

The New Leave Entitlements Under FFCRA - Issues Unique to the Public Sector

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Practice Area: School Law & County and Municipal Governance & Government Law

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("FFCRA"). The FFCRA relief package includes two (2) distinct provisions that provide emergency leave to employees: (1) the Emergency Paid Sick Leave Act ("EPSLA"); and (2) the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). The provisions of the FFCRA were fine-tuned in a matter of five (5) days, with the expectation that the Department of Labor ("DOL") will provide clarifying rules shortly following the FFCRA's effective date of April 1, 2020. Until such time as the DOL clarifies the FFCRA's provisions, employers are working diligently to interpret the FFCRA's terms and prepare for implementation. In particular, the public sector is faced with the unpleasant reality that the FFCRA may serve as an unfunded mandate on a local government system that is already underfunded. This Q & A overview seeks to provide further clarification and guidance to local governments as they implement the provisions of the FFCRA while continuing to provide effective and efficient services to their constituents.

General Questions Regarding the FFCRA

Q: The FFCRA applies to employers with less than 500 employees. How do we know whether our local government is subject to the FFCRA?

A: The FFCRA applies to private sector employers with fewer than 500 employees (subject to specific small business exemptions not applicable here) and governmental employers with one (1) or more employees. This means that all local governments – counties, municipalities, and school districts – are subject to the mandates of the FFCRA.

Q. Does the employer have to post notices to its employees regarding the FFCRA?

A: Yes. The FFCRA requires that each employer post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in the FFCRA. The DOL will publish the form of notice by March 25, 2020.

Q: Does an employer need to update policies regarding changes to the FFCRA?

A: Every public sector employer needs to either (1) update existing policies or create an addendum to existing policies; or (2) create new policies if the employer did not previously have an FMLA policy. Each policy or policy addendum is unique to the employer.

Specific Questions Regarding the EPSLA

Q: How long must an employee be employed by a local government before the employee is entitled to paid leave under the EPSLA?

A: All employees—regardless of the employee’s tenure or FTE status with a local government—are entitled to emergency paid sick leave under the EPSLA.

Q: What circumstances trigger the requirement that a local government provide emergency paid sick leave under the EPSLA?

A: A local government is required to provide emergency paid sick leave to an employee who is unable to work or telework because, due to COVID-19, the employee:

1. Is subject to a federal, state, or local quarantine or isolation order;
2. Has been advised by a health care provider to self-quarantine;
3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Is caring for an individual subject (or advised) to quarantine or isolation;
5. Is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6. Is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.

Q: If one of our employees seeks emergency paid sick leave to care for a neighbor who is subject to quarantine, are we required to provide the employee with paid leave under EPSLA? Does the EPSLA extend beyond care provided solely to family members?

A: It is unclear as to whether the EPSLA limits leave taken to only family members. The plain language of the law defining the qualifying event sets forth that leave may be taken to care for an “individual.” However, with respect to the pay rate for an employee who takes leave for this purpose, the language utilized under the law is “care for family members.” Given the discrepancy in the language utilized, and unless otherwise clarified by the DOL, it would be prudent to consider such situations on a case-by-case basis, with an eye toward allowing leave to care for non-family members.

Q: How much emergency paid sick leave is available to employees under the EPSLA?

A: Local government employees are entitled to two weeks of paid sick leave. For full-time employees, two weeks is the equivalent of 80 hours at the employee’s regular rate of pay; part-time employees are entitled to two-weeks of pay based on the number of hours the employee works, on average, over a two-week period (or if the employee has variable hours of work each week, the employee’s average hours of work over the preceding six (6) months).

Q: At what rate is emergency paid sick leave paid to employees?

A: An employee is entitled to his/her full salary or wages where, as a result of COVID-19: (1) the employee is subject to a federal, state, or local quarantine or isolation order; (2) the employee has been advised by a health care provider to self-quarantine; or (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

An employee is entitled to 2/3 of his/her wages/salary where, as a result of COVID-19: (1) the employee is caring for an individual subject or advised to quarantine or isolation; (2) the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable; or (3) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services.

Q: What payment caps are in place for the emergency paid sick leave benefit available under the EPSLA?

