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In-Depth Analysis The Families First Coronavirus Response Act

Combined 5-part Series

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The Families First Coronavirus Response Act Regulations

Part One in a Five-part Series

On April 1, 2020 (no, not an April Fool's Day joke!), the US Department of Labor (DOL) issued its final regulations interpreting the Families First Coronavirus Response Act (FFCRA), a landmark piece of federal legislation that provides paid sick leave and paid family leave to eligible employees who are unable to work for certain qualifying reasons due to COVID-19, such as quarantine, isolation, COVID-19 infection, suspected COVID-19 infection and childcare obligations due to school and daycare closures. The FFCRA went into effect April 1, 2020 and sunsets on December 31, 2020, but the 124-page long federal rule published on April 1 proves that there is much to learn and digest in a short time.

Rather than try to summarize all of the regulatory guidance at once, we will be summarizing key provisions of the FFCRA regulations daily, one general topic each day for one week. In the interim, if you have any questions about FFCRA coverage, eligibility, compensation or job restoration responsibilities, please reach out to your labor and employment counsel.

In this first update, we discuss which employees are entitled to protection under, and which employers are required to provide leave pursuant to, the FFCRA.

FFCRA-covered Employers

To take advantage of FFCRA leave, an employee must work for an employer covered by the FFCRA at the time the requested leave is taken. Under 29 C.F.R. § 826.40, covered employers include the following:

1. Any private entity or individual who employs fewer than 500 employees.

- All US employees – full-time and part-time – are counted.
- Only US employees are counted; workers permanently based outside the country (meaning outside the 50 states, District of Columbia, and Territories and Possessions of the US) are not included.
- Employees on leave of any kind are included.
- All employees currently employed, regardless of how long they have worked for the employer, are included in the headcount.
- Employees of temporary placement agencies that are jointly employed by the employer and another employer, regardless of which employer's payroll the employee appears on, are included.
- Day laborers supplied by a temporary placement agency, regardless of whether the employer is the temporary placement agency or the client firm.
- Independent contractors are not included in the headcount.
- Employees who have been laid off or furloughed and not subsequently reemployed are not included in the headcount.

The DOL regulations provide better clarity on how to count employees of companies that are partially or wholly owned by parent companies or affiliates. The default rule is that a corporation – including its separate establishments or divisions – is considered a single employer and all of its employees must be counted together. Where one corporation has an ownership interest in another corporation, the two corporations are separate employers, unless they are joint employers with respect to certain employees, or treated as integrated employers.[1]

Joint employment – The FFCRA regulations incorporate by reference the joint employment test under the Fair Labor Standards Act, set forth in 29 CFR Part 791. Joint employment exists where an employee has an employer who suffers, permits or otherwise employs the employee to work, but another person simultaneously benefits from that work. The other person (the putative joint employer) is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. Factors weighed in the fact-intensive analysis include whether the putative joint employer (i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records. The putative joint employer must actually exercise – directly or indirectly – one or more of these indicia of control to be a joint employer. If two entities are joint employers with respect to certain employees, all common employees of joint employers must be counted together.

1 Prior to the implementation of the regulations, informal DOL guidance seemed to suggest that the joint employer test was applicable to both the paid sick leave and paid family leave provisions of the FFCRA, but that the integrated employer test applied only to determining coverage under the paid family leave provisions. The regulations clear up this apparent incongruity and clarify that if two entities satisfy *either* the joint employer test *or* the integrated employer test, then employees of all entities making up the integrated or joint employer will be counted in determining coverage for purposes of coverage under both the emergency paid sick leave and emergency paid family leave provisions of the FFCRA. The informal guidance has been updated to reflect this.

Integrated employment – The FFCRA regulations incorporate by reference the integrated employer test under the Family Medical Leave Act, set forth in 29 C.F.R. § 825.104(c)(2). That test – which is ordinarily applied when determining if two entities' employees should be aggregated for meeting the 50-employee threshold applicable to non-FFCRA FMLA coverage determinations – starts with the general principle that a corporation is a single employer rather than its separate establishments or divisions, but separate entities will be deemed to be parts of a single employer for purposes of the FMLA if they meet the integrated employer test. The determination is not based on any single criterion, but requires consideration of the entities' entire relationship in its totality. Factors considered in determining whether two or more entities are an integrated employer include (i) common management; (ii) interrelation between operations; (iii) centralized control of labor relations; and (iv) the degree of common ownership/financial control. If two entities are an integrated employer under this test, then employees of all entities making up the integrated employer are counted together. Barring either or both of these tests being satisfied, corporations are measured separately.

Because the regulations make clear that the 500-employee test is measured as of the date that an employee's requested leave is to begin, employers must perform this analysis each time an employee requests leave and not simply at the time the FFCRA is enacted. For example, if an employer has 525 employees on April 1, 2020 and an employee requests leave that day for an FFCRA-qualifying reason, the employer may deny that request because it is over the 500-employee threshold. However, if the employer lays off 50 employees on May 1, 2020, leaving it with only 475 employees, and the employee renews their request for leave for an FFCRA-qualifying reason, the employer is now below the 500-employee threshold and may be required to grant the request. Conversely, if an employer is covered by the FFCRA as of the effective date of the Act, but later adds headcount so as to cross the 500-employee threshold, it will no longer be required to continue to grant paid time off under the FFCRA.[2]

To summarize:

Counted Toward 500-employee Threshold
US employees of a corporate entity
Employees on leave
Employees placed by temporary placement agencies and day laborers
Employees of joint and integrated employers

Not Counted Toward 500-employee Threshold
Foreign workers
Independent contractors
Laid-off workers not reemployed
Furloughed workers not reemployed

2. All public employers must provide employees paid sick leave, except to healthcare providers, emergency responders and those federal employees excluded by the Director of the Office of Management and Budget (OMB), including, without limitation, postal workers and certain other individuals occupying positions in the civil service and federal officers or employees covered under Title II of the pre-FFCRA FMLA.
3. All public employers must provide employees expanded Family and Medical Leave for childcare related issues, except to healthcare providers, emergency responders, certain federal employees excluded by the Director of the OMB, postal workers and other certain other federal employees.

FFCRA-eligible Employees

Duration of Employment

Employees who have been employed for any length of time are entitled to utilize the *paid sick leave* provisions of the FFCRA. However, employees must have been employed at least 30 days by the employer to utilize the expanded *paid family leave* provisions of the FFCRA. This 30-day employment requirement is satisfied if the employee has been employed by the employer for at least 30 calendar days or, if the employee was laid off or terminated on or after March 1, 2020, if the employee worked for the employer for at least 30 of the 60 calendar days prior to termination and was subsequently rehired or otherwise reemployed by the same employer. Additionally, 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 30-day eligibility period. These tenure requirements apply only for purposes of FFCRA coverage. Employees still must be employed for one year and have worked 1,250 hours in the preceding 12 months for purposes of eligibility under other non-FFCRA provisions of the FMLA.

