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Insights

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

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For employers scrambling to comply with the recently-enacted Families First Coronavirus Response Act (FFCRA), the Department of Labor (DOL) has added additional information to its **Covid-19 and the American Workplace website**, including Fact Sheets on **Employee Paid Leave Rights** and **Employer Paid Leave Requirements**; **Questions & Answers**; **Non-Federal Employer** and **Federal Employer** Posters (with **FAQ**); and **Field Assistance Bulletin No. 2020-1** (Bulletin) detailing a temporary non-enforcement period. These materials provide clarification for employers who are preparing to comply with the paid sick leave requirements of the Emergency Family and Medical Leave Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Here are some key takeaways:

Effective Date. The effective date for EFMLEA and EPSLA is April 1, 2020, and the end date is December 31, 2020. It was originally thought that the effective date would be April 2, 2020.

Counting Employees. The DOL clarified the process for counting employees to determine applicability of the EFMLEA and EPSLA for private employers with less than 500 employees[1].

All full-time and part-time employees within the United States, including any State of the United States, the District of Columbia, or any Territory or possession of the United States should be considered. Employees who are on leave, temporary employees who are jointly employed by two entities, and day laborers supplied by a temporary agency should be included in the calculation. Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, should not be counted in the total number of employees.

- *Corporation*. If an employer is a corporation with separate establishments or divisions, it will generally be considered a single employer and its employees must each be counted towards the 500-employee threshold.

- *Corporation with Ownership Interest in Another Corporation.* When a corporation has an ownership interest in another corporation, the FLSA will treat those corporations as separate employers unless the corporations are joint employers under the FLSA with respect to certain employees. If the two entities are found to be joint employers, all of the common or jointly employed employees must be counted toward the 500-employee threshold for determining whether the joint employer is subject to the requirements of the EFMLEA and EPSLA.

- *Integrated Entities*. Two or more entities are usually treated as single employers unless the entities meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities meet the FMLA integrated employer test, then the employees of all entities making up the integrated employer are counted toward the 500-employee threshold for purposes of the EFMLEA.

Small Business Exemption. The EFMLEA provides leave for employees who are unable to work (or telework) because child-care is unavailable due to Coronavirus. Small businesses with fewer than 50 employees may be exempt from providing this leave when complying with the EFMLEA would jeopardize the viability of the small business as a going concern. While the EPSLA has several qualifying needs that trigger its requirements, small businesses, with fewer than 50 employees, may only seek exemption from providing child-care related leave to employees when doing so would jeopardize the viability of the small business as a going concern.

The DOL will provide additional guidance in the future, including through promulgation of implementing regulations. In the meantime, if a small business believes it is exempt, it should document how complying with the child-care related leave requirements under the FFCRA would jeopardize the viability of the small business as a going concern. Small businesses seeking an exemption should not send any materials to the DOL.

Calculating Hours Worked for Part-Time Employee. A part-time employee is entitled to leave for the average number of hours the employee works in a two-week period. If the employee's hours are normally scheduled, the calculation is based on those regularly scheduled hours. However, if the part-time employee's scheduled hours vary, or are unknown, then an average of the employee's hours over the past six-months is used. If the employee has not been with the employer for six months, take an average of the employee's hours over the time the employee has been with the employer.

Under the EPSLA, the part-time employee may take paid sick leave for this number of hours per day for up to two weeks or 10 days. If the part-time employee is also eligible for leave under the EFMLEA, the employee may take that same number of hours per day for the 10 weeks of paid leave.

Required Compensation under the FFCRA. When leave is taken, it should be paid based on the employee's regular rate of pay. The DOL explained that employers should calculate this rate by using the employee's average regular rate over the six months leading up to the date the leave begins. If the employee has not been with the employer for six months, then the regular rate is the average of the regular rate of pay for the time the employee has been employed up to the date the leave begins.

Under the EPSLA if the employee is taking leave to care for another or because the employee is experiencing any substantially similar condition of Coronavirus, the employee only receives 2/3 of the employee's regular rate. Similarly, the amount of pay for 10 weeks under the EFMLEA is 2/3 of the employee's regular rate.

Under the EPSLA, the amount of paid leave cannot exceed (i) $511 a day ($5,110 total) when the employee takes leave for the employee's own care; or (ii) $200 a day ($2,000 total) when the employee takes EPSLA leave to care for another. Under the EFMLEA, the employee's paid leave may not exceed $200 a day ($10,000 total).