A: Payments are capped at \$511 per day (\$5110 for the total leave period) for leave necessary for an employee to deal with his/her own illness or quarantine/isolation. Payments are capped at \$200 per day (\$2000 for the total leave period) for employees who are caring for an individual affected by COVID-19 or providing care for a son or daughter whose school or childcare facility has closed.

Q: Does the EPSLA allow for a grandparent, aunt/uncle, niece/nephew, or similar kin to take emergency paid sick leave for purposes caring for a child whose school or childcare is closed or unavailable?

A: No. The EPSLA explicitly provides that emergency paid leave is available for school closure or loss of childcare only for an employee's son or daughter. The EPSLA does not extend benefits to any and all next of kin.

Q: If an employee is informed by the employee's health care provider that the employee should self-quarantine due to being high-risk, does the EPSLA provide leave benefits to the employee? After the 10 days, would traditional FMLA apply?

A: Where an employee has been advised by a medical provider to self-quarantine, the employee is entitled to emergency paid sick leave under the EPSLA. Upon expiration of all EPSLA leave available to the employee, the employee may qualify for further leave if the employee is experiencing a "serious health condition" under the FMLA. A traditional FMLA analysis would apply to further job-protected leave requested by the employee. While such a request must be handled on a case-by-case basis, we are suggesting that employers consider following relaxed rules on otherwise required FML certification given the existing strain on healthcare professional resources.

Q: Does the EPSLA provide an employee with emergency paid sick leave if a local government employer prohibits the employee from returning to duty so the employee can self-quarantine because of travel to a Level 2 or Level 3 country or a domestic "hot spot"?

A: The EPSLA is explicit as to the categories of leave giving rise to the entitlement to emergency paid sick leave. A requirement by an employer for an employee to self-quarantine is not one of the categories of leave recognized by the EPSLA. Thus, an employee would not be entitled to EPSLA leave because the employer prohibited the employee from returning to duty. Of important note, an employer-demanded quarantine should be undertaken with caution, as the Americans with Disabilities Act may be implicated with respect to such a decision by an employer. Moreover, an employer may consider temporarily modifying PTO rules to allow substitution of paid time off for the imposition of a quarantine. Such decisions must be handled through modification of existing leave policies.

Q: If our Employee Handbook makes paid sick leave available to employees, is a local government still required to make emergency paid sick leave available to its employees pursuant to EPSLA?

A: Yes. The emergency paid sick leave available to employees under the EPSLA is in addition to any paid leave already provided by a local government. In other words, an employee is entitled to sick leave under the EPSLA without first exhausting any paid leave benefit offered by their employer and the paid leave entitlement does not serve to diminish an employee's sick leave bank.

Q: What qualifies an employee for leave under the last provision of the EPSLA, which states that "the employee is experiencing a substantially similar condition to COVID-19 as has been identified by the Secretary of Health and Human Services?"

A: In order for an employee to qualify for emergency paid sick leave under this criteria, the employee would be required to demonstrate s/he is experiencing a condition that has been specifically identified by the Secretary of Health and Human Services. The Secretary has not yet identified any conditions similar to COVID-19. Therefore, an employer would not yet be required to grant an employee leave under this provision until such time as a substantially similar condition has been identified by the Secretary.

Q: In mid-March when Governor Evers first announced he was closing schools, our local government board modified our existing leave policies to provide increased sick leave benefits to our employees in anticipation of the hardship to come. Can our newly enacted (and more generous leave policies) be substituted for the emergency paid leave required under the EPSLA?

A: Maybe. Although the original House version of the FFCRA would have outright prohibited this sort of modification, the version ultimately adopted removed the prohibition. Nonetheless, the legality of this sort of change will depend upon the language of the employer's emergency policy and coordination with existing leave policies and the FFCRA. We highly recommend a public employer seek legal counsel when crafting a policy to address this issue.

Q: Given that the local government board previously modified existing leave policies to provide for a more generous benefit prior to the FFCRA's passage, our board now wants to take action at the next board meeting to rescind the previously granted (and generous) benefit. Can the board take such action to rescind the previously granted benefit?

A: Maybe. Although the original House version of the FFCRA would have outright prohibited this sort of modification, the version ultimately adopted removed the prohibition. Nonetheless, the legality of this sort of change will depend upon the language of the employer's emergency policy and coordination with existing leave policies and the FFCRA. We highly recommend a public employer seek legal counsel when crafting a policy to address this issue.