2 For those following other congressional initiatives, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), or Phase III of the federal government's response to the coronavirus, pledges more than US$360 billion in immediate loan assistance for small businesses, including (1) an expanded Economic Injury Disaster Loan program and (2) the Paycheck Protection Program administered under the Small Business Administration's 7(a) program. Part of the qualification criteria for this financial assistance is whether the applicant business has fewer than 500 employees. Although beyond the scope of this summary, the 500-employee threshold is critical in the analysis of employer coverage under a number of COVID-19-related laws.

Exemption of Healthcare Providers and Emergency Responders

From there, employees must demonstrate that they have a qualifying reason to take leave under the FFCRA, a subject we have discussed here and will discuss in more detail in our next part in this series. But even employees who work for a covered employer and demonstrate a qualifying reason may still be exempted from coverage if they are healthcare providers or emergency responders.

Employers may exclude from paid sick leave and/or expanded paid family leave coverage a healthcare provider, which is defined solely for purposes of the FFCRA exemption as:

> …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 includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

The definition of "health care provider" also

> includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support 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. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Although the definition of "health care provider" in the regulations is very broad, the executive summary published by the DOL with the final rule cautions that "health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency," such as "medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational." The summary, therefore, seems to suggest that the healthcare providers intended to be exempted from coverage are those who are essential to fighting the COVID-19 crisis and those employees supporting them in doing so. Although the executive summary does not have the force and effect of law, it further underscores the importance of being "judicious" in applying the exemption, as the DOL previously recommended in informal guidance.

The regulations also define "emergency responder." For purposes of the FFCRA, an employer may exclude from coverage "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 definition "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, 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." In addition, the definition includes "any individual whom 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." The executive summary accompanying the regulations explains that the goal of exempting emergency responders "is reflective of a balance" between sparing employees from "choos[ing] between their paychecks and the individual and public health measures necessary to combat COVID-19" and ensuring that "providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society."

Small Business Exemption

Although the FFCRA expressly applies to private businesses from one to 499 employees, an employer with fewer than 50 employees (a "small business") is exempt from providing paid sick leave and/or expanded paid family leave for purposes of caring for a son or daughter whose school, place of care or childcare provider is closed or unavailable "when the imposition of such requirements would jeopardize the viability of the business as a going concern." We discuss this exemption here, and not under the section above on FFCRA covered employers, because the small business exemption analysis must be performed each time an employee makes a request for paid leave, and some employees may be permitted to take paid childcare leave whereas others may be denied, depending on their unique skills and knowledge.

A small business is entitled to an exemption from the paid sick and paid family leave obligations of the FFCRA if an authorized officer of the business has determined that:

1. The leave requested would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating a minimal capacity
2. The absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business or responsibilities
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(s) requesting paid childcare leave, and these labor or services are needed for the small business to operate at a minimal capacity

According to the DOL's executive summary accompanying the final rule, "[f]or reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, post a substantial risk, or prevent the small employer from operating at a minimum capacity, respectively," reinforcing that this requires an individualized analysis after each employee request and not a prospective determination that a small business is wholly relieved from coverage.

After the employer's authorized officer makes the determination that one or more of these criteria is satisfied, the company "must document the facts and circumstances that meet the criteria . . . to justify such denial," and retain such records for its own files. If an employer denies an employee's request for leave pursuant to the small business exemption, the company must retain the documentation supporting the denial for four years.

Perfectly clear, right? And this is just the analysis of who is covered by the FFCRA. The next part will discuss the reasons for which FFCRA leave may be taken and the types of certification employers may request to confirm eligibility.

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DOL Clarifies Certification for Covered Reasons to Take FFCRA Leave

Part Two in a Five-Part Series

In the first installment of this five-part series exploring the US Department of Labor (DOL) regulations (29 CFR Part 826) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible to take, and which employers are required to provide, emergency paid sick leave or emergency paid family leave under the FFCRA.

In this second installment, we take a closer look at the reasons why an employee might take job-protected leave under the FFCRA and what proof an employer may request to determine employee eligibility.

Qualifying Reasons for Leave

As we covered previously, under the Emergency Paid Sick Leave (EPSL) provisions of the FFCRA, eligible employees may take up to 80 hours of paid sick leave between April 1 and December 31, 2020, for one of six covered reasons related to coronavirus disease 2019 (COVID-19), and up to 12 weeks (10 of which are paid) of extended paid FMLA leave for reason number 5 below. Although the qualifying reasons for paid leave are unchanged from the original FFCRA language, the DOL has provided additional guidance on how to interpret these provisions, shown below.

1. Quarantine or Isolation Orders

Under the FFCRA, a covered employer shall provide its eligible employees EPSL to the extent that the employee is unable to work or telework because he or she "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." 29 C.F.R. § 826.20(a)(1)(i).

- The Executive Summary the DOL issued with the regulations (which provides context for the regulations, but that does not separately have the force of law) explains that "[q]uarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility."
- Many employees are currently impacted by such orders; however, the regulations make clear that an employee qualifies for leave under this first reason only if "but for being subject to the [quarantine or isolation] order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework." 29 C.F.R. § 826.20(a)(2). In other words, even if an employee is affected by a shelter-in-place or non-essential business closing order because the place of business where the employee works is closed temporarily, he or she may not be entitled to paid time off under this provision because "[a]n Employee Subject to a Quarantine or Isolation Order may not take [EPSL] where the Employer does not have work for the Employee as a result of the order or other circumstances." This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.
- The Executive Summary accompanying the regulations provides an example of a coffee shop that closes indefinitely due to a downturn in business related to COVID-19. As a result, it no longer has any work for its employees. A cashier who worked at the coffee shop and is subject to a shelter-in-place order would be unable to work even if he were not required to stay at home, and, therefore, does not qualify for EPSL under the first reason. The Executive Summary goes on to explain that the same result would apply if the coffee shop closed because of the quarantine or isolation order itself; even if the coffee shop closed because it is deemed non-essential or because its customers must adhere to the stay-at-home order, the cashier's inability to work would be because those customers were subject to the order and/or because the store was required to close, not because **the cashier** was subject to the order. A subtle difference, but one that may result in disqualification from EPSL leave under the first FFCRA reason.
- The Executive Summary contains a further example of a law firm that permits its lawyers to work from home during a quarantine or isolation order. Because the lawyer is not prevented from working by the order because of the availability of teleworking, she would not be entitled to EPSL under the first qualifying reason. However, if she were unable to telework due to a power outage or similar extenuating circumstance and could not access the office due to a stay-at-home order, then she may be entitled to EPSL.

2. Recommendation to Self-Quarantine

Another reason why an employee may take EPSL under the FFCRA is that the employee is unable to work or telework because he or she "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19." 29 C.F.R. § 826.20(a)(1)(ii).

- Section 826.20(a)(3) of the FFCRA regulations explains that the advice to self-quarantine must be based on an approved healthcare provider's belief that the employee has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19.

