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FFCRA - U.S. DOL Issues Regulations For Implementing Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act

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Practice Area: Labor and Employment

On April 6, 2020, the U.S. Department of Labor ("DOL"), Wage and Hour Division issued final regulations for implementing the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLEA") to assist working families facing public health emergencies arising out of the Coronavirus Disease 2019 ("COVID-19") global pandemic. Both the EPSLA and the EFMLEA are provided for under the Families First Coronavirus Response Act ("FFCRA") and became effective on April 1, 2020. In this *Legal Update*, we summarize answers to common employer questions based on the DOL's final regulations.

1. Can employees take EFMLEA Leave to care for their son or daughter over 18?
If the son or daughter who is 18 or older is incapable of self-care because of a mental or physical disability, the employee may take EFMLEA to care for the person if the school or day care is closed or the day care provider is unavailable due to COVID-19.

2. When teleworking, are employees paid for all hours between the first principal activity and the last principal activity of the day?
No. Under the DOL guidance if an employee teleworks the employee is only paid for the actual hours of work performed. For example, if an employee performs actual work from 7-9 am, 12:30-3 pm, and 7-9 pm the employee would be compensated for 7.5 hours that day as opposed to 14 hours under the continuous workday guidance.

A. Paid Leave Entitlements

3. Is an employee eligible for paid leave if they have been advised to self-quarantine but are otherwise able to perform telework?
If an employee is under self-quarantine but is otherwise capable of telework, the employee is not "unable to work" and therefore is not eligible for EPSLA paid leave.

4. Is an employee eligible for paid leave if they are experiencing symptoms but are not seeking a medical diagnosis?
No. Employees are eligible for EPSLA paid leave for the time spent making, waiting for, or attending an appointment for a COVID-19 test but may not take paid sick leave if they are choosing to self-quarantine without seeking a medical diagnosis. Eligibility for paid sick leave includes awaiting the results of the COVID-19 test.

5. Is an employee eligible for EPLSA leave to care for a son or daughter if there is another individual also caring for the same child?
No. Under the Department of Labor regulations, an employee does not have a need for EPSLA leave if another suitable individual, such as a co-parent, co-guardian, or the usual child care provider, is available to provide the care the employee's child needs.

6. How do employers calculate the amount of leave for part-time employees who work varied schedules?
Part-time employees with varying weekly schedules are entitled to fourteen times the number of hours that the employee was scheduled per calendar day, averaged over the six-month period preceding the need for leave, but not to exceed 80 hours.

7. Which employees are considered full time? Which are part time?
Full time employees are employees who are normally scheduled to work, on average, at least 40 hours each workweek, using the preceding six-month period. Anyone with an average below 40 hours each workweek is considered a part-time employee.

8. How do employers calculate leave entitlement for employees who have been employed for fewer than six months?
Instead of using an average over a six-month period, the "average hours" of the employee is based on the reasonable expectation of work for the employee at the time of hire. In the absence of an agreement addressing expected work hours, the average of the actual number of hours the employee was scheduled to work each workday since hire should be used.

9. When must an employer pay an employee their regular rate of pay for EPSLA leave?
If an employee takes EPSLA leave because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order, has been advised by a health care provider to self-quarantine for COVID-19-related reasons, or is experiencing COVID-19 symptoms and seeking a medical diagnosis, the employee is entitled to their regular rate of pay (or minimum wage, whichever higher) for each hour of EPLSA leave taken. If an employee takes EPSLA for any other reason the employer must pay the employee two-thirds of the employee's regular rate of pay (or two-thirds of minimum wage, whichever is higher).

10. How should employers compute an employee's regular rate for EPSLA leave?
Employers should use an average of an employee's weekly regular rate over the six-month period preceding the need for leave in order to determine the regular hourly rate for EPSLA leave. If an employee has been employed for fewer than six months, the regular rate should be an average of their weekly regular rate over the term of the employee's employment.

B. Employee Eligibility for Leave under the EPSLA and the EFMLEA

11. How long must employees have been employed in order to be eligible for EPSLA and EFMLEA leave?
All employees, regardless of duration of employment, are eligible for leave under the EPSLA. Employees who have been employed by a covered employer for at least thirty calendar days are eligible to take leave under the EFMLEA. Eligibility is determined by whether the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin.