Q: An employee is worried about contracting COVID-19 and has requested access to emergency paid sick leave under the EPSLA. Is the employer required to provide the employee with leave benefits pursuant to the EPSLA?

A: No. The employee is not entitled to emergency paid sick leave under the EPSLA because the employee does not satisfy one of the six (6) criteria mandating the employer provide the leave benefit. An employee's *concern* for contracting COVID-19, while not an absence requiring EPSLA leave, may nonetheless warrant allowing the employee access to other leave provided to employees pursuant to employer policy.

Q: Our local government has a number of employees with robust accrued sick leave banks. Can we require employees to exhaust their current sick leave banks prior to taking emergency paid sick leave under the EPSLA? Can we require employees to concurrently exhaust their employer-provided sick leave bank *in addition to* accessing emergency paid sick leave under the EPSLA?

A: No. A local government employer may not require an employee to first exhaust leave granted pursuant to its employee policies prior to the employee taking advantage of emergency paid sick leave under the EPSLA. Likewise, a local government employer may not require employees to concurrently exhaust their sick leave bank *in addition to* utilizing emergency paid sick leave under the EPSLA. Emergency paid sick leave granted to an employee under the EPSLA is an entirely separate job-protected leave benefit provided to employees.

Q: Is leave granted under the EPSLA a "use it or lose it" proposition or will we be required to pay out emergency sick leave banks at the end of the year?

A: Emergency sick leave granted under the EPSLA is not required to be paid out at the end of the year or upon separation from employment. The requirements imposed by the EPSLA sunset on December 31, 2020.

General Questions Regarding the EFMLEA

Q: How long must employees be employed by the local government in order to qualify for the extended leave provided by the EFMLEA?

A: Any full-time or part-time employee who has been on the payroll of the local government for 30 days prior to taking leave under the EFMLEA is eligible for the leave benefits provided by the EFMLEA. There is not an hours of work or duration requirement associated with EFMLEA leave as there is under the FMLA.

Q: What leave benefit is available under the EFMLEA?

A: The EFMLEA allows employees 12-weeks of job-protected leave if an employee is unable to work or telework because the employee is needed to care for the employee's son or daughter (who is under the age of 18) because the child's school or childcare facility has been closed or the child's childcare provider is unavailable due to the public health emergency.

Q: Does the EFMLEA allow for a grandparent, aunt/uncle, niece/nephew, or similar kin to take EFMLEA leave for purposes caring for a child whose school or childcare is closed or unavailable?

A: No. The EFMLEA explicitly provides that leave is available for a school closure or loss of childcare only for an employee's son or daughter. The EFMLEA does not extend benefits to any other family members or next of kin.

Q: Is a local government employer required to provide paid leave to an employee under the EFMLEA and if so, at what rate of pay must the employee be paid?

A: Yes. The first 10 days of leave is unpaid under the EFMLEA; however, an employee may choose to take any existing pay benefit during the 10-day unpaid leave portion of EFMLEA, including emergency paid leave provided by the EPSLA. Paid leave provided by the EPSLA runs concurrently with leave provided by the EFMLEA. Thereafter, the last 10-weeks of EFMLEA job-protected leave is paid at 2/3 of the employee's regular rate of pay.

Q: Is there a payment cap in place for the EFMLEA benefit?

A: Payments are capped at \$200 per day (\$10,000 for the total leave period) for full-time employees. Part-time employees are subject to the same cap and entitled to be paid based on 2/3 of their usual pay for the average number of hours worked for the six (6) months prior to taking the EFMLEA leave.

Q: A previously full-time non-exempt employee has been reduced to 20 hours per week and now the employee wants to take 12 weeks of EFMLEA. What is the benefit calculation under EFMLEA?

A: The employee is entitled to paid leave equal to 2/3 their regular rate for 20 hours per week. Section 110(b)(2)(B) states that the amount of paid leave is based on the number of hours the employee would otherwise be scheduled to work. In this scenario, the employee is consistently working a 20-hour schedule.

Q: One of our employees already used six (6) weeks of job-protected leave under the FMLA due to a knee surgery in December (we calculate leave on a rolling calendar year basis). Is that employee entitled to 12-weeks of leave under the EFMLEA in addition to the six (6) weeks of FMLA leave already taken?