- In addition, the self-quarantine must prevent the employee from working. If an employee is self-quarantining based on a healthcare provider's advice but is able to telework, he or she does not qualify for EPSL under this second FFCRA reason. An employee who is self-quarantining is able to telework and, therefore, may not take EPSL for this reason if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.
- The advice to self-quarantine required to fall within this qualifying reason must come from a "health care provider" as defined in 29 C.F.R. § 825.102. This is not the expansive definition of healthcare providers who may be exempted from coverage under the FFCRA in employers' discretion as we discussed in Part 1 of this series, but rather is limited to those providers who are able to certify FMLA leaves in the ordinary course, and includes "[a] doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or [a]ny other person determined by the Secretary [of Labor] to be capable of providing health care services." This latter category includes only: podiatrists, dentists, clinical psychologists, optometrists and chiropractors; nurse practitioners, nurse-midwives, clinical social workers and physician assistants; Christian Science Practitioners; any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and healthcare providers who practice in a country other than the US who are authorized to practice in accordance with the law of that country and who are performing within the scope of his or her practice as defined under such law.
- Therefore, employees may not make their own determination that they are vulnerable to COVID-19; they must be **instructed** by one of the narrow list of enumerated healthcare providers above that they should self-quarantine for a *bona fide* reason and, by virtue of that self-quarantine, they must be unable to work or telework despite the availability of work otherwise in order to qualify for EPSL under this reason.

3. Seeking Medical Diagnosis After COVID-19 Symptoms

The third qualifying reason why an employee may take EPSL if he or she "is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider." 29 C.F.R. § 826.20(a)(1)(iii).

- Section 826.20 clarifies that to qualify for EPSL under this qualifying reason, an employee must be experiencing symptoms identified by the US Centers for Disease Control and Prevention as being consistent with COVID-19, such as fever, dry cough or shortness of breath, and be unable to work because the employee is taking affirmative steps to obtain a medical diagnosis to confirm whether or not the employee is COVID-19-positive, "such as making, waiting for, or attending an appointment for a test for COVID-19."
- Therefore, being symptomatic alone is insufficient. To qualify for EPSL under this reason, an employee must be both symptomatic **and** taking affirmative steps to obtain a diagnosis, and the covered time off is limited to the time the employee is unable to work because of taking those affirmative steps. Self-quarantine without seeking a medical diagnosis is not sufficient to qualify for EPSL under this reason. And, similar to the scenarios set forth above, employees who are able to telework while waiting for their appointment or test results would not be eligible for EPSL for this reason.
- An employee may continue to take EPSL while experiencing COVID-19 symptoms and awaiting test results under this reason, and may continue to do so until EPSL is exhausted after testing positive for COVID-19 if the employee's healthcare provider advises the employee to self-quarantine, but then the EPSL would be covered under reason number 2.

4. Caring for an Individual Who Is Quarantining or Isolating

The FFCRA allows an eligible employee to take EPSL to care for an individual who is subject to a "Federal, State, or local quarantine or isolation order related to COVID-19" or has been directed to self-quarantine by a health care provider due to concerns related to COVID-19." 29 C.F.R. § 826.20(a)(1)(iv).

- The regulations clarify this qualifying reason applies only if, **but for** a need to care for an individual, the employee would be able to perform work for his or her employer. Accordingly, an employee caring for an individual may not take paid sick leave if the employer does not have work for him or her.
- Although the statute is written broadly to suggest that leave may be taken to care for any "individual," the regulations narrow this and state that leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, a person who regularly resides in the employee's home, such as a roommate, 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 self-quarantined or was quarantined. Furthermore, the individual being cared for must (a) be subject to a federal, state or local quarantine or isolation order, or (b) have been advised by a healthcare provider to self-quarantine based on a belief that he or she (i) has COVID-19, (ii) may have COVID-19 or (iii) is particularly vulnerable to COVID-19.
- For purposes of certification, an employee requesting EPSL under this reason 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 healthcare provider who advised the individual to self-quarantine, depending on the precise reason for the request.

5. Child Care Paid Sick Leave

The FFCRA also permits an eligible employee to take EPSL to care for the employee's son or daughter "whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID-19." 29 C.F.R. § 826.20(a)(1)(v). The FFCRA further permits eligible employees to take emergency paid FMLA leave for up to 12 weeks total for emergency child care leave due to school and daycare closures and daycare provider unavailability.

- Although the FFCRA specifically limited leave for this reason to children under 18 years of age, the DOL expanded the definition to be consistent with the definition of "child" as used in the existing provisions of the FMLA to include children over the age of 18 who are incapable of self-care because of a mental or physical disability.
- To qualify for EPSL under this provision, the employee must be able to perform work for his or her employer but for the need to care for the child, which means that the employee may not qualify for EPSL under this reason if the employer does not have work for him or her to do.
- Moreover, an employee may take EPSL to care for a child only when the employee needs to, and actually is, caring for his or her child. According to the DOL's Executive Summary, generally, an employee does not need to take EPSL for child care reasons "if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide the care the child needs."
- Although the DOL regulations do not address this, please note that the IRS issued guidance regarding employer applications for tax credit relief to offset the cost of EPSL and emergency paid FMLA leave suggesting that employees who used paid time off under the FFCRA for child care for a child over the age of 14 would need to demonstrate extenuating circumstances for why the child could not be left unattended. In an abundance of caution, employers may wish to obtain the specific age and circumstances requiring child care leave when employees exercise FFCRA rights to care for older, non-disabled teens.

6. Other "Substantially Similar Condition"

The FFCRA includes a catch-all provision whereby an employee may use EPSL if he or she "has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor." Although these "substantially similar conditions" have not yet been defined, the regulations make clear that they "may be defined at any point during the Effective Period, April 1, 2020 to December 31, 2020." 29 C.F.R. § 826.20(a)(1)(vi). If they are updated, we will provide further guidance.

Employee Notice Requirements

Despite the state of alarm that we all find ourselves in, employees still must take affirmative steps to alert their employers to their request for FFCRA-qualifying leave. Section 826.90 of the FFCRA regulations addresses an employee's notice obligation.

