Update for Employers on Families First Coronavirus Response Act Regulations

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COVID-19 Task Force

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From April 1 until December 31, 2020, the Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees to provide eligible employees with paid sick time and expanded family and medical leave for qualifying reasons related to the COVID-19 public health emergency. On April 1, 2020, the Department of Labor (DOL) released an extensive set of regulations implementing FFCRA's leave provisions. On April 10, 2020, the DOL published a correction in the Federal Register making technical amendments to the regulations. In addition, the DOL updated and expanded the Question and Answer Guidance (Q&A) that it had previously released before the FFCRA's April 1 effective date. The revised Q&A can be found here.

The rapid rollout of a complex new set of employee leave entitlements creates challenges for small and mid-size employers who are already grappling with unprecedented circumstances brought on by the COVID-19 pandemic. While this post provides an overview of key provisions in the regulations and updated guidance, employers are advised to consult with counsel for assistance in developing their FFCRA compliance programs.

OVERVIEW OF THE FFCRA's LEAVE REQUIREMENTS

The FFCRA creates two new forms of leave for employees who cannot work due to certain COVID-19-related reasons: **emergency paid sick leave (EPSL)** and **expanded family and medical leave (EFML)**.

Emergency Paid Sick Leave

Under the FFCRA, an employee qualifies for EPSL if he/she is unable to work or telework because 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 related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Labor and Treasury.

Full-time employees may take up to 80 hours of EPSL, and part-time employees are entitled to a proportionate amount of EPSL based on the average number of hours they are scheduled to work during a 2-week period.

For reasons 1-3, employees must be paid at either their average regular rate of pay or the applicable

minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate over a 2-week period. For reasons 4-6, employees must be paid at either their average regular rate of pay or the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate over a 2-week period. Employees who cannot work or telework because of reason 5 may also be eligible for EFML, which is explained below.

Expanded Family and Medical Leave

The FFCRA temporarily amends the Family and Medical Leave Act (FMLA) to expand the qualifying reasons for leave. Under the FFCRA, an employee qualifies for EFML if he/she is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19. Eligible employees are entitled to use up to 12 total workweeks of traditional FMLA leave and EFML during an employer's existing FMLA year. The first 2 weeks of EFML are unpaid, though an employee may elect to substitute EPSL during that time. For the remaining 10 weeks of EFML, employees are paid 2/3 their average regular rate of pay, as defined by the FFCRA, up to $200 per day and $12,000 in the aggregate for **both** EPSL and EFML.

Continuation of Health Insurance Benefits

When an employee uses either form of FFCRA leave, employers must continue to provide health insurance benefits offered through group plans in accordance with the same terms and conditions that existed prior to leave. Likewise, employees are still responsible for paying their portions of the health care coverage.

HIGHLIGHTS FROM THE DOL REGULATIONS AND Q&A

The regulations, which sunset with the FFCRA entitlements on December 31, 2020, provide detailed information regarding how the seemingly straightforward FFCRA provisions apply in various real-life workplace scenarios. A few of the most notable takeaways from the DOL's regulations and revised guidance are summarized below.

COVERAGE AND ELIGIBILITY

Employer Coverage

Which private employers are covered by the FFCRA?

- All private employers with fewer than 500 employees are covered by the FFCRA, unless the small business exemption applies.

How is the number of employees calculated?

- The number of employees is calculated as of the time the employee requests leave. The number of employees includes the following members of the employer's workforce within the United States:
    - All full-time employees;
    - All part-time employees;
    - Employees on any kind of leave;
    - Day laborers supplied by a temporary placement agency;

- Temporary employees who are jointly employed with another employer as determined under the Fair Labor Standards Act (FLSA); and
- All employees of integrated employers as determined under the FMLA.

Who is not counted for purposes of determining the employer's number of employees?

- Employers need not count independent contractors, employees who have been laid off or furloughed but have not been subsequently reemployed, and employees outside of the United States.

What is the small business exemption?

- Employers who employ fewer than 50 employees may be exempt from providing both types of FFCRA leave if doing so would jeopardize the viability of the business as a going concern.

How does an employer qualify for the small business exemption?

- An authorized officer of the small business must determine:
  - The granting of such leave would result in the employer's expenses and financial obligations exceeding the available business revenue and cause the employer to cease operating at a minimal capacity;
  - The absence of the employee or employees requesting such 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;

    or

  - There are not enough other workers who are able, willing, and qualified, to perform the labor or services needed for the small business to operate at a minimal capacity.
- The DOL states that the determination of whether the small business exemption applies must be made on a case-by-case basis. Employers must document the determination and retain the documentation for 4 years.
- Employers who determine they fall within the small business exemption must still publish the required employee notice.

Employee Eligibility

What are the eligibility requirements for EPSL?

- All employees of a covered employer are eligible for EPSL, unless an exemption applies.