EPSLA and Limits to Paid Leave. The EPSLA provides several instances in which an employee can take paid leave, however, the EPSLA only provides 10 days, or two weeks, of paid leave. This means that an employee may have more than one qualifying need under the EPSLA arise at different times. However, the 10 day paid leave is not attached to the qualifying need but is the maximum amount of paid leave an eligible employee is entitled to receive under the EPSLA. For example, an employee who takes 10 days of paid leave to self-quarantine may not then seek to take another 10 days of paid leave for another qualifying reason, like caring

for an individual who has been ordered to self-quarantine.

Interaction of Leave under EFMLEA and EPSLA. An employee may be eligible for leave under both the EFMLEA and EPSLA when the employee is unable to work (or telework) because the employee is caring for a son or daughter because the child's place of care or school has been closed, or is unavailable, because of Coronavirus pre-cautions (under EPSLA) / a public health emergency (under EFMLEA).

Employees in this situation are eligible for 12 weeks of leave under the EFMLEA, of which 10 are paid. The first 10 days/two weeks of EFMLEA leave will be unpaid unless the employee elects to use EPSLA paid leave is used or other paid leave provided by the employer (vacation, sick, personal, or medical leave). The employee cannot be required to use EPSLA paid leave first, and employers should follow existing policies for use of other types of paid leave. Following the initial 10 day/two-week period, the employee would then receive paid leave at 2/3 of the employee's regular rate of pay for the remaining 10 weeks of leave under the EFMLEA.

Employees who would otherwise qualify but elect not to use EPSLA paid leave during the initial 10-day period under EFMLEA may remain eligible to use EPSLA paid leave during another qualifying event occurring prior to December 31, 2020. EPSLA must be offered as a paid leave option in addition to any other types of paid leave already available to the employee, and employees cannot be required to use EPSLA leave first.

Interaction of Paid Leave under EPSLA and an Employer Policy. If an employer previously provided its employees with paid leave under its own policy, the employer should not deny paid leave to an employee under the EPSLA and may not require that its employees use EPSLA before other available paid leave. The EPSLA is an additional paid leave requirement for employers beginning on April 1, 2020, not a replacement of existing paid leave.

Paid Leave under EFMLEA. EFMLEA expands FMLA to add one additional qualifying circumstance (e.g. to care for the employee's child as described above) and provides that only EFMLEA-qualified leave based on that circumstance shall be paid after the first 10 days. The FFCRA does not extend paid leave status to FMLA leave taken for any other reason.

Retroactivity of the FFCRA. The paid leave provided under the EFMLEA and EPSLA is not retroactive.

Length of Employment[2] for EFMLEA. To be EFMLEA-eligible, an employee must have been employed with their current employer for at least 30 calendar days.

An employee will be considered to have been employed for at least 30 calendar days if the employer had the employee on its payroll for the 30 calendar days immediately prior to the day the leave would begin. For example, if an employee wanted to take EFMLEA leave beginning on April 1, 2020, the employee is eligible to do so if the employee has been on the employer's payroll as of March 2, 2020.

The DOL also clarified that temporary workers who have since been hired as full-time workers may count the days they were classified as temporary toward the 30-day eligibility period.

Posters. Employers are required to place posters in the workplace, and those posters are now available on DOL's website.

Non-Enforcement Period. The Bulletin announces a temporary non-enforcement period from March 18, 2020 to April 17, 2020. In addition, the Bulletin offers key insight into what constitutes "reasonable" and "good faith" conduct on the part of the employer, including employers experiencing cash flow problems. Employers should keep in mind that the effective date of the FFCRA, including EFMLEA and EPSLA, is April 1, 2020. A DOL non-enforcement period does not absolve an employer from complying fully with the law as of that date, nor would it prevent individuals from pursuing a private cause of action, if available.

Moving Forward. While the DOL's guidance clarifies some of the FFCRA-related issues, many uncertainties remain, which many expect will be addressed in the coming weeks with additional guidance. Krieg DeVault LLP's **Labor and Employment Team** and **COVID-19 Task Force** stand ready to help employers navigate the FFCRA's complexities.

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] Private employers with more than 500 employees are exempt from the paid leave provisions of the FFCRA.[1] Private employers with more than 500 employees are exempt from the paid leave provisions of the FFCRA.

[2] All employees are eligible for emergency paid sick leave under EPSLA, regardless of length of service.