A: No. The EFMLEA simply adds new eligibility criteria to the old law. Therefore, the EFMLEA leave benefit counts toward an employee's total of 12-weeks of traditional FMLA leave. Thus, because the employee has already taken six (6) weeks of FMLA, the employee is only entitled to an additional six (6) weeks of total leave under either the EFMLEA or the FMLA. Likewise if the employee used the EFMLEA benefit for a COVID-19 reason the employee does not have access to additional leave for traditional FMLA reasons later on in the 12-month period.

Q. The EFMLEA states it is solely for those employees that are unable to work or telework due to a need to care for a child under 18 due to closures of schools or care providers related to the COVID-19 health emergency. What happens if the employee themselves is hospitalized due to COVID-19?

A. The only benefit available under the EFMLEA is time away from work for an employee to care for a minor child if the child's school or place of childcare has been closed or is unavailable due to a public health emergency. The EFMLEA does not provide a leave benefit for an employee's own hospitalization. That said, the employee may be eligible for job-protected leave under the regular FMLA, which may allow for the use of paid leave provided pursuant to employer policies.

Q. Does EFMLEA allow for intermittent leave? We may have a situation where an employee has a spouse who works a schedule that allows for partial time at work.

A. The EFMLEA does not explicitly provide for the use of intermittent leave. The original version of H.R. 6201 clearly indicated that EFMLEA could not be taken as intermittent leave. That language was removed from the final version of the law. In addition, the traditional FMLA does explicitly provide for the use of intermittent leave within the FMLA's statutory provisions. Arguably, because the EFMLEA is an expansion of the FMLA, there is a strong argument that the traditional FMLA rules apply, thus allowing for employee use of intermittent leave. This is one area where the Department of Labor may exercise its rule making authority to allow for leave on an intermittent basis.

Q: Our school district employs spouses as teachers. Does the EFMLEA limit the couple to 12 total weeks of EFMLEA, or is each individual employee entitled to 12-weeks of EFMLEA leave?

A: The EFMLEA does not contain the same carve out for spouses working for the same employer that is contained within the traditional FMLA for leave for purposes of bonding with a new child. It is unclear under the EFMLEA if the same limitation applies to caring for a child due to school closing – the plain language of the EFMLEA does not address this. Thus, it is logical to presume that spouses working for the same school district are each entitled to a 12-week period of EFMLEA leave to care for their child whose school or childcare facility is closed as the result of COVID-19. It is worth pointing out that in order to be eligible for leave under the EFMLEA, the employee must be *needed* to care for a child due to school or daycare closing. There are obviously certain circumstances when both parents would need to stay home, but in many cases, an employer could likely push back and inform the employees that only one spouse is needed at a given time to provide care.

Q: If the spouses elect to take leave under the EFMLEA to care for a child, is each spouse required to take 10 days unpaid prior to paid leave being available?

A: If spouses are not required to share 12 total weeks of EFMLEA and if each spouse is thus entitled to 12-weeks of EFMLEA, it follows that each spouse is required to exhaust a 10-day unpaid leave period prior to each respective individual being entitled to paid leave.

Q: Is an employer required to restore an employee to her original position upon return from EFMLEA?

A: Yes. An employer is required to return an employee to their position upon the employee's return from EFMLEA. While the DOL is in the process of drafting rules, we anticipate that the job restoration rights under the EFMLEA are likely to mirror those granted under the FMLA.

Q: May an employer allow an employee to utilize leave time offered pursuant to the employee handbook to allow an employee to receive the full value of the employee's full wages while the employee is utilizing EFMLEA?

A: Yes. Nothing in the EFMLEA prohibits an employer from allowing an employee to utilize employer provided leave banks to supplement the unpaid portion of leave taken by an employee under the EFMLEA which is paid at 2/3 of the employee's regular rate of pay.

Q: Is an employer required to continue health insurance benefits for an employee when an employee utilizes leave under the EFMLEA?

A: Yes. Nothing within the EFMLEA modifies the requirement under the FMLA that an employer continue group health insurance coverage on the same terms as if the employee had continued to work. Just as under the FMLA, the employee is required to make normal contributions to the cost of the health insurance premiums. For benefits other than health insurance, the employer's policies will dictate whether such benefits must be maintained while an employee is on FMLA leave.

