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FFCRA - U.S. DOL Issues FAQs Concerning Interpretive Provisions

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Practice Area: Labor and Employment

The U.S. Department of Labor (DOL) issued on March 28, 2020 a notice containing Frequently Asked Questions (FAQs) concerning the recently enacted Families First Coronavirus Response Act (FFCRA). The FAQs are intended to provide guidance on the DOL's interpretation of the operational obligations of the provision and provide employers with a workable framework for compliance. Under this *Legal Update*, we are supplementing the information previously provided to readers regarding these guidelines for compliance. It is important to note that the effective date of the FFCRA as it relates to the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) is April 1, 2020.

Some of the more significant provisions addressed in the FAQs are as follows:

1. How is "Employer" determined for purposes of applying the less than 500 employee threshold?
Answer: Similar to the FMLA, "employer" is defined as the entity which is the employing unit. The employer must consider persons actively on the payroll (including employees on leave), temporary employees who are jointly employed by the Company and another employer, and day laborers supplied by any type of temporary agency. Independent contractors are excluded.

Employers also should consider whether any related entities should be "integrated", including those employees as well. You should consider whether they have a common HR Department, interchange of employees, common credit facilities, etc. Separate entities, even though under common control, will be viewed separately.

2. Are employers with fewer than 50 employees able to seek an exemption from the FFCRA?
Answer: Yes, if compliance will "jeopardize the viability of the business as a going concern." There is no established way to file for this exemption with the DOL. Rather, if an authorized officer of the business determines that the following criteria are met, the exemption applies: (1) the provision of paid sick leave or expanded Family and Medical Leave would result in the business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity; OR (2) the absence of the employee or employees requesting paid sick leave or expanded Family and Medical Leave would entail a substantial risk to the financial health and operating capabilities of the business because of their specialized skill, knowledge of the business or responsibilities; OR (3) 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 paid sick leave or expanded Family and Medical Leave and these labor or services are needed for the business to operate at minimal capacity. The DOL has not discussed its review process for such a determination or the consequences of an error in the determination of the qualifying factors.

This exception is limited to the granting of time away when the employee is unable to work (or telework) due to a need to care for the employee's son or daughter (as further explained below) on the closure of the child's school or place of care or due to the child's care provider being unavailable due to the public health emergency. The other reasons for EPSLA are not subject to a small employer exemption.

3. In calculating the pay due employees under the Emergency Family and Medical Leave Expansion Act (EFMLEA) or the Emergency Paid Sick Leave Act (EPSLA), do I include overtime hours in the determination? Also, is overtime considered for purposes of the hours available as EFMLEA Leave time available and/or for an employee's EPSLA bank?
Answer: The answers to these questions are very different. In determining the pay due the employee for EFMLEA, the pay an employee receives for the normally scheduled hours per week, even if more than 40 hours in a week, is considered for purposes of the calculation. This becomes more important when employees have variable hours by week as opposed to a standard 40- or 50-hour workweek.

As it relates to the EPSLA, however, a full time employee, being scheduled to work 40 hours a week or more, is limited to sick leave availability of 80 hours over a two-week period, regardless of whether the employee routinely works in excess of 40 hours per week. While the sick leave may be taken in excess of 40 hours in one week and less in the next, the maximum number of hours of paid EPSLA leave is 80 hours.

It is important to note that in determining the EPSLA time available to employees, the DOL indicated that the 80-hour threshold is for employees who are working 40 or more hours per week. Employees who work less than 40 hours per week, *e.g.*, 37.5 or 35 hours in a week, are viewed as less than full time and their hours of available EPSLA leave will be reduced accordingly. Therefore, for an employee who is routinely scheduled at 35 hours per week, that individual will be eligible for EPSLA Leave of 70 hours over a two-week period.

4. In determining whether an employee is "unable to work, including telework" for COVID-19 reasons, what are the factors to consider?
Answer: Although this will depend on the individual job duties, we consider this: if an employee is too ill to perform their job duties, including through available remote work, due to COVID-19, he or she is "unable to work". It does not appear that mere inconvenience or desire not to work is a reason for paid leave.

The FAQs make clear that cooperation between the employee and the employer is necessary to identify alternative work arrangements, such as working outside the employee's regular hours. However, state "stay in place" orders will limit most alternative arrangements to telework.

5. May EFMLEA Leave be taken by an employee on an intermittent basis? Is paid sick leave also available on an intermittent basis?
Answer: The taking of EFMLEA Leave to care for a child will be available on an intermittent basis. The need for leave will be dependent upon the particular facts and circumstances and may vary from week to week depending upon the realities of the school/child care scenario.

