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Insights

Employment Law Bulletin - Department of Labor Continues to Provide Additional Information on Paid Leave Requirements Under the Families First Coronavirus Response Act

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By: Shelley M. Jackson and Kate Trinkle

The Department of Labor (DOL) began issuing additional information on paid leave requirements under the Families First Coronavirus Response Act (FFCRA) on March 25, 2020. Since then, the DOL has continued to provide updates to the **Questions & Answers** on the FFCRA. As of March 30, 2020, the Questions & Answers now covers 59 points detailing paid leave requirements under the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) of the FFCRA.

Krieg DeVault LLP's **Labor & Employment Team** first provided a **summary** of the DOL's original Q & A on March 26, 2020. Below, is a summary of more recent updates issued since that time.

Counting Employees. The DOL clarified that the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA) applies to both the EFMLEA and EPSLA for counting employees under the FFCRA.

Varying Hours Calculation. Generally, the number of hours an employee works is based on the number of hours the employee is normally scheduled to work. When the employee's hours are unknown or irregular, a varying hours calculation applies. The DOL clarified that the varying hours calculation used for part-time employees also applies to full-time employees[1] whose hours vary or are unknown. This is significant for full-time employees who are eligible for overtime as those overtime hours are to be taken into account when calculating the amount of pay due to an employee.

Small Business Exemption. Small businesses that employ less than 50 employees may be exempt from providing childcare-related leave under the EFMLEA and EPSLA when providing such leave would jeopardize the viability of the small business as a going concern.[2] The DOL's most recent guidance states that the exemption is available for these small businesses when an authorized officer of the small business has determined that one of the following applies:

1. the provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available revenues and cause the small 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 or operational capabilities of the small business because of their specialized skills, 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 small business to operate at a minimal capacity.

Calculating Regular Rate. An employee's regular rate of pay for purposes of calculating the amount of paid leave is the average of the employee's regular rate, as determined under the Fair Labor Standards Act (FLSA), over a period of up to 6 months prior to the date that FFCRA leave begins. If the employee has not worked for the employer for 6 months, then the period used is however long the employee has worked for the employer.

Employers should also take any commissions, tips, or piece rates into account when calculating to the same extent that those types of payments are taken into account in the calculation of the regular rate under the FLSA. A simpler way to compute the regular rate calculation is to add all compensation that is part of the employee's regular rate over the relevant period (up to 6 months or amount of time employed) and divide that sum by all hours actually worked in the same period.

Determining "Health Care Provider" and "Emergency Responder" for FFCRA Paid Leave Exemption. Prior to this most recent guidance, it was unclear what employees were considered a "health care provider" or "emergency responder" and therefore could be treated as exempt from the FFCRA. The DOL has now provided a definition of each for purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA.[3]

Health Care Provider. A "health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity." This applies regardless of whether the institution is temporary or permanent.

Further, the definition "includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. 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."

Emergency Responder. Under the FFCRA, "an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19."[4]

The definition of emergency responder "includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19."

Definition of Health Care Provider under the EPSLA. The DOL also defined a "health care provider" whose certification can constitute a qualifying reason for paid sick leave under the EPSLA. For this purpose, a "health care provider" "means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA."

Intermittent Use of FFCRA Paid Leave. Whether an employee may use the FFCRA paid leave intermittently depends on whether the employee is teleworking or reporting to the employer's worksite. Under either circumstance, the employer's approval is required.

Teleworking. With the employer's approval, an employee that is teleworking and is unable to work the normally scheduled hours because of one of the qualifying reasons under the EPSLA may use the FFCRA paid leave benefits intermittently. Similarly, if the employee is prevented from teleworking the employee's normally scheduled hours because the employee is caring for the employee's child whose school of place of care is closed or unavailable, or whose caregiver is unavailable, due to COVID-19, the employee may use EFMLEA leave intermittently so long as the employee's employer approves. The intermittent leave increment is to be determined by the employee and the employer.

Reporting to Worksite. If an employee is still reporting to work, the employee is only able to take intermittent EPSLA or EFMLEA leave when it is approved by the employer and is needed because the employee has to care for the employee's child whose school or place of care is closed or unavailable, or the child's caregiver is unavailable, because of reasons related to COVID-19. Additionally, the paid leave must be taken in full day increments when the employee is not teleworking. For example, if the employee's need for leave is childcare-related, the employee and the employer could agree to an arrangement where the employee takes EPSLA or EFMLEA leave on Mondays, Wednesdays, and Fridays to care for the employee's child and then reports to work on Tuesdays and Thursdays.

