have under an employer's paid leave policies. Thus, if an employee has not used earned paid leave under the employer's paid leave policies, the employee will remain entitled to that leave in accordance with

the employer's plan.

Further Guidance on Covered Employers

The temporary regulations provide some additional guidance on which employers are covered by the FFCRA and, thus, must provide EPLSA and EFMLEA leave.

Private Employers

When counting employees to determine whether the business is over the 500 employee mark, individuals who have been laid off or furloughed, and independent contractors, are *not* included.

The headcount is taken at the time an employee would take leave. Thus, for example, an employer who has 600 employees is not covered; but if that employer lays off 125 employees, it will become a covered employer at the time of the layoff, and its employees will then be entitled to the paid leave provisions in the EPSLA and EFMLEA.

Integrated employers and joint employers combine their employees for purposes of determining whether they are covered employers under the EPSLA and EFMLEA provisions.

Small Employer Exception for Private Employers

Employers with fewer than 50 employees (small employers) have a limited exemption from the EPSLA and EFMLEA leave requirements. Under certain circumstances, they do not need to provide leave requested to care for a child who is at home because of school or child care closures, or because child care is otherwise unavailable, due to COVID-19 related reasons.

Small employers are not exempt, however, from the other potential grounds for paid leave under the EPSLA. For example, small employers will still need to provide paid sick leave to an employee who is subject to a quarantine or isolation order related to COVID-19, who has been advised by a health care provider to self-quarantine due to COVID-19 concerns, who is experiencing COVID-19 symptoms and seeking a medical diagnosis, or who is caring for someone else in one of these situations.

To qualify for the limited exemption, small employers need to show that providing the leave would jeopardize the viability of the company as a going concern. More specifically, an authorized officer of the business must determine that one of the following conditions applies:

- Providing the leave would "result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business

to cease operating at a minimal capacity";

- Absence of the employee(s) requesting leave would "entail substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities"; or
- "There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave … and these labor or services are needed for the small business to operate at a minimal capacity."

Even if a small employer meets one of these three criteria, it may deny EPSLA or EFMLEA leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively. In other words, this is not a "blanket" exemption as to all employees.

If a small employer denies leave under the FFCRA to an employee under this exemption, it must document the facts and circumstances that meet the criteria described above to justify the denial and retain those records for its own files for four years. Regardless of whether a small employer chooses to exempt one or more employees, the employer is still required to post a notice of the law's requirements.

Public Employers

All public employers must provide EPLSA to their eligible employees. They must also provide EFMLEA leave to their employees unless they are health care providers or emergency responders, or the Office of management of Budget has excluded the employees under § 826.30(d). Additionally, federal employees that are not covered under Title I of the FMLA are not eligible for EFMLEA.

Elective Exemption for Health Care Providers and Emergency Responders

The DOL retains the authority to exempt Health Care Providers and Emergency Responders but has not yet created a mandatory exemption. Rather, the Department has allowed employers to continue exercising their discretion to determine whether to exempt certain employees from eligibility under EPSLA and EFMLEA.

Employers may exclude health care providers or emergency responders from the EPSLA and EFMLEA leave requirements. Exercising this option does not affect whether those employees are eligible for any employer-provided paid leave (e.g., PTO, vacation, or sick leave) under the employer's policies.

If an employer does *not* exercise its right to exclude health care providers and emergency responders from the EPSLA and EFMLEA leaves, the employer is subject to the requirements of the FFCRA with respect to leave requests from those employees as all other employees, and the employer will also be able to obtain tax credits for such leaves.

Health Care Provider

The term "health care provider" is used in two contexts in the FFCRA provisions. The first context involves the health care providers who are qualified to advise, for example, that an employee should be quarantined or that an employee is ill with COVID-19, as discussed in the section "Clarification of Emergency Paid Leave Triggers," above.

For purposes of an employer's discretion to exclude an employee from the EPSLA and EFMLEA, however, the term "**health care provider**" is defined much more broadly to include 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."
- employed at "any permanent or temporary institution, facility, location or site where medical services are provided that are similar to such institutions."
- "employed by an entity that contracts with any of the institutions already described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility."
- "employed by an 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."
- that a Governor of a state (or the highest official of the district of Columbia or a territory) determines is necessary for the State's (or the territory's or D.C.'s) response to COVID-19.

Emergency Responder

The term "emergency responder" is also broadly defined for purposes of an employer's discretion to exclude employees from the EPSLA and EFMLEA, as follows:

- Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19, including military or national guard, law enforcement officers, correctional

institution personnel, fire fighters, 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.

When Employees Can Take Intermittent Leave

Employees may take intermittent leave under the EPSLA and EFMLEA in some circumstances if–and only if–the employer and employee agree to it. The agreement need not be in writing if the parties reach a "clear and mutual understanding." However, we recommend that the agreement be reduced to writing. Absent agreement between the employer and employee, intermittent leave is not available under the EPSLA and the EFMLEA.