If an employee is laid off or terminated on or after March 1, 2020 and is later rehired, that employee is considered to have been employed for at least thirty calendar days if the employee was on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. For example, an employee hired on January 15, 2020, laid off on March 14, 2020, and rehired on October 1, 2020 would immediately satisfy the thirty day requirement at the time of rehire.

C. Employer Coverage under the EPSLA and the EFMLEA

12. At what time should an employer evaluate its employee numbers to determine whether it is a covered employer?
The determination is dependent on the number of employees at the time an employee would take leave. An employer with 450 employees on April 20, 2020 would be a covered employer if an employee required leave. If the same employer then hires 75 new people between April 21, 2020 and August 3, 2020, the employer would not be a covered employer for a leave request on August 3, 2020.

13. What employees count toward the 500 employee threshold?
The employer should count full time employees, part time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. These counts should only include employees employed within the United States.

Employees who have been laid off or furloughed, and have not been reemployed, should not be counted. Independent contractors should also not be included in the employee count.

14. My company is a non-profit. Are we a covered employer?
Yes. Non-profits must also comply with the FFCRA.

15. My business has fewer than 50 employees. Are we exempt from the FFCRA?
Businesses with fewer than 50 employees may be exempt from providing leave to care for an employee's son or daughter whose school or place of care is closed or child care is unavailable. This exemption only applies to this limited reason for leave under the EFMLEA and EPSLA. The exemption does not cover other available leave under the EPSLA.

In order to be eligible for the exemption, the following requirements must be met with regard to providing the leave:

- Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; or
- The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- The small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide and these labor or services are needed for the small employer to operate at a minimal capacity.

In such cases, the employer may only deny leave to otherwise eligible employees whose absence would cause one of the above circumstances.

D. Intermittent Leave

16. Can leave under the EFMLEA or the EPSLA be taken intermittently?
Absent an agreement between an employee and the employer, no leave under the EPSLA or the EFMLEA may be taken intermittently, and that leave would be limited to EFMLEA and EPSLA leave to care for a child due to the closure of the school/day care or the unavailability of the child care provider. The agreement does not need to be in writing but there must be a clear and mutual understanding between the employer and the employee that EPSLA or EFMLEA leave may be taken intermittently.

17. If agreed upon, can EPSLA leave be taken intermittently for any of the remaining qualifying reasons under the EPSLA?
No. Because of the high risk of exposure and contraction for leave taken for the following reasons, the DOL states that intermittent EPSLA leave is prohibited if the employee is absent due to:

1. being subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. having been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;
4. caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
5. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

E. Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability - Intersection between the EPSLA and the EFMLEA

18. If an employee has already exhausted his/her 12-week leave entitlement under the FMLA, can the employee take EFMLEA leave to care for a child due to a school or place of care closure?
No. The maximum amount of EFMLEA leave is reduced by the amount of FMLA leave entitlement taken in that year.

19. If an employee qualifies for leave under both the EFMLEA and the EPSLA, may the employee use the two weeks of leave provided by the EPSLA concurrently with the first two weeks of unpaid EFMLEA leave?
Yes.

20. If an employee has already exhausted his/her 12-week leave entitlement under the FMLA for the year, can he/she still take EPSLA leave for a COVID-19 qualifying reason?
Yes.

F. Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability - Intersection between the EFMLEA and the FMLA

21. Are the employee eligibility requirements for leave under the EFMLEA different than those under the traditional FMLA?
Yes. To be eligible for EFMLEA, the employee only needs to have been employed for 30 calendar days with no minimum number of worked hours.

22. If I am not a covered employer under the FMLA, does the EFMLEA apply to me?
The EFMLEA applies to all employers with fewer than 500 employees, while the FMLA generally does not apply to employers with fewer than 50 employees.

H. Employer Notice

23. What are my obligations as an employer to notify employees of their rights under the FFCRA?
Covered employers must post the DOL notice on the law's requirements. The DOL issued a model notice, which employers may download at https://www.dol.gov/whd.

I. Employee Notice of Need for Leave

24. What are an employee's obligations to notify an employer of their need to take leave under the FFCRA? What is the documentation required to be provided to the employer?
Employers may require employees to follow reasonable notice procedures as soon as practical after the first workday or portion of the workday for which an employee receives EPSLA leave in order to continue to receive such leave.

