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Insights

Developing Leave Policies to Keep Up with the FFCRA

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Many employers that did not previously have a sick time policy or a Family and Medical Leave Act (FMLA) policy are now having to address employee questions and concerns, and also ensure compliance with the Families First Coronavirus Response Act (FFCRA). To properly comply with the FFCRA, employers should implement a policy to handle employee requests for Paid Sick Leave or Expanded Family Medical Leave. Below are some steps to take when developing and implementing a policy for paid leave under the FFCRA.

1. Confirm your company is covered under the FFCRA.

Under the FFCRA, two sections provide paid leave: the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Covered employers must provide Expanded Family and Medical Leave (EFML), the paid leave offered under the EFMLEA, and Paid Sick Leave (PSL), the paid leave offered under the EPSLA, to eligible employees.

An "employer" means any private employer with fewer than 500 employees or any public agency or any other entity, other than a private entity, that has more than one employee. The definition also includes:

- any person acting directly or indirectly in the interest of an employer in relation to an employee;[1]
- any successor in interest of an employer;
- joint employers under the Fair Labor Standards Act (FLSA); and
- integrated employers under the FMLA.[2]

The EPSLA also provides that the following fall under the definition of "employer:"

- an entity employing a State employee;
- an employing office;[3] and
- an executive agency, including the U.S. Postal Service and the Postal Regulatory Commission.[4]

Employers with less than 50 employees do not have to comply with FMLA provisions.[5] However, under the EFMLEA, those same employers must comply with the EFMLEA and its amendments to FMLA as well as the EPSLA.

2. Properly display your FFCRA notices to employees.

Covered employers must post and keep posted a notice explaining the FFCRA's paid leave provisions and providing information about filing complaints for violations of the FFCRA with the Wage and Hour Division of the Department of Labor (DOL).[6] The DOL issued posters in early April, which can be found **here**.

Employers may have many or all of their employees working remotely. If that is the case, employers can satisfy the notice requirement by either: (i) emailing or direct mailing the notice to employees; or (ii) posting the notice on an employee information internal or external website.[7]

Regardless of how the notice is transmitted, either in the employer's workplace or an alternative method, the notice must be conspicuous and posted in a manner such that employees will see it. For example, if employers use email to transmit the notice, make sure the title of the email clearly depicts the information being sent.

For employers that are covered by the EFMLEA but not the other provisions of the FMLA, posting or transmitting the FFCRA notice satisfies their FMLA general notice obligation.[8]

3. Determine your 12-month measurement period for determining eligibility under the Emergency Family Medical Leave Expansion Act.

Employers who are covered by the EFMLEA but not covered by the other provisions of the FMLA have greater flexibility in determining the 12-month leave year. Since the EFMLEA is only effective from April 1, 2020 to December 31, 2020, it would be best to start the leave year on April 1 when employees first become eligible for Expanded Family and Medical Leave.

However, for those employers already covered by FMLA, the same 12-month period established for FMLA leave should be used. The reason for this is that any EFML comes from the same 12-week period allotment for FMLA rather than being in addition to that leave.[9]

4. Develop a process by which employees can request Paid Sick Leave or Expanded Family Medical Leave.

When developing a process for employees to request PSL or EFML, there are many considerations to take into account, such as the following questions: Is there a system that would allow an employee to request this leave on their own? If so, who is the contact person? And, what forms does the employee need to complete? Is any documentation required?

The important part of establishing this process is to use current systems to the employer's advantage. If an employer currently has an online portal for employees to request time off, work with the IT department to get an option to request PSL or EFML as well. If, however, a current system does not exist, employers should develop a standard form to ask the pertinent questions and determine whether an employee is eligible for PSL or EFML. These questions are not only important for providing employees with their entitled FFCRA leave but are also critical for ensuring that employers have the requisite documentation to receive a tax credit from the Internal Revenue Service (IRS) for the PSL and EFML paid to employees.

Specifically, the IRS has issued the following **guidance** that details what may be required to substantiate tax credits for qualified leave wages, including the following: the employee's name, the dates for which leave is requested, a statement of the reason the employee is requesting leave and support for such statement, and a statement that the employee is unable to work or telework. In addition, an employer should also have record of the following:

a. Documentation to show how the employer determined the amount of qualified PSL and EFML wages paid to employees who are eligible for the credit, including records of work, telework and qualified PSL and EMFL.
b. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.[10]
c. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
d. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS.