Teleworking

The employer and employee may agree to intermittent EPSLA leave for any of the reasons triggering such a leave, and to intermittent EFMLEA leave, if the employee is able to telework. The employer and employee have flexibility to agree to any increments of time for the intermittent leave, allowing the balancing of business needs and the employee's personal obligations.

Reporting to Work at the Employer's Worksite

If the employee is working at the employer's worksite, rather than teleworking, the employer and employee can agree to intermittent leave only in circumstances where there is minimal risk of spreading the COVID-19 virus to other workers. Thus, the employer and employee can agree to intermittent leave **only in the instance where the leave is due to the employee need to care for children because of daycare or school closings**. An employee may not take intermittent leave under the EPSLA for other reasons, because doing so would increase the risk of spreading COVID-19. If an employee does take intermittent leave, the employer can only count the amount of leave actually taken by an employee towards the employee's leave entitlements.

Health Care Coverage for Employees on EPSLA and EFMLEA Leave

As under the FMLA, the employer must maintain the employee's coverage under any healthcare plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period. An employee

who chooses to go off the employer plan during EPSLA or EFMLEA leave must be permitted to reinstate their coverage under the plan on the same terms as prior to taking leave.

Return to Work

Employees are generally entitled to be reinstated at the end of an EFMLEA or EPLSA leave on the same terms as those returning from traditional FMLA leave. The "key employee" exception to job restoration under the FMLA also applies to EFMLEA and EPLSA leaves. In addition, as with the FMLA, employees on EFMLEA or EPLSA leave may be included, for instance, in an otherwise lawful reduction in force or layoff that would have affected the employees regardless of leave status. Employers are encouraged to seek legal counsel in instances where employees on leave are going to be included in a reduction in force or layoff or are otherwise going to be denied restoration to employment at the end of the leave.

An employer with fewer than 25 employees may deny restoration to employment to an eligible employee if all four of the following conditions are met:

- 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;
- 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 (*e.*, due to COVID-19 related reasons) during the period of the employee's leave;
- the employer made reasonable efforts to restore the employee to the same or an equivalent position; and
- 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 twelve weeks after the employee's leave began, whichever is earlier.

Employer Notices to Employees

Employers are required to post a notice of the leave provisions in the EPSLA and EFMLEA, as well as the procedure for filing complaints of violations of the FFCRA to the DOL/WHD, in a conspicuous place at the worksite. The DOL has provided a model notice for this posting, which can be downloaded from the DOL/WHD website. If employees cannot access the information at the worksite, employers can provide the information to their employees either online or through email. Employers are not required to translate the notice into other languages, but the DOL has provided a Spanish version of the poster on its website.

Because many employers who are not covered by the classic FMLA provisions now find themselves covered by the EFMLEA, and we are operating in a time of crisis, the DOL has determined that employers do not need to provide the usual FMLA notices of eligibility, rights and responsibilities, or written designations for the EFMLEA leave.

Employee Notice Regarding the Need for Leave and Recordkeeping

For EPSLA leave, other than leave due to care for a son or daughter who is home because of school or daycare closings, employers can require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which the employee receives the leave. If the leave to care for a son or daughter under either the EPSLA or EFMLEA is foreseeable, employees must provide notice as soon as practicable, but notice can only be required after the first workday or portion of a workday of leave.

Employees' notice can be oral, but employers can require sufficient information to determine that the leave is covered by the FFCRA.

The documentation an employee must provide depends on the basis for the leave. For all EPSA and EFMLEA leave, it must include: :

- employee's name,
- date(s) for which leave is requested,
- qualifying reason for leave, *and*
- an oral or written statement that the employee is unable to work because of the qualified reason for leave.

In addition, employees must provide the following, depending on the reason for taking paid leave:

- If an employee is taking EPSLA leave due to a quarantine or isolation order, the employee must identify the governmental entity that issued the order.
- If an employee is taking EPSLA leave because a health care provider advised him/her to self-quarantine, the employee must identify the health care provider.
- If an employee is taking EPSLA or EFMLEA leave to care for a child whose school or place of care is closed, the employee must identify the name of the child being cared for, the name of the school or childcare provider that is closed or unavailable and represent that no one else will be taking care of the child.

The employer may also request the employee to provide additional material as needed to support a request for tax credits. Please see the accompanying flash focus "Claiming the Credit: IRS Issues Guidance on Tax Credits under Families First Coronavirus Response Act" for additional information regarding claiming the FFCRA

tax credit. Employers should seek legal counsel in regarding to additional required documentation.

If an employer fails to grant an employee leave, the employer must give the employee notice of the denial and an opportunity to provide the proper documentation for the leave. Only after the employee has failed in that regard can the employer deny the paid leave.

An employer is required to retain all documentation provided by employees for **four years**, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is also required to document and retain that information for four years.

Employers should in addition consult the IRS guidances regarding records needed to support the tax credit.

The Fredrikson & Byron Employment & Labor and Compensation Planning & Employee Benefits team members are regularly providing employers advice and counsel regarding the Families First Coronavirus Response Act, and strategies for addressing the impact of the coronavirus. Please reach out to any member of the Employment & Labor and Benefits teams for assistance.