An employee requesting paid sick leave based upon a Federal, State, or local quarantine or isolation order must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

If an employee is requesting paid sick leave because a health care provider advised him or her to self-quarantine for COVID-19 related reasons, the employee must provide the name of the health care provider.

An employee requesting paid sick leave to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.

An employee requesting to take EPSLA leave due to the closure of the child's school or day care or due to the unavailability of the child care provider or EFMLEA must provide the employer with: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or is 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.

J. Health Care Coverage

25. Does an employer need to continue coverage under its group health plan for an employee who takes either EFMLEA or EPSLA leave?
Yes, employees are entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave during the period of absence covered by the law.

26. If an employer provides a new health plan or changes existing benefit plans, is an employee who is on EFMLEA or EPSLA leave entitled to the new or changed benefit package?
Yes, and the employer must give the employee notice of any opportunity to change plans or benefits.

K. Multiemployer Plans

27. Can an employer who is a party to a multiemployer collective bargaining satisfy its obligations under the EFMLEA and the EPSLA by contributing to a multiemployer fund?
Yes, provided that the contributions are based on the amount of EPSLA and EFLMEA leave to which the employee is entitled and are based on each employee's work under the multiemployer bargaining agreement.

L. Return to Work

28. Are all employees who take leave under the FFCRA guaranteed the right to be restored to their same or similar position?
In most cases, yes. However, the restoration requirements do not apply to an employer that has fewer than 25 employees when all 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; and
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 twelve weeks after the employee's leave began, whichever is earlier.

29. If an employer lays off a portion of its workforce, and an employee who is taking leave under the FFCRA is employed in a position that is eliminated, is that employee entitled to job restoration with the employer?
No, but the employer has the burden of proof to demonstrate that the employee would have been laid off even if he or she had not taken leave. Additionally, that employee's right to continue to take FFCRA leave ceases.

M. Recordkeeping

30. How long are employers required to retain documentation related to EFMLEA and EPSLA leave?
Employers must retain this documentation for a minimum of 4 years.

31. What are an employer's recordkeeping requirements when an employee makes a request for leave orally?
Employers are required to document such information and then retain the records for a minimum of 4 years.

N. Prohibited Acts and Enforcement

32. What potential penalties and damages do employers who violate EPSLA face?
An employee may bring action in any federal or state court to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees. Moreover, the Secretary may bring an action against an employer to recover an amount equal to the Federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer. Finally, in the case of a repeated or willful violation, the employer will also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.

33. What potential penalties and damages do employers who violate EFMLEA face?
Employers are subject to the same enforcement provisions of the FMLA for violations of the EFMLEA, with one exception: an employee may not bring a private action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA. In other words, an employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year.

O. Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements

34. If an employee has accrued paid time off benefits or other leave entitlement that has already accrued under an employer's existing policies or under applicable law, can the employer require the employee to substitute those benefits for EPSLA or EFMLEA leave?
An employee cannot be required to use accrued paid leave instead of using EPSLA leave, including during the first two workweeks of EFMLEA leave. However, in the subsequent 10 weeks of EFMLEA an employee may elect to use, or an employer may require that an employee take leave under the terms and conditions of the employer's policies that would be available to the employee to care for a child, such as vacation or personal leave or paid time off, concurrently with EFMLEA leave to the extent of the unpaid time, and the employer may be required to pay the employee a full day's pay for that day. If the employer would not otherwise pay an employee for the time away under the applicable policy, the employer is not required to make the paid leave available as a result of the EFMLEA leave.

35. If an employee took leave for a reason that would have qualified under either the EPSLA or the EFMLEA prior to April 1, 2020, will they have any right or entitlement to use EPSLA or EFMLEA leave retroactively?
No, leave entitlement under the FFCRA is not applied retroactively.

36. Are all employers with health care providers or emergency responders employees exempt from the FFCRA?
No. Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, the employers may have some employees who do not meet the definition, so these employers may still be obligated under the provisions of the FFCRA.

37. How do the regulations define Health Care Provider?
The regulations define health care provider 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.

The exemption also includes any entity providing support to the health care providers as contractors, entities that manufacture supplies for health care providers, provides medical services, or otherwise is involved in making COVID-19 preventative equipment for treatment, testing, or otherwise.

38. How do the regulations define Emergency Responders?
The regulations define emergency responders as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. The regulations provide a list of occupations that includes but is not limited to 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, and public works personnel.