- Employers may require employees to follow reasonable notice procedures **after the first workday or portion thereof** for which an employee takes EPSL for any reason, other than for child care reasons. Notice may not be required in advance, and may only be required after the first workday or portion thereof when the employee uses paid leave. However, after the first workday, it will be reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case. Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case.
- Because leave for school/daycare closures are generally more foreseeable, in any case, where an employee requests leave to care for a son or daughter whose school or daycare closed, if that leave was foreseeable, an employee shall provide the employer with notice of the need for leave "as soon as practicable." Even then, if an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.
- Generally, it will be reasonable for the employer to require the employee to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Furthermore, it will generally be deemed reasonable for notice to be given by the Employee's spokesperson (spouse, adult family member, or other responsible party) if the Employee is unable to do so personally.
- The DOL presumes that it is reasonable for an employer to require oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA. An employer may not require notice to include documentation beyond the certification items listed below.
- The DOL encourages, but does not require, employees to notify employers about their request for paid leave as soon as practicable, and, if an employee fails to give proper notice, the employer is required to give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

Employee Documentation/Certification Requirements

- All employees requesting EPSL or paid FMLA leave must provide their employer a signed statement containing the following information:
  - Employee name
  - Date(s) for which leave is requested
  - Qualifying reason for the leave, and
  - Oral or written statement that the employee is unable to work or telework because of the qualified reason(s) for the leave

In addition:

- Employees seeking to take EPSL for qualifying reason number 1 "must additionally provide the employer with the name of the government entity that issued the quarantine or isolation order."

- Employees seeking to take EPSL for qualifying reason number 2 must provide the employer "with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19."
- Employees seeking to take EPSL to care for an individual subject to a quarantine or isolation order must provide the employer with "the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject," or "the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19."
- Employees seeking to take paid sick leave for child care reasons must additionally provide:
  - The name of the son or daughter being cared for
  - The name of the school, place of care or child care provider that has closed or become unavailable, and
  - A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or expanded paid FMLA leave
- Employers may also request an employee to provide such additional material as is needed for the employer to support a request for tax credits pursuant to the FFCRA. This information will be laid out in anticipated IRS guidelines, but for now, employers can review informal IRS guidance here.
- Employers must retain all documentation provided as part of the certification process for four years, regardless of whether leave was granted or denied. If the employee provides oral statement to support a request for EPSL or paid FMLA, the employer must document and retain such information for four years.

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DOL Guidance Clarifies Nuances on How FFCRA Leave May Be Used

Part Three in a Five-Part Series

In the first installment of this five-part series exploring the US Department of Labor (DOL) regulations (29 CFR Part 826) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible to take, and which employers are required to provide, emergency paid sick leave or emergency paid family leave under the FFCRA. In the second installment, we reviewed the six reasons why an eligible employee may take job-protected paid sick leave or paid family leave for coronavirus disease 2019 (COVID-19)-related reasons. In this third installment, we look at the unique rules regarding how emergency paid sick leave (EPSL) and paid public health emergency FMLA leave (EFMLA) may be used – whether continuously or intermittently, and how both leave provisions work in conjunction with existing employer leave policies.

General Principles

The EPSL provisions of the FFCRA allow eligible full-time employees to take up to 80 hours of paid sick leave between April 1 and December 31, 2020, for one of the six enumerated reasons set forth in the Act, which we discussed in depth here. Part-time employees are entitled to a prorated amount of time off. EPSL is paid at the employee's regular rate of pay, up to US$511/day maximum or US$5,110 in the aggregate, for certain EPSL-qualifying reasons (i.e., when the employee is subject to a quarantine or isolation order; when the employee has been directed to self-quarantine by a health care provider; or when the employee is symptomatic and awaiting a COVID-19 diagnosis). EPSL is paid at two-thirds the employee's regular rate of pay, up to US$200/day maximum, for all other EPSL-qualifying reasons (i.e., when the employee is caring for an individual subject to a quarantine or isolation order, caring for a child whose school or daycare has closed, or for other reasons as may later be determined by the Secretary of Health and Human Services).

The EFMLA provisions of the FFCRA allow an eligible employee to take up to 12 weeks of job-protected FMLA leave when they have a need to care for a child whose school or place of care has closed or childcare provider is unavailable. The first two weeks of EFMLA leave may be unpaid, but the remainder of the EFMLA leave is paid at two-thirds the employee's regular rate of pay, up to US$200/day maximum or US$10,000 in the aggregate. This seems simple enough in theory, but as we will discuss in part four of the series, even these pay obligations can be quite vexing. For today, though, we look first on whether and when employers can require that employees use accrued paid time off with, or in place of, the paid leave available under the FFCRA.

Coordination With Paid Time Off Policies

1. Employers may, but are not required to, allow use of accrued paid time off to supplement EPSL wages.

We know from the FFCRA that the maximum number of EPSL hours to which an eligible employee is entitled is 80 hours [FFCRA § 5102(b)]. The regulations now make clear that that is 80 hours total between April 1 and December 31, 2020, regardless of how many employers an employee works for, meaning the 80-hour maximum is per person, not per job. 29 C.F.R. § 826.160(f). We also know that any unused EPSL hours do not carry over at year end [FFCRA § 5102(b)(2)(3)], and that EPSL provided to an employee shall cease beginning with the employee's next scheduled work shift immediately following the termination of the need for EPSL [FFCRA § 5102(c)]. We also know that an employer may not require, as a condition of providing EPSL, that the employee search for or find a replacement employee to cover the hours during which the employee is using EPSL [FFCRA § 5102(d)]. Further, we know that EPSL is "available for immediate use by the employee" for qualifying reasons, "regardless of how long the employee has been employed by an employer" [FFCRA § 5102(d)], and that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses EPSL [FFCRA § 5102(e)(2)(B)]. The regulations confirm this, and the executive summary published by the DOL with the regulations explain that, "[p]aid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before . . . April 1, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave." What the FFCRA left unclear was whether employers could permit, or even require, employees to use other paid leave to supplement wages payable under the FFCRA.

The DOL regulations now clarify that use of other available paid sick leave to supplement wages is permissible, but not required. Section 5107 of the FFCRA makes clear that the FFCRA is not to be construed in a manner to diminish rights or benefits an employee is entitled to under any federal, state, or local law; collective bargaining agreement; or existing employer policy. Therefore, leave available to employees under federal, state, or local law, such as paid sick leave statutes adopted by many states and municipalities, or leave available under discretionary employer policies, continue in full force and effect notwithstanding the adoption of the FFCRA. Therefore, if an employee has paid time off available, such as in a discretionary employer-provided bank, the employer may not require the use of such time prior to, or in lieu of, providing the employee with the daily pay required under the EPSL provisions of the FFCRA, but may permit the employee to use such accrued time off to supplement their wages so as to be paid their regular rate of pay until leave is exhausted. It is also clear that an employer may refuse to allow an employee to do so, as, according to 29 C.F.R. § 826.22(c)(1)-(2), "[i]n no event shall an Employer be required to pay more than US$511 per day" or "US$200 per day" for applicable qualifying reasons, as set forth above. That discretion may be particularly useful if employers are facing cash flow issues in the current economic crisis.