What are the eligibility requirements for EFML?

- Employees who are employed by a covered employer for at least 30 calendar days before the date of leave are eligible.
- An employee is considered employed for 30 calendar days under the FFCRA if:

  The employee was on the employer's payroll for the 30 calendar days immediately prior to the

- day the employee's leave would begin;

or

- The employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or reemployed on or before December 31, 2020, so long as the employee was previously on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated.

Are laid off or furloughed employees entitled to FFCRA leave?

- In order to be eligible for FFCRA leave, the employer must have work available that the employee is able to perform but for a FFCRA-qualifying reason.
- If a business closes or lays off employees after April 1, FFCRA requirements apply to the days from April 1 to the date of closure or the date employees are laid off.
- If a business is open but lays off or furloughs part of its workforce, employees who are laid off or furloughed are not entitled to leave under the FFCRA.

What do the regulations say about telework and employee eligibility?

- "Telework" means work that the employer allows an employee to perform while he/she is at home or at a location other than the employee's normal workplace.
- An employee is able to telework if his/her employer has work for the employee, the employer permits the employee to work from the employee's location, and there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing the work.
- Telework must be performed during normal hours or other times agreed to by the employer and employee.
- Telework is compensable work under applicable wage and hour laws. It is not compensated as paid leave under the FFCRA, unless the employee cannot telework due to qualifying COVID-19 reasons.
- The DOL encourages employers and employees to implement flexible telework arrangements.

What is the health care provider and emergency responder exclusion?

- Employers may exclude health care providers and emergency responders from eligibility to use EPSL or EFML. The regulations define this exclusion broadly.
- The term "health care providers" refers *to 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.
- The term "emergency responders" refers to anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel,

911 operators, child welfare workers and services 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*.

QUALIFYING REASONS FOR LEAVE

Emergency Paid Sick Leave

When is an employee subject to a federal, state, or local quarantine or isolation order and entitled to take leave?

- Employees are eligible when "but for" being subject to an order, the employee would be able to work or telework.
- Leave is ***not*** available if an employer does not have any work for the employee, even if the lack of work is the result of a shelter-in-place or stay-at-home order impacting the employer's business.
- Leave is ***not*** available if:
  - The employer has work for the employee to perform;
  - The employer allows the employee to perform that work from the location where the employee is quarantined or isolated; and
  - There are no extenuating circumstances that prevent the employee from performing that work.

What does it mean to be subject to a quarantine or isolation order?

- For purposes of EPSL, a "quarantine or isolation order" includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority that cause the employee to be unable to work even though the employer has work that the employee could perform but for the order.
- This also includes when a federal, state, or local government authority advises categories of citizens (e.g., of certain ages or with certain conditions) to stay at home, causing those employees to be unable to work even though their employers have work for them.

When is an employee in self-quarantine due to concerns related to COVID-19 entitled to leave?

- An employee is eligible when he/she is experiencing symptoms of COVID-19 ***and*** is seeking a medical diagnosis from a health care provider.
- The advice to self-quarantine must be based on the health care provider's belief that the employee has, may have, or is particularly vulnerable to COVID-19, and self-quarantining must prevent the employee from working.
- Leave is limited to the amount of time the employee is unable to work or telework because he/she is taking affirmative steps to obtain a medical diagnosis.
- If an employee has a confirmed case of COVID-19, he/she may use paid sick leave for the amount of time the employee is unable to work or telework due to serious COVID-19 symptoms.
- Leave is ***not*** available for an employee who is ill with COVID-19 symptoms and self-quarantines for 2 weeks, but does not seek a diagnosis or medical advice from a health care provider.

- Leave is ***not*** available when:
  - The employer has work for the employee to perform;
  - The employer allows the employee to perform that work from the location where the employee is quarantined or isolated; and
  - There are no extenuating circumstances that prevent the employee from performing that work.

What does it mean for the employee to be caring for an "individual" subject to federal, state or local quarantine or isolation order or directed to self-quarantine by a health care provider?

- The regulations define the term "individual" to include the employee's immediate family member, someone who regularly resides within the employee's home, or a similar person with whom the employee has a personal relationship that creates an expectation that the employee would care for that person if he/she were quarantined or self-quarantined as defined under the FFCRA.
- An employee may take paid sick leave to care for a self-quarantining individual if a health care provider has advised that individual to stay home or otherwise quarantine him/herself because he/she may have COVID-19 or is particularly vulnerable to COVID-19 and provision of care to that individual prevents the employee from working or teleworking.

When is an employee entitled to FFCRA leave to care for a son or daughter due to school closure or child care provider unavailability?