Q: What information, if any, can an employer request to verify that the employee needs to miss work to care for a child? Can an employer develop their own certification form and ask employees: (1) age of children, (2) school or daycare that has been closed, (3) spouse's occupation to determine if they are eligible for EFMLEA, (4) if their spouse is on EFMLEA, (5) if the employee has searched for alternative child care arrangements?

A: Traditional FMLA allows an employer to request sufficient information to evaluate eligibility and leave requirements. As such, some questions could be appropriate, but the content and number of the questions will be tailored by the employer unless the DOL provides additional guidance. We strongly suggest you seek advice from counsel when preparing forms and questionnaires to implement the EFMLEA.

Q: Are there any employees who are exempt from the EFMLEA?

A: The EFMLEA specifically allows employers to exempt from coverage an employee who is a health care provider or an emergency responder. The EFMLEA does not define the terms "health care provider" or "emergency responder." The Department of Labor has authority to issue regulations in this regard. Such regulations are to be issued by March 25, 2020, although the dates associated with DOL actions have been somewhat of a moving target. As of this writing, we are working with local governments on solutions to address local needs and demands in this regard to ensure appropriate staffing levels in this time of emergency.

Q: How is "health care provider" defined under the FMLA?

A: The FMLA defines "health care provider" as: "[a] doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or "[a]ny other person determined by the Secretary to be capable of providing health care services. The FMLA further defines others "capable of providing health care services" to include only: (1) [p]odiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; (2) [n]urse practitioners, nurse midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; (3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; (4) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and (5) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law. We anticipate that the DOL may provide a definition of "health care provider" for purposes of the EFMLEA in its regulations.

Q: Is "emergency responder" currently identified in any federal law?

A: No. Emergency responder is not defined in the FMLA or FLSA. Absent guidance from the Department of Labor, employers must consider their local conditions and personnel necessary to respond to the variety of emergency situations. Employers looking for guidance on what constitutes an "emergency responder" may also look to the Cybersecurity and Infrastructure Security Agency ("CISA") on March 19, 2020, which provided guidance on designating critical infrastructure workers during the COVID-19 pandemic. Such guidance may be accessed [here](#).

Application of FMLA and Interplay With the EFMLEA

Q: Assuming an employee is eligible for FMLA, must a local government employer grant an employee FMLA job-protected leave when the employee is subject to a federal, state, or local quarantine or isolation order, is advised by a health care provider to self-quarantine, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis?

A: An employee may be entitled to job-protected leave under the FMLA under these circumstances, assuming the employee has a "serious health condition" as defined by the FMLA. Without the certification of a health care provider, an employer may not be able to determine whether an employee subject to quarantine, isolation, or COVID-19 symptoms, has a "serious health condition" under the FMLA. Given the current circumstances facing the medical profession, as well as the potential for contact exposure, it would be prudent for an employer to seek assistance from the local public health department to determine whether an employee's personal circumstances warrant absence from work and, in support of such mitigation strategies, the employer may wish to consider flexible leave policies for its employees. *But see above for a discussion of leave rights under the EFMLEA.*

Q: An employee is concerned about contracting COVID-19 and has requested access to FMLA job-protected leave. Is the employer required to provide the employee with leave benefits pursuant to the FMLA?

A: Generally speaking, no. The FMLA provides employees with job-protected leave benefits for their "serious health condition." Fear of contracting COVID-19 is likely not a "serious health condition" in most circumstances which would trigger application of the FMLA. An employee's *concern* for contracting COVID-19, while not an absence protected by the FMLA, may nonetheless warrant an employer allowing the employee to access other leave provided to employees pursuant to the employer's policies. This should be done with significant caution and in consideration of the need to provide essential services to citizens. Local governments are cautioned that in some instances, an employee with an underlying mental health condition or anxiety may be entitled to leave under the traditional FMLA if the concern or anxiety exacerbate an existing condition. In such instances, an employer should require the necessary health care provider certification under the traditional FMLA and consult with counsel.

Q: Does the FMLA allow an employee access to job-protected leave to care for a family member who is quarantined, isolated, or experiencing symptoms associated with COVID-19?