2. Employers may, but are not required to, allow use of accrued paid time off to supplement EFMLA wages.

We know from the FFCRA that the first 10 days for which an employee takes EFMLA leave "may consist of unpaid leave," but that an employee may elect to substitute any accrued vacation leave, personal leave or medical or sick leave for unpaid leave during the 10-day period. [FFCRA § 3102(b)(1)]. We also know that an employer "shall provide paid leave for each day of [EFMLA] leave . . . that an employee takes after taking leave . . . for 10 days," up to a total of 12 weeks of leave in total, but "[i]n no event shall such paid leave exceed US$200 per day and US$10,000 in the aggregate." [FFCRA §§ 3102(b)(2)(A); 3102(b)(2)(B)(ii)]

The DOL regulations now make clear that, although "[i]n no event shall an Employer be required to pay more than US$200 per day and US$10,000 in the aggregate per Eligible Employee when an Eligible Employee takes Expanded Family and Medical Leave for up to ten weeks after the initial two-week period of unpaid Expanded Family and Medical Leave," 29 C.F.R. § 826.24(a), an eligible employee may elect to use vacation, personal leave, or other paid time off to make up the difference between (a) the lesser of (i) two-thirds the employee's regular daily pay, and (ii) US$200; and (b) the employee's regular daily wage. 29 C.F.R. § 826.24(d). Likewise, if an employer requires eligible employees to use vacation, personal leave, or other paid time off concurrently with FMLA leave, the employer may require the eligible employee to supplement their EFMLA wages with accrued time off so as to be paid "a full day's pay for that day." However, the employer may only take a maximum of US$200/day, or US$10,000 in the aggregate, in tax credits per employee for wages paid as EFMLA. *Id*.

According to an executive summary issued by the DOL with the regulations, the DOL believes this effectuates the purposes of the FFRA "by allowing employees to receive full pay during the period for which they have preexisting accrued vacation or personal leave or paid time off, and allowing employers to require employees to take such leave and minimize employee absences."

Coordination of EPSL and EFMLA for Childcare Purposes

Both the EPSL and EFMLA provisions of the FFCRA provide leave to care for a child due to a school or place of care closure or child care unavailability; up to 80 hours of EPSL are available, and up to 12 weeks of EFMLA are available, the first two weeks of which may be unpaid. The regulations clarify that EPSL and EFMLA for childcare reasons may "run concurrently." 29 C.F.R. § 826.60(a). In such case, the first two weeks of EFMLA leave (up to 80 hours) may be paid under the EPSL provisions of the FFCRA, whereas the subsequent weeks will be paid under the EFMLA provisions of the FFCRA. 29 C.F.R. § 826.60(a)(1)-(2).

However, if an employee has already used or exhausted EPSL for any other qualifying reason, that will impact the amount of EPSL that remains available to the employee. For example, if an employee first uses 60 hours of EPSL because he or she is symptomatic and awaiting a COVID-19 diagnosis, and then after being confirmed negative for the virus, wishes to take time off due to his or her child's daycare closure, the first 20 hours of childcare leave will be paid under the EPSL provisions; the balance of the first two weeks of childcare leave may be unpaid; and then the subsequent leave – up to a maximum of 10 weeks – will be paid under the EFMLA provisions of the Act. 29 C.F.R. §§ 826.60(a)(3)-(4), (b).

The regulations also clarify that, once EPSL has been exhausted, the employee may choose to substitute earned or accrued paid leave provided by the employer during the two-week unpaid portion of EFMLA leave, which substitute pay will run concurrently with the EFMLA leave. 29 C.F.R. § 826.60(b)(2). If the employee does not elect to substitute paid leave for unpaid EFMLA leave during the balance of the first two weeks of childcare leave, the eligible employee will remain entitled to any paid leave he or she has earned or accrued. 29 C.F.R. § 826.60(b)(3).

Once the employer and employee are past the two-week unpaid period and into the 10-week paid FMLA portion of childcare leave, neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where Federal or state law permits, to have accrued paid leave supplement the two-third pay so that the employee receives the full amount of their normal pay."

What about those employees who already have exhausted all annual FMLA leave, such as for birth or baby bonding or due to an unrelated serious health condition? The EFMLA enactment does not add to the 12-week FMLA limit; therefore, if an employee has already exhausted all available FMLA leave but requires time off for childcare purposes, he or she may use up to 80 hours of EPSL for childcare leave, but then has no FMLA time remaining thereafter. 29 C.F.R. §§ 826.60(a)(4), (b); § 826.70(b). In addition, even if the employer utilizes a 12-month period other than a rolling 12-month period for determining FMLA eligibility, the regulations clarify that employees may take no more than 12 weeks of EFMLA leave between April 1 and December 31, 2020. 29 C.F.R. § 826.70(e). For example, if the employer defines the FMLA eligibility year as July 1 – June 30 each year, the employee nonetheless may take no more than 12 workweeks of paid EFMLA leave between April 1 and December 31, 2020, even though the leave spans two FMLA leave 12-month periods under established employer policies. *Id.*

Intermittent Leave – A Matter of Employer Discretion

Employers already know that FMLA leave may be used intermittently, but what about EPSL and EFMLA? The regulations clarify that intermittent use is possible, but that intermittent EPSL and EFMLA leave is entirely at employer discretion.

As a general premise, the DOL supports "providing maximum flexibility to employers and employees during the public health emergency." For that reason, as explained in the DOL's executive summary, an employee's use of intermittent leave combined with EPSL or EMLA "should not be construed as undermining the employee's salary basis." [Executive Summary, p. 20.] That said, intermittent leave is not required under either EPSL or EFMLA, as, according to the executive summary, "one basic condition applies to all employees who seek to take their [EPSL] or [EMLA] intermittently – they and their employer must agree." [*Id.*, p. 43] "Absent agreement, no leave under the FFCRA may be taken intermittently." Although a written agreement is not necessary, there must be "a clear and mutual understanding between the parties that the employee may take intermittent [EPSL] or [EFMLA] or both" and as to "the increments of time in which leave may be taken." 29 C.F.R. 826.50(a).

According to the regulations, and assuming the employer and employee agree:

- If an employee is reporting to the employer's worksite, and if the employer and employee agree:
  - The employee may take EPSL and EFMLA intermittently for child-care-related reasons due to school or daycare closures, and in any increment of time agreed to by the employer and employee.
  - The employee may not take EPSL for any reason other than childcare intermittently, but instead "must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take EPSL."
- If the employee is teleworking, the employee and employer may agree to allow the employee to use EPSL or EFMLA intermittently for any reason and in any agreed increment of time, but only when the employee is unavailable to telework because of a COVID-19 related reason.

Only the amount of time actually taken may be counted toward the employee's leave entitlement, so if an employee normally works 40 hours per week but takes three hours of leave each workday for child care reasons, for a total of fifteen hours per workweek, then the employee has only used 15 hours of EPSL (out of 80), or 37.5% of the workweek if in EFMLA leave.

According to the executive summary published by the DOL, these regulations are intended to afford "teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business." Further, "as teleworking employees present no risk of spreading COVID-19 to work colleagues, intermittent leave for any qualifying reason furthers the statute's objective to contain the virus." By contrast, employees reporting to the worksite may only take leave in full-day increments when using time off for potential infection or when exposed to possibly infected individuals because of the "unacceptably high risk that the employee might spread COVID-19 to other employees when reporting to the employer's worksite."