- The employee must be unable to work or telework because the employee is caring for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, for reasons related to COVID-19.
- The regulations make clear that FFCRA is available to care for a son or daughter for FFCRA-related reasons only if there is no other suitable person available to care for the child during the period of leave.
- "Child care provider" is defined broadly to include most individuals who care for a child on a regular basis. This includes individuals paid to provide child care as well as individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, or neighbors.
- "Place of care" is also defined broadly. The physical location does not have to be solely dedicated to child care. Examples include daycares, schools, before and after school programs, homes, summer camps, enrichment programs, and respite care programs.
- If the physical location where the child received instruction or care is now closed, the school or place of care is considered "closed" even if some or all of the instruction is provided online or through distance learning.
- In the updated Q&A, the DOL reiterates that more than one guardian cannot take EPSL or EFML simultaneously to care for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19-related reasons.

AMOUNT OF LEAVE

Emergency Paid Sick Leave

How much EPSL are full-time employees entitled to?

- Full-time employees are entitled to use up to 80 hours of EPSL.
- An employee is considered full-time if:
  - He/she is normally scheduled to work 80 hours over 2 workweeks, or at least 40 hours per workweek;

    or

  - The average number of hours that an employee (without a normal work schedule) is scheduled to work, including hours used by the employee for leave, is at least 40 per workweek over the lesser of either the previous 6 months or the entire period of the employee's employment.

How much EPSL are part-time employees entitled to?

- The method for determining the EPSL entitlement for part-time employees depends on whether the employee has a normal weekly work schedule and the length of time he/she has been employed by the employer.
- Part-time employees with normal weekly schedules are entitled to the number of hours that the employee is normally scheduled to work on average over a 2-week period.
- Part-time employees without normal weekly schedules and who have been employed for at least 6 months are entitled to the number of hours of EPSL that is equal to 14x the average number of hours the employee was scheduled to work each calendar day during the 6-month period ending on the date on which leave was taken, including hours for which the employee took any type of leave.
- Part-time employees without a normal weekly schedule and who have been employed for less than 6 months are entitled to the number of hours of EPSL equal to 14x the number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. If no agreement exists, then the leave entitlement is 14x the average number of hours per calendar day the employee was scheduled to work over the entire period of employment, including hours taken for any type of leave.

Expanded Family and Medical Leave

How much EFML are employees entitled to?

- The FFCRA provides for 12 workweeks of EFML due to school closures or child care unavailability for COVID-19-related reasons.
- The first 2 workweeks of this leave are unpaid.
- An eligible employee is entitled to use up to 12 total workweeks of EFML and FMLA leave, combined.
- Any EFML taken by an employee is subtracted from the employee's total available FMLA leave during a given FMLA 12-month period.
- Eligible employees who have exhausted their FMLA entitlement may still take EPSL if they are unable to work or telework due to school closures or child care unavailability.

Interaction Between the Different Types of Leave

Does EPSL run concurrently with other types of leave?

- The DOL is clear that EPSL is in addition to all other benefits under existing employer policies and that EPSL does not run concurrently with sick time or other earned time. However, the first two weeks of EFML may run concurrently with EPSL, at an employee's election, if EPSL is taken due to school closure or child care unavailability.

- Employees may use their EPSL first before using any other leave the employee is entitled to by law, agreement, or employer policy that existed before April 1, 2020. Under FFCRA, employers may not require, coerce, or unduly influence any employee to use any other type of leave first before using their EPSL.

Does EFML run concurrently with other types of leave?

- The DOL's corrections to the regulations clarify that employees may elect to use, or employers may require an eligible employee use, provided or accrued leave available to eligible employees concurrently with the EFML. If the employee elects to do so, or the employer requires the employee to use the leaves concurrently, then the employer must pay the eligible employee the full amount to which the eligible employee is entitled under the employer's preexisting paid leave policy for the period of leave taken.

- After an employee uses all or part of his/her EPSL for any reason other than caring for a child, then all or part of the employee's first ten days of EFML may be unpaid because the EPSL has been exhausted. However, the employee may choose to substitute earned or accrued leave provided by an employer that will run concurrently with the first ten days of EFML.

Intermittent Leave

Can FFCRA leave be taken intermittently?

- Yes, in certain circumstances, but only if the employer and employee agree. While the agreement need not be in writing, it is always helpful to have documentation of the parties' mutual understanding, including the increments of time in which leave may be taken.

- If an employee is teleworking, then the employer and employee can agree to allow FFCRA leave taken for any COVID-19 qualifying reason to be taken on an intermittent basis in agreed-upon increments.

- If an employee has to physically be at the workplace for work, then an employee may take FFCRA leave intermittently only if the leave is based on the employee's need to care for his/her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. Such leave can only be taken in full-day increments.

NOTICE, REQUESTS, AND DOCUMENTATION

What are the notice requirements for employers?

- All covered employers must provide a notice regarding the FFCRA rights to employees. The DOL has provided a model notice, which can be found here. An employer can satisfy this obligation by emailing or mailing a copy of the FFCRA notice directly to employees or by posting it on its internal employee website or on its external website.