In order to satisfy these requirements, it is important that employers develop separate leave request forms for PSL and EFML and separate approval/designation forms that show the employer has approved the leave and designated it as PSL or EFML.

Specifically, the leave request forms should contain the following information:

a. The employee's information such as name, title, position, who they report to, and the date the form was submitted;
b. The reason for leave and a detailed description written by the employee in support of that reason;

i. If PSL, this should contain either a checklist or guide to the six reasons that an employee is entitled to take leave under the EPSLA and ask further questions depending on the reason selected.
ii. If EFML, this should contain an option to select either the school is closed, child care is closed, or child care provider is unavailable. It should further ask the employee to provide the age(s) of their child(ren), the name of the facility/person closed or unavailable, and an affirmation that no one else is able to care for the child(ren).

c. The dates for which leave is being requested; and
d. The employee's signature certifying that the information is correct (electronic or physical).

The approval/designation of leave forms that are completed by the employer should contain the following information:

a. Whether the request was approved or not;
b. Whether additional information is needed;
c. A statement of the dates of the leave; and
d. Any additional information that the employer wishes to include, including whether leave will be on an intermittent basis and whether there is a policy for returning to work.

The process of developing these forms can be tedious, and mistakes could cause legal and financial consequences to your company. Our team is prepared to assist with this process and answer any questions as to best and legally-recommended practices.

5. Establish communication guidelines for employees while on Emergency Paid Sick Leave or

Emergency Family Medical Leave.

It is important that employers develop communication guidelines with employees during their use of PSL and EFML. Employers should inform employees who and how to contact the company if their dates of leave change or their situation changes. In addition, employers should ensure that employees are not performing any work during FFCRA leave, especially salaried employees, as doing so could implicate FLSA issues. Typically, a member of Human Resources will contact employees during their leave either by phone, email, or letter to inform them of any updates or additional information needed from the employee. Creating a policy regarding this communication or even detailing it in leave documents will alleviate any confusion of either the employee and the company.

6. Determine whether employees will be able to supplement leave with paid time off.

Another facet of FFCRA leave is whether an employee will be required, allowed, or entitled to take paid time off to either supplement or substitute PSL or EFML leave. This should be a designation on the approval form for leave, but employers should be careful in making these determinations, as both EPSLA and EFMLEA have different requirements for whether employees are required, allowed, or entitled to use accrued paid time off.

Under the EPSLA, an employer cannot require an employee to first use any paid sick time before taking PSL.[11] However, an employee may opt to use other paid time provided by the employer including paid sick time or other paid time off.[12] Similarly under the EFMLEA, an employer can agree to allow an employee to use any accrued paid leave available (including vacation, personal leave, or paid time off) concurrently with EFML for the first two weeks of unpaid leave, or for the duration of the EFML.[13]

Most importantly, an employer must be consistent and uniform when permitting employees to supplement PSL or EFML with accrued paid leave or to allow paid time off during the unpaid portion of EFML leave.

7. Determine steps for employees to follow to return to work.

The last step to consider in developing leave policies under the FFCRA, is to determine what steps an employee must take to be able to return to work. There are many items to consider in making this determination and these considerations will be unique to the employer's type of business and workplace safety issues, as well as location. Some considerations include who and how the employee must notify the employer they are coming back to work; whether an employee will be required to be released from a doctor or certify that they are healthy in any way; and what role the employee will be returning to after FFCRA leave ends.

All of the above considerations and steps require an in-depth analysis of an employer's workplace situation and circumstances. Our Employment Law Team has extensive experience in this area and is always willing to assist employers in making appropriate decisions, both legally and practically. Should your company have any questions please contact **Elizabeth M. Roberson** or any other member of our **Employment Law Team.**

[1] 29 CFR § 826.10(i)(A).

[2] 29 CFR § 826.10(i)(B).

[3] As defined in section 101 of the Congressional Accountability Act of 1995 and as defined in 3 U.S.C. 411(c).

[4] 29 CFR § 826.10(ii).

[5] 29 CFR § 825.104(a).

[6] 29 CFR § 826.80(a).

[7] 29 CFR § 826.80(a).

[8] 29 CFR § 826.80(e).

[9] 29 CFR § 826.70(b).

[10] See FAQ 31 (“Determining the Amount of Allocable Qualified Health Plan Expenses”) for methods to compute this allocation.

[11] 29 CFR § 826.160(b)(2).

[12] 29 CFR § 826.160(b)(1).

[13] 29 CFR § 826.70(f).