Now that we have clarity (or close to clarity!) on when and how EPSL and EFMLA may be used, we address next in our series how to pay for such leave, which is less intuitive than it seems on the surface.

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How to Pay for FFCRA Leave

Part Four in a Five-Part Series

In the first installment of this five-part series exploring the US Department of Labor (DOL) regulations (29 CFR Part 826) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible to take, and which employers are required to provide, emergency paid sick leave or emergency paid family leave under the FFCRA. In the second installment, we reviewed the six reasons why an eligible employee may take job-protected paid sick leave or paid family leave for coronavirus disease 2019 (COVID-19)-related reasons. In the third installment, we looked at the unique rules regarding how emergency paid sick leave (EPSL) and paid public health emergency FMLA leave (EFMLA) may be used.

In this fourth installment, we consider how employers calculate the "regular rate of pay" in order to pay employees exercising EPSL and EFMLA leave rights, a concept far easier in theory than in practice.

General Principles

The FFCRA requires that full-time employees be permitted to take up to 80 hours of EPSL (part-time employees are entitled only to a prorated amount), and up to 12 weeks of EFMLA (10 of which are paid), for qualifying reasons. As we discussed in part two of this series, EPSL may be taken for one of six qualifying reasons, namely where the employee:

(1) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19

(2) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

(3) Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis

(4) Is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

(5) Is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19-related reasons; or

(6) Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

For reasons (1)-(3), the employer must pay the employee his or her regular rate of pay, up to a maximum of US$511/day, or US$5,110 in the aggregate, over the course of the EPSL leave. For reasons (4)-(6), the employer must pay the employee two-thirds his or her regular rate of pay, up to a maximum of US$200/day, or US$2,000 in the aggregate, over the course of the EPSL. These wages are subject to a dollar-for-dollar offset, up to the daily maximum caps, as a tax credit.

The FFCRA also requires that employees who request leave for reason (5) – for need to care for a child whose school or place of care has closed – be permitted to take paid FMLA leave, the first two weeks of which may be unpaid (unless running concurrently with EPSL time for the same reason) and the balance of which is paid at two-thirds the employee's regular rate of pay, up to a maximum of US$200/day, or US$10,000 in the aggregate, over the course of the FMLA leave. These wages are subject to a dollar-for-dollar tax credit, up to the daily maximum caps.

The devil is in the details, though. How does one determine who is full-time versus part-time, and what is an employee's regular rate of pay? We consider those issues here.

Full-time Versus Part-time Employment

Section 5102(b)(2) of the FFCRA states that full-time employees are entitled to up to 80 hours of EPSL, while part-time employees are entitled to "a number of hours equal to the number of hours that such employee works, on average, over a 2-week period."

Full-time Employment

- The DOL regulations, 29 C.F.R. § 826.21, clarify that full-time employees are those who are "normally scheduled to work at least 40 hours each workweek."
- In addition, full-time employees are those who do not have a normal weekly schedule, but whose "average number of hours per workweek . . . , including hours for which the Employee took leave of any type, is at least 40 hours per workweek over a period that is the lesser of (i) the six-month period ending on the date on which the Employee takes Paid Sick Leave; or (ii) the entire period of the Employee's employment."
- Therefore, for employees who work a variable schedule, the employer must look back over the six-month period preceding the start date of the EPSL leave and determine whether the employee averaged 40 hours per workweek. If so, he or she is entitled to a full 80 hours of EPSL.

- The same calculus applies for purposes of the EFMLA requirements. Full-time employees are entitled to up to 12 weeks of FMLA leave, 10 of which may be partially paid, under the EFMLA expansion to the FMLA. For full-time employees, this results in 12 40-hour workweeks of leave (10 of which are paid), or 480 total hours of EFMLA leave (400 of which are partially paid).

Part-time Employment

- Part-time employees are entitled to a prorated number of EPSL hours. If the part-time employee has a normal weekly schedule that is consistent from week to week, the employee is entitled to up to the number of hours of EPSL that he or she would be "normally scheduled to work over two workweeks." Therefore, if an employee consistently works 25 hours each workweek, she would be entitled to 50 hours of EPSL leave.
- If the employee lacks a normal weekly schedule and works variable hours, the employee is entitled to EPSL in an amount equal to "fourteen times the average number of hours that the Employee was scheduled to work each calendar day over the six-month period ending on the date on which the Employee takes Paid Sick Leave, including any hours for which the Employee took leave of any type."
- If the employee has not yet worked six months, then he or she is entitled to a number of EPSL hours "equal to fourteen times the number of hours the Employee and the Employer agreed to at the time of hiring that the Employee would work, on average, each calendar day." Or, if the employee has not worked a full six months and there was no agreement in place as to the number of hours the employee would work per day, then the employee is entitled to a number of EPSL hours "equal to fourteen times the average number of hours per calendar day that the Employee was scheduled to work over the entire period of employment, including hours for which the Employee took leave of any type." What this means in practice is that employees who work variable schedules require special attention to determine the total number of hours of leave to which they are entitled.
- Special attention also is required to the number of hours permitted under the EFMLA provisions of the FFCRA. The FFCRA and regulations clarify that an employer's total exposure is capped at US$200/day or US$10,000 in the aggregate, meaning that the employer will not be required to pay for more than 50 days, or 200 hours, of EFMLA leave. 29 C.F.R. § 826.24(a). The employer can either pay for EFMLA based on the employee's "scheduled number of hours" (meaning the number of hours the employee is normally scheduled to work on a day for which she uses EFMLA, or, if the employee works a highly variable schedule, the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date on which the employee first takes EFMLA, or the average number of hours the employee and employer agreed the employee would work each workday if the employee has been employed fewer than six months) or "in hourly increments instead of a full day." Paying in hourly increments is particularly useful if the employer and employee agree that childcare leave may be taken on an intermittent basis.

Regular Rate of Pay

Once the employer has determined how much time an employee is entitled to take off under the EPSL and EFMLA provisions of the FFCRA, it must then determine the employee's "regular rate of pay," as the employee is entitled to pay at the greater of his or her regular rate of pay or the applicable federal or state minimum wage for reasons (1)-(3) above, up to a daily cap of US$511; or the greater of two-thirds the employee's regular rate of pay or two-thirds the federal or state minimum wage for reasons (4)-(6) above, up to a daily cap of US$200.

For purposes of the EPSL provisions of the FFCRA, an employee's regular rate is computed for each workweek as "all [non-overtime] remuneration for employment" paid to the employee except for eight statutory exclusions, divided by the number of hours worked in that workweek. This means that the regular rate is usually computed by dividing the total number of hours worked into the total non-overtime compensation received by the employee. For salaried employees, this is simple: total salary divided by 40 hours. For non-exempt employees, though, particularly those who earn incentive compensation or tipped wages, this is a more difficult computation, as the employer must include commissions, piece rates, tips, shift differentials, and non-discretionary bonuses in the calculation.