However, EPSLA leave cannot be taken on an intermittent basis, unless working by way of telework, if the leave is being taken because: (1) the employee is subject to a federal, state or local quarantine or isolation order; (2) the employee has been advised by a healthcare provider to self-quarantine due to concerns the employee is experiencing symptoms of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis; (4) the employee is caring for a family member who either is subject to a quarantine or isolation order or has been advised by a healthcare provider to self-quarantine due to concerns he or she is experiencing COVID-19 symptoms or the employee is experiencing other substantially similar conditions which are identified by the Secretary of Health and Human Services as warranting exceptions from working.

6. In taking EFMLEA Leave, what are the requirements I must satisfy to be eligible for this time away?
Answer: To be eligible for EFMLEA Leave, the employee must demonstrate that: (1) the child's school or place of daycare is closed or the child care provider for the child is unavailable due to COVID-19 related reasons; (2) the individual for whom the employee is caring is his/her son or daughter (as is defined under the FMLA); (3) the son or daughter is under the age of 18 (unless disabled within the meaning of the ADA); and (4) the employee is needed to care for the child.

"Needed to care for" is an undefined term. However, looking at the Family and Medical Leave law for guidance as to what the "to care for" requirement stands for is that the employee would be needed to assist with the activities of daily living for the affected individual. Employers appear able to inquire as to the "care" the employee would be providing for the child.

7. If my worksite closes, does that impact my right to EPSLA or EFMLEA Leave?
Answer: Yes, the EPSLA and EFMLEA Leaves are only available while the individual is otherwise requested to perform services for the employer. When relieved by furlough or layoff, the employee's right to paid leave ends.

8. If I have been off of work for a qualifying reason under the EFMLEA or EPSLA, am I able, as of April 1, 2020, to receive pay for my continuing absence?
Answer: If you would otherwise be working on or after April 1, 2020 and are absent as a result of a qualifying reason under the EPSLA or EFMLEA, yes, you will be eligible for pay. However, if you are laid off or otherwise separated from employment, you will not be eligible for pay.

9. If my hours are reduced by my employer, can I use EPSLA or EFMLEA Leave to receive pay for the time that I am displaced from employment?
Answer: No. In FAQ No. 28, the DOL states that a reduction in an employee's hours of work does not result in a right to pay. It is the absence from work that results in the entitlement to pay, not the business limit on scheduled work time.

10. Can I require my employer to pay me – or supplement pay I am receiving under the FFCRA – with sick leave or other types of paid leave it may offer to employees?
Answer: No. The employee may be allowed certain substitutions but that would be based upon employer policy, not on legal entitlement.

11. Does my healthcare coverage continue during EPSLA or EFMLEA Leave?
Answer: Yes. The employer has an obligation to continue group health plan coverage during periods of FMLA and during periods of EPSLA Leave. However, once the leave period has ended, continuation of coverage responsibilities as an active employee also end, and any continuation rights will be dictated by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

12. Am I entitled to 12 weeks of leave under the EFMLEA if I have already used Family and Medical Leave in the current administrative year?
Answer: No. The 12 weeks for Family and Medical Leave are the total for all the reasons available under the law. If you have previously used Family and Medical Leave time, the remaining balance may be available to you for use under the EFMLEA or for other reasons which would otherwise qualify for FMLA Leave. However, your only entitlement to paid leave is if the FMLA used time is under the EFMLEA. This 12 week maximum does not affect your available leave under the EPSLA.

13. Who is a healthcare provider for purposes of the law?
Answer: It depends upon the context in which the phrase is being used. If it is being used to define who can determine or advice on self-quarantining of an individual or complete the Health Care Provider Certification form, that will be a licensed doctor of medicine, nurse practitioner, or other healthcare provider authorized to issue a certification for purposes of the FMLA.

For purposes of exclusion under the law from benefits under the EFMLEA or EPSLA, healthcare provider includes anyone employed at a doctor's office, hospital, healthcare center, clinic, post-secondary education institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health provider, any facility that performs laboratory or medical testing, pharmacy, or any other similar institution, employer, or entity. This is intended to include any permanent or temporary institution, location, facility or site where medical services are being provided. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This expansive definition is intended to reflect the totality of individuals within the care process.

For additional information regarding the U.S. Department of Labor FAQs, please access the U.S. Department of Labor website here.

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