A: Under the FMLA, an employee is entitled to 12-weeks of leave to care for an immediate family member (*i.e.*, spouse, child, or parent) with a serious health condition. Without the certification of a health care provider, a local government employer may not be able to determine whether an employee's family member is subject to quarantine, isolation, or COVID-19 symptoms and therefore has a "serious health condition" under the FMLA. Given the current circumstances facing the medical profession, as well as the potential for contact exposure, it would be prudent for the local government employer to seek assistance from the local public health department to determine whether an employee's personal circumstances warrant absence from work and, in support of such mitigation strategies, the employer may wish to consider flexible leave policies for its employees. *But see above for a discussion of leave rights under the EFMLEA.*

Q: If we allow our employees to take FMLA for the employee's own serious health condition due to quarantine, isolation, or COVID-19 symptoms, are we required to pay the employee for the FMLA leave taken by the employee?

A: No. Neither state nor federal law entitles the employee to paid FMLA. However, EPSLA leave would be available to the employee for substitution along with other paid leave available through employer policies, pursuant to Wisconsin Family and Medical Leave Act ("WFMLA"), for the first two (2) weeks of such leave, if WFMLA leave is available to the employee. Thereafter, the local government employer may require the substitution of paid sick and paid vacation/personal/PTO leave for the remaining FMLA period. Flexibility with use and the requirement of substitution of paid leave is encouraged by the local government employer where an employee is taking action in relation to COVID-19. *But see above for a discussion of leave rights under the EPSLA.*

Common Questions Concerning the EPSLA and EFMLEA

Q: Are any of the provisions of the FFCRA retroactive to provide relief to an employee who was required to miss work prior to the President signing the FFCRA on March 18, 2020?

A: No. The FFCRA is not retroactive. The FFCRA will go into effect on April 2, 2020. The Act has no retroactive application – for leave occurring prior to President Trump signing the Act into law, or for leave occurring between the Act's signing and the enactment date of April 2.

Q: May an employee be required to provide a medical certification or certification of need for childcare in order to be entitled to leave under FFCRA?

A: The FFCRA is silent as to what documentation an employer may require an employee to produce in order for leave to be approved under the FFCRA. Given the current concerns surrounding availability of medical personnel and facilities, as well as Governor Evers' Executive Order encouraging social distancing and banning gatherings of more than 10 people, it is recommended that local governments not require a health care provider's certification for an employee to validate an illness or the need to care for an individual experiencing COVID-19 related symptoms or subject to quarantine or isolation.

A local government, may, however, seek to verify the need for leave for childcare purposes by calling the childcare center or provider and/or substantiating the ages of the children for which an employee is providing care.

Q: Is our local government eligible for reimbursement from the federal government for providing this job-protected leave benefit to employees?

A: Local governments are not entitled to the refundable tax credits that are available to private employers. In the past, when employer tax credit programs have been created, tax-exempt employers, such as counties, municipalities, and school districts, were allowed to claim a credit against social security tax for wages paid to employees. This social security tax relief has not yet been extended for the FFCRA. For the time being, the EPSLA is an unfunded mandate for local governments. Note however, that unlike the tax credit provisions of the FFCRA, public employers are not exempted from the provisions relieving employers of the obligation to pay the employer's 6.2% share of social security tax on FFCRA wages. Therefore, local governments need not pay their 6.2% share of social security tax on wages paid to employees on leave granted pursuant to the FFCRA. However, local governments will be required to pay the employer's 1.45% share of Medicare taxes on FFCRA benefits. We will release additional guidance on these tax issues soon, but public employers should also be aware that Congress is considering various forms of additional legislation, some of which provide public sector employers with payroll tax relief. For this reason, we must stress that local government finance departments verify that payroll systems are configured consistent with the most recent guidance available.

Q: In the event this pandemic is short-lived, is an employee entitled to carryover the emergency paid sick leave benefit into the next calendar year?

A: No. Emergency paid sick leave benefits pursuant to the EPSLA sunset on December 31, 2020.

Q: May an employee stack leave provided under either the EPSLA or the EFMLEA?

A: There is nothing in the FFCRA prohibiting an employer from offering additional pay above and beyond what the FFCRA requires.

Q: In our county, we have a number of employees who work four 10-hour shifts. Under both the EPSLA and the EFMLEA, an employee is capped at the rate the employee receives per day. How should a county handle pay for an employee who works four 10-hour shifts per week to ensure the employee receives the maximum benefit?