Because the FFCRA does not indicate the workweek for which the calculation should be performed to determine the regular rate of pay, and using a workweek in which an employee takes leave would be unrepresentative of an employee's hours worked and, therefore, also unrepresentative of his regular rate, the DOL requires that employers use an average of the employee's regular rate over multiple workweeks, weighted by the number of hours worked each workweek.

For example, if an employee received US$400 in non-excludable compensation in one week for working 40 hours and US$200 of non-excludable compensation in the next week for working 10 hours, the regular rate in the first week would be US$10/hour (US$400 divided by 40 hours), and the regular rate for the second week would be US$20/hour (US$200 divided by 10 hours). The weighted average would then require adding up all compensation over the relevant period and dividing that sum (US$600) by all hours worked over the period (50 hours), resulting in a weighted average regular rate of US$12/hour.

In this relatively simple example, a two-week period is considered, but for purposes of the FFCRA regulations, the DOL determined that employers must look back over a six-month period ending on the date on which the employee first takes leave or, if the employee has not worked six months, consider the average regular rate over the entire term of the employee's employment. 29 C.F.R. §§ 826.22, 826.24, 826.25. To see this in practice, consider the following example:

James is a non-exempt, commissioned, inside sales employee. He earns US$7.25/hour (federal and state minimum wage) in base compensation plus commissions on completed sales. On April 6, 2020, James requests time off because he is ill with shortness of breath, dry cough, and fever and is awaiting a diagnosis from his family practitioner. James has 40 hours of accrued vacation time as of April 6. After 40 hours of waiting for his appointment and test results, he receives clearance from his physician that he is negative for COVID-19, but his six-year-old daughter's elementary school has now closed through the end of the year and there are no other adults capable of providing care for her, so he requests time off to care for her, for a total of 12 weeks of total leave.

To determine how much James must be paid for these hours of EPSL and EFMLA leave, the employer must perform a six-month lookback at his total non-overtime earnings (including commissions) before he began leave on April 6, 2020. His employer, therefore, created a chart tracking his total non-overtime compensation and total hours worked for each of 26 workweeks preceding April 6, 2020:

Workweek	Total Non-overtime Compensation (US$)	Total Hours Worked
October 7 – October 13	$450	40
October 14 – October 20	$375	45
October 21 – October 27	$499	43
October 28 – November 3	$500	44
November 4 – November 10	$525	42
November 11 – November 17	$400	37
November 18 – November 24	$375	35
November 25 – December 1	$420	34
December 2 – December 8	$515	45
December 9 – December 15	$600	46
December 16 – December 22	$350	36
December 23 – December 29	$300	40
December 30 – January 5	$560	37
January 6 – January 12	$650	42
January 13 – January 19	$525	41
January 20 – January 26	$500	38
January 27 – February 2	$375	36
February 3 – February 9	$350	40
February 10 – February 16	$450	42
February 17 – February 23	$400	43
February 24 – March 1	$430	36
March 2 – March 8	$380	30
March 9 – March 15	$395	37
March 16 – March 22	$415	32
March 23 – March 29	$525	43
March 30 – April 5	$550	44
	Total compensation for 26 weeks: $11,814	**Total hours worked over 26 weeks: 1,028 hours**

Looking back at the six months prior to the start of James' leave, he worked a total of 1,028 hours and earned US$11,814 in non-overtime compensation. His weighted average rate of pay, or regular rate of pay for purposes of EPSL and EFMLA computations, is, therefore, US$11.49/hour (US$11,814 divided by 1,028 hours). Consequently:

- The first 40 hours of leave are covered by qualifying reason #3 under the EPSL because James is experiencing symptoms consistent with COVID-19 and awaiting a medical diagnosis. Those 40 hours are paid at 100% of James' regular rate of pay or US$511/day, whichever is less. James is entitled to (40 hours x US$11.49) = US$459.60. Because the daily amount is less than the maximum daily or EPSL-aggregate caps, the regular rate of pay calculation applies.
- The first 40 hours of childcare leave are covered by qualifying reason #5 under the EPSL, but at two-thirds James' regular rate of pay or US$200/day, whichever is less. Because James' regular rate is US$11.49, these 40 hours are paid at the rate of (40 hours x US$11.49 x .67) = US$307.93. Because the amount is less than the daily, and still less than the EPSL-aggregate caps, the regular rate of pay calculation applies.
- Having exhausted his EPSL, James is now a full week into his 12 weeks of EFMLA. The first 40 hours of EFMLA ran concurrently with the last 40 hours of James' EPSL leave, meaning that the next 40 hours of EFMLA (week two) may be unpaid. If the employer has a policy of requiring employees to use paid time off concurrently with unpaid FMLA, it may require James to exhaust his 40 hours of accrued time with his first 40 hours of EFMLA leave, leaving him with a zero balance in his PTO bank.
- James has now used two out of his 12 weeks of EFMLA leave. He has 10 weeks of EFMLA remaining, paid at two-thirds James' regular rate of pay or US$200/day, whichever is less. These 10 weeks would be paid at two-thirds James' regular rate of pay (10 weeks x 40 hours x US$11.49) x .67 = US$3,079.32. Because the daily amount and aggregate EFMLA amount is still below the maximum caps, the regular rate of pay calculation applies.

Believe it or not, this is a simple equation; the computation becomes increasingly difficult the more variables are included, such as tipped wages and non-discretionary bonuses allocable over multiple pay periods. Employers are, therefore, encouraged to work with labor and employment counsel to determine employees' regular rate of pay if, like James in our example above, their wages and hours vary significantly week to week.

Having hopefully mastered who is covered by the FFCRA, what absences are covered by the Act, how much leave an employee is entitled to, how it can be used and how much employees must be paid for using leave, we come to our final segment, which is what protections employees have, and what obligations employers owe to employees, after utilizing FFCRA leave. Stay tuned.

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Job Restoration and Non-discrimination Obligations Under the FFCRA

Part Five in a Five-Part Series

In parts one through four of this five-part series exploring the US Department of Labor (DOL) regulations (29 CFR Part 826) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible for leave under the FFCRA; the reasons why an eligible employee may take job-protected emergency paid sick leave (EPSL) or paid public health emergency FMLA leave (EFMLA) for coronavirus-related reasons; the unique rules regarding how EPSL and EFMLA may be used; and how employers calculate the "regular rate of pay" in order to pay employees exercising EPSL and EFMLA leave rights.

In this final alert in the series, we discuss employees' rights regarding job restoration and protection against discrimination and retaliation for exercising FFCRA rights.

Job Restoration Under the EPSL Provisions of the FFCRA

Although the EPSL provisions of the FFCRA modify the Fair Labor Standards Act, which does not address job restoration (because it is not a leave statute, but rather one providing for payment of a minimum wage and overtime compensation), the DOL nonetheless reads into the EPSL provisions of the FFCRA an obligation to restore employees to their position at the conclusion of their EPSL leave. According to 29 C.F.R. § 826.130(a), "[o]n return from [EPSL] . . ., an Employee has a right to be restored to the same or an equivalent position[.]"