What are the notice requirements for employees who need leave?

- If an employee is requesting FFCRA leave in order to care for his/her son or daughter whose school is

closed or child care provider is unavailable, then, if that leave was foreseeable, the employee must provide the employer with notice of the need for leave as soon as practicable.

- For all other FFCRA-qualifying reasons for leave, employers may not require notice to be given in advance. Notice may only be required after the first workday or portion thereof for which an employee is using EPSL or EFML. Thereafter, it is reasonable for an employer to require employees to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

What information and documentation must employees requesting leave provide?

- Employees can be required to provide employers with the following before taking FFCRA leave: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work because of a qualified reason for leave.

- Employees can also be required to provide additional information depending on the reason for leave, including the governmental authority who issued the quarantine or isolation order to which the employee or individual is subject, or the name of the healthcare provider that has advised the employee or individual to self-quarantine for COVID-19 reasons.

- Notably, employees requesting leave in order to care for their son or daughter must provide, among other information, a statement representing that there is no other suitable person available to care for the child during the requested period of leave.

Does the FFCRA alter existing FMLA employee documentation requirements?

- Employees taking leave under the FMLA for their own serious health condition related to COVID-19 or to care for an employee's qualifying family member with a serious health condition related to COVID-19 must follow the standard FMLA certification requirements.

What happens if an employee does not comply with notice and documentation requests?

- If an employee fails to provide proper notice or documentation, then an employer should give the employee notice of the failure and an opportunity to provide the required documentation before denying the request for leave.

- Employers are eligible for a refundable tax credit to cover the cost of the paid leave, employer portion of Medicare tax, and qualified health plan expenses. The regulations are clear that employers can ask employees to provide whatever documentation the Internal Revenue Service (IRS) deems necessary to support the employer's entitlement to the credit and that leave can be denied if the employee fails to provide the necessary documentation. However, the DOL regulations do not identify the specific form of documentation that will be required by the IRS. Therefore, employers are strongly urged to consult with tax professionals regarding their eligibility for the tax credit and necessary documentation.

What are the employer record-keeping requirements?

- Employers must retain all documentation and information related to an employee's need for leave under the FFCRA for 4 years, regardless of whether the leave was granted.

- An employer that denies FFCRA leave due to an exemption must document the information that supports an authorized officer's determination that the employer meets the exemption.

RATE OF PAY

How do employers determine the employee's average regular rate for FFCRA leave?

- Employers should be aware that the employee's average regular rate for purposes of the FFCRA paid leave provisions is not the employee's hourly rate at the time he/she takes leave. Rather, the "regular rate" under FLSA must be averaged over a 6-month look-back period using a formula contained in the regulations.

- In brief, calculating the employee's "average regular rate" of pay under the FFCRA leave provisions requires employers to follow a 2-step process. First, using FLSA methods, employers must calculate the regular rate of pay (including commissions, tips, and piece rates) for each full workweek in which an employee has been employed over the *lesser* of (i) the 6-month period ending on the date on which the employee takes FFCRA leave, or (ii) the entire period of employment. Second, the employer must average the weekly regular rates by weighing them against the number of hours worked for each workweek.

RETURN TO WORK

When can an employer deny job restoration at the end of FFCRA leave?

- Employees are generally entitled to be restored to the same or an equivalent position as they were prior to using FFRCA leave. However, an employee is not protected from employment actions, such as layoffs, that would have impacted the employee regardless of whether he/she took leave.

- Employers can deny job restoration to key eligible employees, as defined under the FMLA, to prevent substantial and grievous economic injury to the employer's operations.

- Employers with fewer than 25 eligible employees may also deny job restoration to an employee who took EFML if:

    - Leave was taken to care for a child whose school or place of care, or whose child-care provider is unavailable, due to COVID-19 related reasons;

    - The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in operations that affect employment and are caused by a public health emergency during the period of leave;

    - The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment;

    and

    - If the employer's efforts to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee about an available equivalent position during the 1-year period beginning on the earlier of the either the date the leave concludes or the date 12 weeks after the leave began.

PROHIBITED ACTS

Does the FFCRA contain an anti-retaliation provision?

- Employers are prohibited from discharging, disciplining, or discriminating against any employee because he/she took FFCRA leave, filed a complaint, caused any proceeding under the EPSLA to be instituted, or testified or is about to testify in any such proceeding.

FURTHER INFORMATION

As this post illustrates, the FFCRA imposes many new obligations on employers in the midst of an unprecedented pandemic. Moreover, the DOL has frequently amended its guidance and has amended the regulations at least once as of the date of this posting. Employers are encouraged to contact a member of Peabody & Arnold's Employment Law and Litigation Practice Group for updated information and an analysis of their unique workplaces as they implement the FFCRA.