A: Neither the EPSLA or the EFMLEA account for varying work shift hours among employees. Rather, the Acts contemplate a standard workweek of five (5) eight (8) hour days. The Acts provide a per day cap. Thus, if a county seeks to allow employees to receive the maximum benefit allowed under either Act, the county may wish to consider revising employee work schedules for purposes of allowing the employee maximum benefit in compliance with the Acts.

Q: We are contemplating layoffs of a number of employees due to lack of work and the inability to sustain wage/salary continuity during this period of uncertainty. If an employee is on leave pursuant to the FFCRA, do such benefits continue in the event of a layoff?

A: In the event an employee is subject to a layoff at the time the employee is on leave pursuant to the FFCRA, leave benefits do not continue, nor is the employee entitled to a payout of unused leave time under the FFCRA. However, the employee may be eligible for unemployment compensation benefits.

Q: Are there legal consequences to laying off an employee as part of an overall reduction in force, while the employee is taking leave under the FFCRA?

A: An employer should proceed with caution when making a layoff decision involving an employee who is taking paid leave under the FFCRA. Under the FFCRA, employers are prohibited from discharging, disciplining, or otherwise discriminating against an employee who takes paid leave under the FFCRA or who files a complaint or institutes proceedings under or related to the FFCRA. While laying off an employee who is on leave pursuant to the FFCRA is not strictly prohibited, an employer should consult with legal counsel prior to engaging in such a layoff.

Q: Do wages and hours paid by a local government under the EPSLA and/or the EFMLEA count for purposes of reporting to the Wisconsin Retirement System ("WRS")?

A: Yes. Payment and associated leave time hours are WRS reportable when used by an employee.

Q: Can an employee choose to take 12 weeks of EFMLEA first and then take 2 weeks of EPSLA so the employee will have access to 14 weeks of leave to care for a child due to school closing?

A: Yes, assuming the employee meets all eligibility criteria for the 14 weeks. Under the EFMLEA, the employer cannot require that an employee substitute paid leave for the first two weeks; however the employee does have the option to substitute. Therefore, an employee could take the first two weeks unpaid, or substitute employer paid leave, and save their EPSLA leave for a later date.

Q: A previously full-time employee is now working part-time from home, can I deny EFMLEA and EPSLA leave because she is available for telework.

A: It depends on the child care obligations being performed by the employee and whether she can realistically work from home. If the employee has young children it will be harder to work from home than she has older children. It would be appropriate to ask an employee seeking EFMLEA or EPSLA leave for child care if she can work from home and the nature of their child care responsibilities for purposes of performing this analysis. Such situations must be handled on a case-by-case basis with care so as to avoid discrimination.

Q: Is an employee on furlough (active employee but not being scheduled) entitled to EFMLEA and EPSLA leave benefits?

A: FFCRA benefits are based upon providing leave from scheduled work. Section 110(b)(2)(B) of the EFMLEA states that the amount of paid leave is based on the number of hours the employee would otherwise be scheduled to work. The EPSLA has a similar provision. In this scenario, the employee is not scheduled to work, and therefore would not be eligible for paid leave.

Q: When will the Department of Labor begin enforcement of the FFCRA?

A: The DOL has indicated that it will observe a temporary period of non-enforcement for the first 30 days after the FFCRA takes effect, so long as an employer has acted reasonably and in good faith to comply with the FFCRA. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by an employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Q: When does the Department of Labor anticipate releasing regulations related to the FFCRA?

A: In its guidance issued on March 23, 2020, the DOL notes that it anticipates FFCRA regulations in April 2020.

Questions abound regarding the FFCRA and the leave provisions to which employees are entitled. While many situations must be addressed on a case-by-case basis, as emphasized by the sheer number of questions addressed herein (which constitute only a fraction of the questions that will likely arise with respect to implement of the FFCRA), there are a number of measures that will assist employee understanding through a review and communication of existing leave and FMLA policies, and development of specific leave policies addressing new leave allotments allowed under the FFCRA. While we have developed foundational compliance policies and strategies that can be used by our public sector clients, we strongly encourage individual customization based upon existing policies – now is not the time for template implementation. In other words, please work with counsel when developing your policies and forms.

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