According to existing FMLA regulations incorporated by the DOL by reference, an "equivalent position" is one that is "virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites and status," and one that involves "the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). "Equivalent terms and conditions of employment" requires reinstatement to the same or geographically proximate worksite, schedule, opportunity for bonus payments, and profit-sharing and other discretionary and non-discretionary payments. 29 C.F.R. § 825.215(e). "Equivalent pay" includes any unconditional pay increases that occurred during the EFMLA leave period, such as cost-of-living increases, and restoration to a position with the same or equivalent pay premiums, such as pay differentials, bonus eligibility and equivalent benefits. 29 C.F.R. §§ 825.215(c)(1), (c)(2), (d). An employee ordinarily is entitled to such reinstatement even if he or she "has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 C.F.R. § 825.214.

However, this job restoration expectation is subject to one exception in the context of EPSL leaves. If an employer would have implemented employment actions, such as layoffs, that would have affected the employee whether or not he took EPSL leave, the employee is not guaranteed job restoration. However, to deny job restoration in such circumstances, the employer "must be able to show that an Employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 C.F.R. § 826.130(b)(1). It is, therefore, critical that employers carefully document selection criteria when terminating employees who are on, or recently have taken, EPSL leave. It is also important to document the dates when leave is taken – job restoration rights only apply to leaves taken on or after April 1 and before December 31, 2020, and do not have retroactive effect to leaves employees were permitted to take prior to the effective date.

Job Restoration Under the EFMLA Provisions of the FFCRA

The EFMLA expands on the existing Family and Medical Leave Act (FMLA) and, therefore, the general principles of job restoration in the FMLA apply equally with respect to EFMLA leave. The general rule, therefore, is that, upon return from EFMLA leave, an employee has a right to be restored to the same or equivalent position as they held prior to EFMLA leave. 29 C.F.R § 826.130(a). However, several exceptions exist:

- An employer may deny job restoration to "key employees," if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 826.130(b)(2); 29 C.F.R. § 825.217.
  - A "key employee" is a salaried-exempt, FMLA-eligible employee who is among the highest paid 10% of all the employees (both salaried and non-salaried, FMLA-eligible and FMLA-ineligible) employed by the employer within 75 miles of the employee's worksite.
  - In determining which employees are among the highest paid 10%, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses, but exclude incentives whose value is determined at some future date, such as stock options.
  - The key employee determination must be made at the time the employee gives notice of the need for leave. This notice allows the employee the opportunity to make an informed decision whether to take FMLA leave (or, in this context, EFMLA leave), aware of the risk the employee may not be restored to their prior position at the conclusion of the leave period.
- In addition, according to 29 C.F.R. § 826.130(b)(3), an employer who employs fewer than 25 eligible employees may deny job restoration to an eligible employee who has taken EFMLA if all four of the following conditions are satisfied:
  - The eligible employee took leave to care for a son or daughter whose school or place of care was closed, or whose childcare provider was unavailable for COVID-19 related reasons.

- The position held by the eligible employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by the COVID-19 public health emergency during the period of the employee's leave.
- The employer makes reasonable efforts to restore the eligible employee to a position equivalent to the position the employee held when the leave began, with equivalent employment benefits, pay and other terms and conditions of employment.
- Where reasonable efforts to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period if an equivalent position becomes available. This one-year period begins on the earlier of (i) the date the EFMLA leave ends or (ii) the date 12 weeks after the employee's leave began.

- For covered employers of all sizes, even those with more than 25 employees, an employee is not entitled to job restoration if the employer can show that an employee would not otherwise have been employed at the time reinstatement is requested, such as due to layoffs that would have included the employee irrespective of their taking EFMLA leave. 29 C.F.R. § 826.130(b)(1).
- Finally, any employee who fraudulently obtains EFMLA leave is not protected by the job restoration requirements otherwise applicable under the FMLA. 29 C.F.R. § 825.216(d).

Prohibition Against Discrimination and Retaliation; Causes of Action

The FFCRA does more than simply provide employees with paid time off from work for certain COVID-19 related issues. It also creates causes of action for employees whose rights were disregarded or against whom employers retaliate for exercising those rights.

EPSL Remedies

Section 5104 of the FFCRA provides that it "shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes [EPSL] leave …, and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to [use of EPSL] (including a proceeding that seeks enforcement of [the EPSL provisions of the FFCRA]), or has testified or is about to testify in any such proceeding." The regulations reinforce this. See 29 C.F.R. § 826.150(a). If an employer violates the EPSL provisions of the FFCRA, an aggrieved employee may recover the wages that should have been paid to them under the EPSL provisions and an equal amount as liquidated damages. If the employee brings a private civil action to recover actual and liquidated damages and prevails, they also may recover attorneys' fees and costs of litigation. See 29 C.F.R. § 826.150(b).

The DOL may also pursue relief on behalf of victims denied EPSL rights in which it seeks damages and liquidated damages and other legal or equitable relief to which the employees may be entitled, and seek civil money penalties for the violation. In addition, any employer who willfully violates the EPSL provisions of the FFCRA could be subject to criminal penalties, including a fine and, if a repeat offender, imprisonment. If the DOL concludes that an employer has unlawfully terminated the employment of an employee who pursued rights under the EPSL provisions of the FFCRA, it may seek victim-specific relief, including lost wages, liquidated damages and reinstatement.

EFMLA Remedies

Enforcement rights under the EFMLA provisions of the FFCRA differ. The prohibitions against interference with the exercise of rights, discrimination and interference with proceedings or inquiries described in the FMLA also apply in the EFMLA context. 29 C.F.R. § 826.151(a). Even though an employer who violates the non-discrimination or non-interference provisions of the FMLA is subject to oversight by the DOL, an eligible employee may only file a private action against the employer if the employer is otherwise subject to the FMLA in the absence of the EFMLA expansion. 29 C.F.R. § 826.151(b). In other words, an employee may not bring a private action against an employer under the EFMLA if the employer, although now subject to the paid leave requirements of the EFMLA, is not otherwise subject to the FMLA, meaning that to bring a private action, the employee's employer must have had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The DOL can investigate written complaints lodged with the Wage and Hour Division, including through its subpoena power, 29 C.F.R. §§ 826.151, 826.152(b), but otherwise employees of businesses with fewer than 50 employees lack the ability to file a private cause of action under the EFMLA expansion.

Although this concludes our five-part in-depth look at the DOL's FFCRA regulations, we assume that this area will continue to evolve as the pandemic continues and employers face difficult decisions regarding workforce structuring. We will continue to share guidance as the situation evolves, both through alerts and through our blog, to which we suggest employers subscribe for the most current information regarding regulatory developments: www.employmentlawworldview.com.

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