39. What type of documentation are employers required to keep for purposes of complying with the EPSLA and the EFMLA?
The regulations require covered employers to document and retain information submitted by employees to support requests for EPSLA and EFMLEA leave. The regulations also require any employer that denies a request for leave pursuant to the small business exemption must document and retain the determination by its authorizing officer that it meets the criteria for that exemption. Employers are also encouraged to create and maintain records for the purpose of obtaining a tax credit from the Internal Revenue Service.

40. Are employers required to keep hard copies of documentation?
The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

41. How is "Child Care Provider" defined for purposes of this regulation?
The term "Child Care Provider" means a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under the State.

42. Must the "Child Care Provider" be compensated or licensed?
No. The eligible Child Care Provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

43. How is "Place of Care" defined in the regulations?
The term "Place of Care" means a physical location in which care is provided for the employee's child while the employee works for the employer. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, and respite care programs.

44. How is "Public Agency" defined in the regulations?
The term "Public Agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. A Public Agency shall be considered to be a person engaged in Commerce or in an industry or activity affecting Commerce. Whether an entity is a Public Agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.

45. How is "Public Health Emergency" defined in the regulations?
The term "Public Health Emergency" means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

46. How is "School" defined in the regulations?
The term "School" means an "elementary school" or "secondary school" as such terms are defined in accordance with section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801). "Elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under State law. "Secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

47. Can I take EPSLA Leave to care for my spouse who has a mental or physical disability and whose home health care worker is no longer available to treat him/her?
For purposes of EPSLA, "caring for an individual" means an employee's 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 that the employee would care for the person if he or she were quarantined or self-quarantined. An employee may take EPSLA leave to care for an individual if the employee is unable to perform work for his or her employer because the employee is providing care for the individual who depends upon the employee to care for him or her and is either under quarantine, has been advised to self-quarantine due to COVID-19 contact and/or symptoms or is vulnerable to COVID-19.

48. Do state Governors' Executive Orders qualify as being "subject to a Quarantine or Isolation Order"?
Yes, "subject to a Quarantine or Isolation Order" includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. This also includes when a Federal, State, or local government authority advises categories of citizens to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them. For EPSLA benefits, the employee is eligible if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her employer. An employee subject to a Quarantine or Isolation Order may not take EPSLA leave where the employer does not have work for the employee as a result of the order or other circumstances.

49. Can I receive benefits under FFCRA even though I am teleworking?
No, an employee is considered to be able to telework if: (a) his or her employer has work for the employee; (b) the employer permits the employee to work from the employee's location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work. Telework is not compensated as paid leave under the EPSLA or the EFMLEA. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the employer knew or should have known were worked by the employee.

50. Will employees lose exempt status under the Fair Labor Standards Act for going out on Paid Sick Leave?
No, taking EPSLA leave or EFMLEA leave will not impact an employee's status or eligibility for any exemption.

51. What is the maximum amount I will have to pay employees under FFCRA?
An employer is not required to pay more than $511 per day and $5,110 in the aggregate per employee to an employee who takes EPSLA leave for his or her own COVID-19 related reason. When an employee takes leave to care for another individual, or to care for his or her son or daughter as a result of a closure of school or daycare or other unavailability of care taker pay to the employee is capped at a maximum of $200 per day and $2,000 in the aggregate per employee.

52. What is the paid benefit under the EFMLEA?
After the initial two-week unpaid period of EFMLEA leave, the employer is required to pay two-thirds of the eligible employee's average regular rate, times the scheduled number of hours for each day of such leave taken up to a maximum of $200 per day and $10,000 in aggregate per employee.

53. Are commissions, tips, and piece rates included in calculating an employee's regular rate of pay for purposes of the EFMLEA and EPSLA?
Yes, an employee's commissions, tips, and piece rates are incorporated into the regular rate for purposes of FFCRA to the same extent that they are included in the calculation of the regular rate under the FLSA.

54. Does any part of a temporary worker's service count toward eligibility for EFMLEA leave?
If an employee employed by a temporary placement agency is subsequently hired by the employer, the employer will count the days worked as a temporary employee at the employer toward the thirty-day eligibility period.

55. Can I require employees eligible for EPSLA or EFMLEA Leave to comply with my existing notice policy?
Generally, it will be reasonable for the employer to require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

For additional information regarding the U.S. Department of Labor Temporary Regulations, please access the U.S. Federal Register website here.

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