Unless the employee is teleworking, EPSLA leave must be taken in full-day increments. It cannot be taken intermittently when taken because:

- the employee is subject to a federal, State, or local quarantine or isolation order related to COVID-19;
- the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- the employee is 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
- the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Business Closures and Paid Leave. The DOL also covered whether an employee is entitled to leave when the business is closed. In general, if an employee's business is closed, the employee is not entitled to paid leave under the FFCRA.

Business Closures before April 1, 2020. If an employer closes the business prior to the FFCRA's effective date, the employee is not entitled to FFCRA paid leave benefits.

Business Closures on or after April 1, 2020. If an employer closes the business on or after April 1, 2020, the employee is not entitled to FFCRA paid leave benefits. This applies regardless of whether the business is closing because of a reduction in business or because the employer was required to close pursuant to a Federal, State or local directive.

Business Closures during Paid Leave. If an employee is taking FFCRA paid leave and the employer closes the business, the employer must provide the paid leave for the leave used before the employer closed. This applies regardless of whether the business is closing because of a reduction in business or because the

employer was required to close pursuant to a Federal, State or local directive.

Furloughs on or after April 1, 2020. If an employee is furloughed on or after April 1, 2020, the employee is not entitled to FFCRA paid leave benefits.

Temporary Business Closures. If an employer temporarily closes the business but will reopen in the future, the employees of that business are not entitled to FFCRA paid leave benefits.

Reduction in Hours. If an employee's hours are reduced, the employee may not use FFCRA paid leave to compensate for the reduction in hours, regardless of whether the reduction in hours was somehow related to COVID-19. However, an employee may take FFCRA paid leave if a COVID-19 qualifying reason prevents the employee from working the employee's full schedule.

FFCRA Paid Leave and Unemployment Insurance Benefits. An employee is not able to collect unemployment insurance benefits at the same time as the employee receives paid leave provided by an employer under the FFCRA.

Supplementing FFCRA Paid Leave. An employer is not required to allow an employee to supplement the EPSLA or the EFMLEA paid leave with vacation, sick, personal, or other leave provided by the employer. However, the employer may elect to do so. In that case, the employer would not be entitled to receive a tax credit for any amount that is paid to employees beyond the statutory requirements.

EFMLEA Leave and FMLA Leave. An employee is entitled to 12 workweeks of job protected leave under both the EFMLEA and the FMLA. This means that if an employer was covered by the FMLA prior to April 1, 2020, the employee's eligibility under the EFMLEA depends on how much FMLA leave the employee previously took. The amount of EFMLEA leave is determined by subtracting the FMLA previously used. Similarly, taking EFMLEA leave counts against the employee's FMLA entitlement.

Even if the employee has exhausted FMLA leave and is therefore not entitled to EFMLEA leave, the employee may still be eligible to receive EPSLA so long as those requirements are met. Taking EPSLA leave does not count against other types of paid sick leave entitlements.

Right to Return to Work. Any leave taken under the FFCRA is considered job-protected, which means that an employer is prohibited from firing, disciplining, or otherwise discriminating against an employee who is taking paid leave for a qualifying reason under the FFCRA. Additionally, an employee taking FFCRA leave is generally entitled to return to the same, or equivalent, position as the one held prior to taking leave.**5**

However, the employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took paid leave under the FFCRA or not. An employer must demonstrate that an employee who is laid off while taking FFCRA leave would have been laid off regardless of whether the leave had been taken.

Moving Forward. Even with this new round of clarifications by the DOL, challenges remain for employers in navigating the FFCRA. **Shelley M. Jackson** along with Krieg DeVault LLP's **Labor and Employment Team** and **COVID-19 Task Force**, are ready to assist with your questions and concerns regarding FFCRA compliance.

Disclaimer. *The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] Employers should note that the varying hours calculation stated in ESPLA references only part-time employees, so employers should use caution in applying the varying hours calculation in any manner that would reduce a full-time employee's paid leave for a given week. The total hours available for full time employees under ESPLA is 80, so the

overall paid leave entitlement would not be affected.

[2] Small businesses may be exempt from providing paid leave under the EFMLEA and EPSLA when the employee is unable to work or telework because the school or place of care of the employee's son or daughter is closed or unavailable due to COVID-19 concerns (EPSLA) / a public health emergency (EFMLEA).

[3] Given the evolving nature of this determination, employers that are otherwise subject to FFCRA and its leave requirements should exercise caution and seek additional guidance in determining whether employees may be exempt as a "health care provider" or "emergency responder".

[4] The DOL encourages "employers to be judicious" when determining what employees are excluded under the definition of emergency responder in order to minimize the spread of the virus associated with COVID-19.

[5] The FFCRA provides an exception for the right to return to the same or equivalent position for employees who took leave due to a childcare-related reason if the employee (i) is employed by a small business with less than 25 employees; or (ii) is highly compensated and considered a key employee under the FMLA, and the other hardship conditions exist.