

## **Department of Labor's Latest Guidance Regarding COVID-19 and the FFCRA**

The U.S. Department of Labor ("DOL") has provided guidance on employers' obligations under the Families First Coronavirus Response Act ("FFCRA") through a series of Q & A's. Comprehensive regulations are forthcoming. The following summarizes the most pertinent provisions of the interim guidance.

### **Closing of the Business or Layoffs**

Although previously implied, the DOL has definitively stated that employees who cannot work because their businesses are closed or they are furloughed are not entitled to emergency paid sick leave (EPSL) or expanded FMLA leave. This is true whether the closure or furlough occurs before or after April 1 or whether workers had requested leave prior to the closure or furlough.

- If the business is closed while employees are on EPSL or expanded FMLA, the employer must still pay for any paid sick leave or expanded leave *before* the closure or furlough, but it has no obligation to do so as of the date of the closure or furlough. Employees are still entitled to unemployment insurance benefits so long as they are not receiving paid leave.
- FFCRA does not distinguish between furloughing employees (on a temporary basis) or laying them off (on a permanent basis). The effect on the workers' right to take EPSL or expanded FLMA is the same.

### **Intermittent FMLA Leave (Teleworking v. Physical Presence)**

**Teleworking:** Employees may take expanded FMLA or EPSL intermittently while teleworking only if both the employee and the employer agree. If so, the intermittent leave can be taken in any increment. Thus, an employee could telework for an hour, take leave for two hours and then return to teleworking.

**Physical Presence:** For employees who are able to work at the employer's work site, whether leave may be taken intermittently depends on the reason for the leave and whether both the employee and employer agree. EPSL in non-telework situations must be taken in full day increments and cannot be taken intermittently if the leave is being taken because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or

- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Once paid sick leave for one or more of these qualifying reasons begins in a non-teleworking situation, employees must continue to take paid sick leave each day until they either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave.

However, if the employee and employer agree in non-telework situations, EPSL may be taken intermittently to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. Similarly, expanded FMLA can be available on an intermittent basis in such a situation with an employer's permission and when an employer agrees upon such a schedule with a worker.

### **Reduction of Scheduled Work Hours**

If the employer reduces scheduled work hours, employees may not use EPSL or expanded FMLA for the hours that they are no longer scheduled to work. This is because the employee is not prevented from working due to a COVID-19 qualifying reason even if the reduction in hours is somehow related to COVID-19.

If the employee, however, is prevented from working their full work schedule due to a COVID-19 qualifying reason they may take EPSL or expanded FMLA computed on the work schedule before it was reduced.

### **Unemployment Benefits/Health Insurance**

Employees may not collect unemployment insurance benefits for a time in which they receive EPSL or expanded FMLA. Each state, however, has established their own eligibility rules.

Employees may continue their group health coverage during expanded FMLA on the same terms as if they continued to work. If enrolled in family coverage, the employer must maintain coverage during the expanded FMLA. Employees, however, generally must continue to make any normal contributions to the cost of their health care coverage.

If an employee does not return to work at the conclusion of expanded FMLA, they should check with their employer to determine whether they are eligible to continue health insurance on the same terms. If not, they may be able to utilize COBRA.

If employees take EPSL, the employer must continue their health insurance and cannot establish a rule for eligibility or set an individual's premium or contribution rate based on whether the individual is actively at work, unless absence from work due to any health factor is treated, for purposes of plan or health insurance coverage, as being actively at work.

## **Use of Preexisting Employer Leave**

EPSL is in addition to any other leave provided under applicable law, CBA, or the employer's policies. EPSL may not count against other types of paid sick leave provided under the employer's preexisting leave policies.

Employees may not use their employer's preexisting leave entitlements and EPSL and expanded FMLA leave concurrently for the same hours, unless the employer agrees to allow the employee to supplement the amount the employee receives from paid sick leave or expanded FMLA leave, up to the employee's normal earnings, with preexisting leave.

Employers may not supplement or adjust the pay mandated under FFCRA with the employee's accrued paid leave unless the employee decides to do so.

If employers want to pay employees more than the employees are entitled to receive for EPSL or expanded FMLA they can do so, but they cannot claim a tax credit for amounts in excess of FFCRA's statutory limits.

## **FFCRA Exemptions**

Assuming an employer is a "covered employer" (less than 500 employees) under the FFCRA, all of its employees are eligible for paid sick leave and expanded FMLA except "healthcare providers" or "emergency responders."

### ***Health Care Provider***

The DOL defines "health care provider" 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."

This definition also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain 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.

### ***Emergency Responders***

The DOL defines "Emergency Responder" as an "employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of 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, 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.

## **Job Restoration Rights**

According to the DOL, employers must provide the same (or a nearly equivalent) job to an employee who returns to work following leave. Employees are not, however, protected from layoffs or business closings that would have affected the employee regardless of the leave. This means that an employer can lay employees off for legitimate business reasons, such as a reduction in business or the closure of the worksite. The employer must be able to demonstrate that it would have taken this action even if the employee had not taken leave.

## **Interplay with Other FMLA Leave**

Employees are entitled to EPSL regardless of how much leave they had previously taken under the FMLA. If, however, the employer was covered by FMLA prior to April 1, 2020, the employee's eligibility for expanded FMLA depends on how much FMLA leave they had already taken during the twelve (12) month period that the employer uses for FMLA leave. Employees may take a total of twelve (12) work weeks for FMLA or expanded FMLA during a twelve (12) month period.

If an employee had taken some, but not all, of the twelve (12) workweeks of FMLA leave during the twelve (12) month period, the employee may take the remaining portion of FMLA leave available. If they have already taken twelve (12) workweeks of FMLA leave during the twelve (12) month period, they may not take additional expanded FMLA.

The DOL also makes it clear that the time taken under the expanded FMLA does count against the employee's entitlement to twelve (12) workweeks of FMLA in a twelve (12) month period.

## **Small Business Exemption**

Importantly, the DOL has provided some instruction as to the "small business exemption," which would exclude a business with fewer than fifty (50) employees from providing EPSL due to school or place of care closures or child care provider unavailability for COVID-19 related reasons or expanded FMLA leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons. A small business with fewer than 50 employees may claim this exemption if an "authorized officer of the business" has determined that:

- 1) The provision of EPSL or expanded FMLA would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- 2) The absence of the employee or employees requesting EPSL or expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

- 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 or employees requesting EPSL or expanded FMLA, and these laborer's services are needed for the small business to operate at a minimal capacity.

## Contact Us

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