Department of Labor Issues Regulations to Help Implement the Families First Coronavirus Response Act

April 3, 2020

On April 1, 2020, the U.S. Department of Labor (DOL) issued regulations in the form of a temporary rule to clarify and implement the Families First Coronavirus Response Act (FFCRA). Our previous *Alert* summarized the initial legislation, which was passed on March 18, 2020.

The regulations will remain in effect through the FFCRA's expiration on December 31, 2020, and will assist employers in complying with the FFCRA's Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA).

> **Now that the FFCRA is officially in effect, employers should expect an influx of paid sick leave and expanded family leave requests from employees.**

As detailed below, the EPSLA requires covered employers to provide paid sick leave to full-time and part-time employees who are unable to work due to one of six qualifying reasons related to COVID-19. The EFMLEA works in conjunction with the EPSLA and expands the Family and Medical Leave Act (FMLA). Under the EFMLEA, an employee is entitled to 12 weeks of leave (two weeks unpaid and 10 weeks paid) to care for a child who is home due to school or childcare closures related to COVID-19.

The following key takeaways from the regulations are discussed in greater detail below:

- Employers with fewer than 50 employees can deny FFCRA leave if the employer determines that certain conditions are met;
- Paid sick leave under the EPSLA is not available where the employer does not have work for the employee, such as during a furlough implemented by the employer for financial reasons;
- An employer can require an employee to use leave available under a separate employer policy, such as vacation, personal leave or paid time off, concurrently with paid leave under the EFMLEA;
- Intermittent leave under the FFCRA is available only if the employee and employer agree;
- The regulations significantly expand the FFCRA's definition of health care providers who can be exempted from the law's benefits;
- Employers and employees must comply with specific notice and documentation requirements relating to FFCRA leave; and
- The FFCRA does not protect an employee from an employment action, such as a layoff, that would have affected the employee regardless of whether leave was taken.

Employer Coverage

The FFCRA applies to all employers with fewer than 500 employees at the time an employee elects to take leave. Joint or integrated employers must combine employees to determine whether they meet the 500-employee threshold under the Fair Labor Standards Act's (FLSA) joint employer test or the FMLA's integrated employer test.

Notably, employers with fewer than 50 employees may not have to provide FFCRA leave to allow an employee to care for a child at home due to a school or childcare closure (i.e. EFMLEA leave or EPSLA leave for this qualifying circumstance) if such leave would jeopardize the viability of their business. The regulations state that an employer with fewer than 50 employees may deny such leave to employees if an authorized officer of the business determines that their absence would (1) cause the employer's expenses and financial obligations to exceed

available business revenue, (2) pose a substantial risk or (3) prevent the small employer from operating at minimum capacity. If a small employer denies leave for one of the above reasons, the employer must document the facts and circumstances that justify such a denial.

Emergency Paid Sick Leave Act

Under the EPSLA, covered employers must provide paid sick leave to all employees, regardless of their duration of employment, if they are unable to work because of any one of six qualifying circumstances related to COVID-19. However, the regulations make clear that an employee *is not* eligible for paid sick leave if their employer does not have work for them to do, even if the employee meets a qualifying circumstance.

The six qualifying circumstances are:

1. **Where an employee is unable to work because he or she is subject to a federal, state or local COVID-19 quarantine or isolation order.** The regulations clarify that quarantine and 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 mobility. However, *the order* must prevent the employee from working or teleworking when the employer otherwise has work available for the employee to perform. An employee who is able to work or telework may not take paid sick leave if (a) his or her employer has work for the employee to perform, (b) the employer permits the employee to perform work from the location where the employee is being quarantined or isolated, and (c) there are no extenuating circumstances that prevent the employee from performing that work. *Significantly, paid sick leave is not available if an employer is forced to close or scale back its operations because of a quarantine or isolation order and there is no work for an employee or group of employees to do.*
2. **If an employee has been advised by a healthcare provider to self-quarantine for a reason related to COVID-19.** Under the regulations, the advice to self-quarantine must be based on the healthcare provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19, *but does not require the employee to actually be tested for COVID-19*. Again, paid sick leave is available for this reason only if self-quarantine prevents the employee from performing available work.
3. **If an employee is experiencing symptoms of COVID-19 and is taking affirmative steps to obtain a medical diagnosis.** The regulations provide that an employee who self-quarantines *without* seeking a medical diagnosis is not eligible for sick leave under this qualifying circumstance. Furthermore, leave taken for this reason must be limited to the time the employee is unable to work while taking steps to obtain a medical diagnosis. However, an employee who ultimately tests positive for COVID-19, *regardless of their symptoms*, is eligible for paid sick leave provided that a healthcare provider advises the employee to self-quarantine and self-quarantine prevents the employee from working.
4. **Where an employee is caring for an individual.** The individual receiving the care must be someone with whom they have a close personal relationship who is (a) subject to a federal, state or local quarantine or isolation order, or (b) has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. The regulations make clear that the employee must have a genuine need to care for the individual (*e.g.*, immediate family member or roommate).
5. **If the employee is unable to work in order to care for a child/children.** The inability to work must be because (a) the child's school or place of care has closed; or (b) the child care provider is unavailable, due to COVID-19 related reasons. The regulations clarify that an employee does not generally qualify for such leave if another suitable individual, such as a co-parent, co-guardian or the usual child care provider, is available to provide care for the child.
6. **If the employee is unable to work because the employee 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.** The regulations do not provide any guidance regarding this qualifying circumstance, and to date the Secretary of Health and Human Services has not specified a "substantially similar condition" that would allow an employee to take paid sick leave.

As a reminder, a qualifying full-time employee is entitled to up to 80 hours of paid sick leave, and a part-time employee is entitled to up to the number of hours that he or she works, on average, over a two-week period. The daily and aggregate caps on paid sick leave benefits vary

based on the reason for the leave.

Emergency Family and Medical Leave Expansion Act

The regulations state that the expanded family leave authorized by the EFMLEA, which is available to employees employed by the employer for at least 30 calendar days, is the same as the fifth qualifying circumstance under the EPSLA discussed above. The regulations clarify that, under both the EPSLA and EFMLEA, leave is available to care for children under 18 years of age *as well as* children age 18 or older who are incapable of self-care because of a mental or physical disability.

If an employee has already taken FMLA leave during the preceding 12-month period, the maximum 12 weeks of EFMLEA leave is reduced by any amount of FMLA leave already taken. However, the regulations clarify that the employee is still eligible for the full two weeks of paid sick leave under the EPSLA to care for a child, regardless of FMLA leave taken in the preceding 12-month period.

An employer may not deny an employee leave under the FFCRA on the grounds that the employee already has taken paid leave for a qualifying reason from another source, such as the employer's vacation policy. However, an eligible employee may elect to use, *or an employer may require that an employee use*, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off, concurrently with paid leave under the EFMLEA. If used concurrently, the employer must pay the employee the full amount to which the employee is entitled under a preexisting leave or paid time off policy, even if the amount is greater than paid leave under the EFMLEA. However, the employer's eligibility for the tax credit available for leave provided under the law is still limited to a cap of $200 per day or $10,000 in the aggregate.

The regulations make clear that the EPSLA and EFMLEA are intended to work together to permit an employee to have a continuous stream of income while taking paid leave to care for a child. Thus, an employee may qualify for both sick leave under the EPSLA and family leave under the EFMLEA. A qualifying employee may first use paid leave provided by the EPSLA, which runs concurrently with the first two weeks of unpaid leave under the EFMLEA. The employee may then use the remaining 10 weeks of paid leave provided by the EFMLEA.

Intermittent Leave May Be Taken Only by Agreement

The regulations state that an employee may take intermittent paid sick leave or family leave *only* if his or her employer agrees (similar to intermittent child-rearing leave under the FMLA). A written agreement is not required, but there must be a clear and mutual understanding between the parties.

Exemption of Healthcare Providers from the FFCRA's Leave Benefits

The FFCRA provides that employers may exclude "health care providers" from the law's coverage. The text of the law expressly references the FMLA's definition of healthcare provider, which includes only licensed doctors of medicine or osteopathy and "any other person determined by the Secretary to be capable of providing health care services," such as nurse practitioners, nurse-midwives, clinical social workers and physician assistants authorized to practice under state law.

