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# Insights

## How to Identify and Curb Employee Abuse of Emergency Paid Sick Leave and Expanded Family Medical Leave and Still Comply With the FFRCA

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Employers have spent much of 2020 figuring out how to administer and comply with the Families First Coronavirus Response Act ("FFCRA") and its two leave provisions: Emergency Paid Sick Leave ("EPSL") and Expanded Family Medical Leave ("EFML"). In the midst of all of these changes, employers likely discovered that similar to any other type of leave offered, these new types of leave could also be abused. It is important for consistency, morale, and productivity that abuse of any type of leave be curbed as immediately as possible.

When an employee requests EPSL or EFML, it is important to request the appropriate documentation before granting the leave. This is both to ensure the leave is legitimate and for the employers' records for obtaining the tax credit that may be available for such leave. For EPSL, that includes obtaining a leave request form that contains the reason for leave, and if applicable, the symptoms being experienced, date of test or doctor's appointment, a quarantine order and health care provider advising of it, information about the person or child(ren) being cared for, or evidence of school or daycare closure including affirmation that no other person could care for the child(ren). For EFML, that includes the reason for leave, evidence of school or daycare closure, name(s) and age(s) of child(ren) needing care, and confirmation that no other person can care for the employee's child(ren). The employer should also ask the employee to designate the dates leave is needed and whether EFML is being requested on an intermittent basis, which must be approved by the employer in order to be permitted. After receiving such documentation, an employer should evaluate the request and provide an employee documentation that the leave is approved or whether additional information is needed. Employers should be careful to not immediately deny leave and to evaluate each individual situation, as an immediate denial could be a violation of the FFCRA.

Not only will the requested documentation allow an employer to have the information necessary for its own record keeping, but it will also allow an employer to evaluate an employee's request for leave and validate whether the information is accurate. In addition, employees are more likely to provide accurate and truthful information if it is required to be placed in writing.

The FFCRA does not have specific validation requirements, thus, employers must turn to other leave laws for guidance. Under the Family Medical Leave Act, if an employee submits a complete and sufficient certification by a health care provider, an employer may not request additional information. However, the employer may contact the health care provider to clarify or authenticate the information provided. Even though such validation is allowed under the Family Medical Leave Act, it is not recommended that employers contact health care providers during the COVID-19 pandemic to verify treatment or a COVID-19 test due to the urgency of the request, and the already strained health care system. However, an employer could verify that an employee did actually have their school or daycare closed and now needs to care for their child(ren) via a simple call to the

location or perhaps an internet search.

In addition, the FFCRA questions and answers issued by the Department of Labor state that an employer is not prohibited "from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child." Thus, if an employer learns that an employee has knowingly and intentionally made a misrepresentation, the employee can be disciplined for such behavior. Likely such a misrepresentation would be discovered after leave is granted, but if it were discovered before leave is granted, nothing in the FFCRA prevents an employer from denying such leave. If an employer chooses to deny the employee's leave, it should document its reasons and ensure there is documentation that it has complied with its statutory obligation or it could subject the employer to liability.

Finally, consistency is key. An employer should be careful not to favor any one employee or position over another when scrutinizing a request for leave. Being consistent in its requirements and evaluation of requests for leave will help prevent claims of discrimination. Further, being consistent will allow employees to understand that the employer is validating everyone's request in the same manner. This will likely deter employees from attempting to obtain fraudulent or unnecessary leave.

**Takeaways**

The FFCRA and any benefits granted thereunder ends on December 31, 2020. It is possible that such benefits will be extended by either an extension of the FFCRA or a new law, although as of this article no such bill is currently pending approval. In addition, states could enact their own extensions of the FFCRA as some have already done. Thus, although requests for leave under FFCRA may be ending, it is likely that the need to be vigilant of fraudulent leave will not cease at the end of 2020. When administering leave under FFCRA or any leave law, requiring documentation deters employees from fraudulently requesting and taking leave. A consistent and thoughtful approach is important in administering any leave policy, including ordinary paid time off policies. Such an approach starts with having the necessary policies, request forms, and approval forms. If you need assistance drafting such policies or forms or even have a question about a specific request for leave, our Labor and Employment Law Team is here to help. Please contact **Elizabeth M. Roberson** or another member of our **Labor and Employment Law Team** for further analysis on the specific situation.

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