

DOL Temporary Rule on the FFCRA: Additional Changes and Clarifications

by Ryan E. Mick

On Wednesday (March 31, 2020), the United States Department of Labor (“DOL”) issued its temporary rule implementing the Families First Coronavirus Response Act (“FFCRA”), including the paid-leave benefits provided in the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) provisions of the FFCRA.

The DOL’s temporary rule contains new information and clarifications that employers should know. Below are a few of the critical changes.

General Changes and Clarifications

Practical Advice to Employers with Employees Who Are “Teleworking”

The DOL considers telework to be equivalent to work that is performed at an employer’s worksite. Non-exempt employees must always record—and be compensated for—all time actually worked, including overtime. An employer is not required to compensate employees for unreported hours worked while teleworking for COVID-19-related reasons, unless the employer knew or should have known about the telework.

To accommodate flexible schedules, the DOL is relaxing the “continuous workday” rule – the general rule that all time between the performance of the first and last principal work activities is compensable work time. Instead, an employer may agree with the employee to an alternative schedule (for example, 7:00-9:00 a.m., 12:30-3:00 p.m., and 7:00-9:00 p.m. on weekdays), but must compensate the employee for all times actually worked that day.

How to Calculate Salary or Wages for Part-Time Employees

The DOL concluded that Congress intended for the EPSLA to provide part-time employees with a number of paid sick leave hours equal to fourteen times the average number of hours that the employee worked per calendar day over the six-month period

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ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type.

For employees who have been employed less than six months, the employer should calculate his or her average hours over the entire period of employment.

Documentation in Support of Requests for leave

Documentation in support of any request for leave under the FFCRA must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

Additionally, an employee requesting paid sick leave, either for themselves or to care for another individual, must provide the name of the government entity that issued the quarantine or isolation order or the name of the health care provider who advised them to self-quarantine for COVID-19 related reasons.

An employee requesting to take paid sick leave or expanded family and medical leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

All records for requests for leave must be retained for four years, whether or not the leave was granted.

Important Clarifications to Small Business Exemption

The DOL rule clarifies an important detail for employers with fewer than 50 employees: The exemption is available only for leave due to the employee's need to care for a son or daughter whose school has closed or whose child care has closed or become unavailable. A small employer is not exempt from the other paid-leave requirements in the FFCRA.

Specifically, an employer with fewer than 50 employees is exempt from the requirement to provide paid leave under the EFMLEA, as well as the fifth permissible reason for leave under the EPSLA (§ 5102(a)(5)), when (i) such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (ii) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (iii) the small employer cannot find enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees

requesting leave provide, and the labor or services are needed for the small employer to operate at a minimal capacity.

The DOL also has provided guidance on how small businesses should claim the exemption. Although the initial language in the FFCRA suggested small businesses would need to apply for an exemption, the DOL has explained a process that is more flexible than previously understood. An employer may deny paid sick leave or EFMLEA benefits to otherwise eligible employees whose absence meets the above-described requirements. However, the employer must document the facts and circumstances that meet the criteria to justify the denial, and should retain the records for its own files (employers should not send any records to the DOL).

EPSLA

Application to “Stay at Home” and “Shelter in Place” Orders

The DOL has clarified that the phrase “quarantine or isolation order” includes “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.” *However*, the critical question is whether the employee could work or telework “but for” being required to comply with such an order. If the employer lacks work for the employee, the employer need not provide paid leave under the EPSLA.

If the employer closes temporarily or indefinitely due to a COVID-19-related downturn in business, the employees are not entitled to the paid sick leave because their inability to work is due to the closure of their place of employment, not due to the need to comply with the stay-at-home order. This analysis is correct even if the closure of the business was substantially caused by a stay-at-home order. Those employees, however, may be eligible for state unemployment benefits.

Who is an “Individual” Under the EPSLA

A commonly asked question under the EPSLA relates to the word “individual” in the caregiver portions of the paid leave criteria: The EPSLA’s use of the term “individual” is unclear. Could it be anyone? The DOL has clarified that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship, and the need to care for the employee must be genuine. More specifically, an “individual” must be an immediate family member, 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. So while it is more inclusive than the usual family member, it is not completely open-ended.

EFMLEA

Employer May Require Use of PTO Concurrently With EFMLEA paid leave

Concurrently with an employee’s use of EFMLEA leave, an employee may elect to use,

or an employer may require an employee to use, accrued leave (e.g., vacation or paid time off) that under the employer's policies would be available to the employee to care for a son or daughter. This leave would be used concurrently with the expanded family and medical leave under the EFMLEA. If the leave is used concurrently, then the employer must pay the employee the full amount to which the employee would be entitled under the preexisting paid leave policy for the period of leave taken, even if that amount exceeds the aggregate cap under the EFMLEA. The employer's eligibility for tax credits is still limited to the aggregate cap, however.

Replacement of "Ten Day" Unpaid Leave Period With "Two Week" Period

The EFMLEA sets a "ten day" period of unpaid leave before paid leave benefits apply. The DOL notes this could create issues for certain employees. For example, an employee who works three 12-hour days (36 hours per week), would have to wait longer before he or she could take paid EFMLEA benefits compared to an employee who works six 6-hour days per week (also 36 hours). The DOL addresses this by setting the initial unpaid period for EFMLEA leave at two weeks, not ten days.

Penalties

Prohibited Acts and Enforcement

An employer that fails to provide paid sick leave will be considered to have failed to pay the minimum wage. Therefore, an employer's exposure would be the minimum wage multiplied by the number of hours of paid sick leave denied, plus liquidated damages and attorneys' fees. The DOL clarified that in the case of a willful or repeated violation, employers will be subject to a civil penalty equal to the minimum wage for each hour of paid sick leave denied.

An employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year, as required by the FMLA.