The regulations significantly expand the scope of "health care providers" beyond the FMLA's definition to include anyone employed at a doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy or any other similar institution. Healthcare providers also include any individual employed by an entity that contracts with one of the above institutions to provide services or maintain the operation of the facility where the individual's services support the operation of the facility. Also exempted are workers who are involved in the research, development and production of equipment, drugs, vaccines and other items needed to combat the COVID-19 public health emergency.

Employer Notice to Employees and Documentation Requirements

The FFCRA requires that employers provide notice to employees of the FFCRA's requirements. The DOL has published a model notice, which in addition to posting at a worksite, an employer can distribute to employees by email, post on an employee information website or directly mail

to employees to satisfy the notice requirement. Under the FMLA, the regulations *do not require* that employers provide employees with notices of eligibility, rights and responsibilities, or written designations indicating that the leave use counts against employees' FMLA allowances.

Employers must retain all documentation related to leave under the FFCRA for four years, regardless of whether leave was granted or denied. Similarly, employers who claim an exemption from the FFCRA must document and retain any information related to the exemption for four years.

Employee Notice of Need for Leave

The regulations provide detailed documentation requirements for employees who request FFCRA leave. An employer may require employees to follow reasonable notice procedures *as soon as practicable* after the first workday, or portion of a workday, for which an employee receives paid sick leave in order to continue to receive such leave. An employer *may not* require advance notice.

An employee seeking FFCRA leave is required to provide supporting documentation that includes: (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.

Additional documentation may be required depending on the qualifying reason for leave. For example:

- An employee requesting paid sick leave pursuant to a government quarantine or stay at home order must provide the name of the government entity that issued the order.
- An employee requesting paid sick leave pursuant to a healthcare provider's advice to self-quarantine must provide the name of the healthcare provider. Notably, additional medical documentation *is not* required.
- Depending on the reason for the requested leave, an employee requesting leave to care for another individual must provide either (1) the name of 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.
- An employee requesting leave to care for a child must provide: (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.

Telework

The regulations clarify what constitutes compensable telework time. An employer must compensate a teleworking employee for all hours actually worked, including overtime, in accordance with the requirements of the FLSA. However, an employer is not required to compensate an employee for unreported hours worked, unless the employer knew or should have known about such telework. The regulations also clarify the "continuing workday" in the context of teleworking during the COVID-19 crisis. Due to the need for flexible teleworking arrangements for COVID-19 related reasons, employers do not need to count all of the time between the first and last principal activity performed as hours worked under the FLSA. However, employers should consider whether state wage-and-hour laws would require such time to be counted as hours worked.

Return to Work

In most instances, an employee who takes paid leave under the FFCRA must be restored to the same or equivalent position upon return to work. However, the regulations clearly state that the FFCRA *does not* protect an employee from an employment action, such as layoffs, that would have affected the employee regardless of whether leave was taken.

Job restoration is not required for employers with fewer than 25 employees if the following conditions are met:

a. The employee took leave to care for his or her child whose school or place of care was closed or whose child care provider was unavailable;
b. The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.*, due to COVID-19

related reasons) during the period of the employee's leave;

c. The employer made reasonable efforts to restore the employee to the same or an equivalent position; *and*

d. If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the employee's leave began, whichever is earlier.

No Compensation Required for Unused FFCRA Leave

The regulations state that an employer is under no obligation to provide financial compensation or other reimbursement for unused leave under the FFCRA either upon expiration of the FFCRA on December 31, 2020, or in the event that the employee's employment ends after April 1, 2020, but before the FFCRA expires.

What This Means for Employers

Now that the FFCRA is officially in effect, employers (both those who are covered by the law and those who are not) should expect an influx of paid sick leave and expanded family leave requests from employees. Employers should carefully review the FFCRA and the DOL's newly issued regulations and ensure that policies are in place to comply, and that management and human resources workers have been trained on the new leave requirements. Employers are encouraged to review the requirements with an employment attorney.

About Duane Morris

Duane Morris has created a COVID-19 Strategy Team to help employers plan, respond to and address this fast-moving situation. Contact your Duane Morris attorney for more information. Prior *Alerts* on the topic are available on the team's webpage.

For Further Information

If you have any questions about this *Alert*, please contact Eve I. Klein, Jonathan A. Segal, Linda B. Hollinshead, Christopher D. Durham, Kevin E. Vance, Elisabeth Bassani, any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group, any member of the COVID-19 Strategy Team or the attorney in the firm with whom you are regularly in contact.