

CLIENT ALERT: U.S. Department of Labor Issues Regulations on the Families First Coronavirus Response Act

Over the past few weeks, MBJ has published several client alerts relative to COVID-19 and the Families First Coronavirus Response Act (“FFCRA”) which may be found [here](#). On April 1, 2020, the United States Department of Labor’s (“DOL”) Secretary of Labor promulgated highly anticipated temporary regulations to implement the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) within the FFCRA. Consistent with the FFCRA, the temporary regulations are effective from April 1, 2020 through December 31, 2020. While some of the regulations clarify various provisions of the FFCRA, **some contradict prior information released by the DOL in its previously published Questions and Answers (which have since been amended)**. The following is an overview of the salient provisions which have not previously been covered by our client alerts, or which have been changed. Accordingly, employers should review the following overview carefully, with an understanding that some of the prior guidance related to the interpretation and implementation of the law has changed.

THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Related Regulations

Use of Accrued, Paid Leave Concurrently EFMLEA. Previously, the DOL’s guidance explained that the use of any existing paid vacation, personal, medical, or sick leave during Emergency Paid Sick Leave or Emergency Family and Medical Leave was solely at the employee’s election. This guidance has now been changed.

The regulations clarify that *after the first two weeks of EFMLEA* (during which the employee will typically be using Emergency Paid Sick Leave or accrued paid time off, at their election), an employer *may require* that an employee use certain accrued paid leave concurrently with EFMLEA. Specifically, employees may elect, or an employer may require, that an employee use accrued vacation, personal leave, paid time off, or other accrued paid leave that would be available to care for a child due to a school closure under an employer’s policy (but not sick leave), after the first two weeks of EFMLEA. However, the DOL explains that if EFMLEA is used concurrently with employer-provided paid leave, the employer must “pay the employee the full amount to which the employee is entitled under the employer’s...paid leave policy for the period of the leave...but the employer’s eligibility for tax credits is still limited to the cap of \$200 per day or \$10,000 in the aggregate.”

If the employee’s accrued paid leave is exhausted prior to the expiration of their EFMLEA, the employee would be entitled to paid leave at 2/3 of their regular rate of pay (or 2/3 of the applicable minimum wage, whichever is higher), up to \$200 per day, for the remainder of the leave period.

It is important to remember that employers *may not*, however, require employees to use existing paid

vacation, personal, medical, or sick leave, or other accrued paid leave concurrently with Emergency Paid Sick Leave.

Employees are Eligible for a Total of 12 Weeks of FMLA and/or EFMLEA. As stated previously, employees eligible for both conventional FMLA and EFMLEA are entitled to only a total of twelve weeks of leave per 12-month period. However, if the 12-month “benefit period” expires during EFMLEA’s effective dates (4/1-12/31/20), employees are not entitled to another 12-weeks of EFMLEA. For example, if the 12-month benefit period expired on July 1, 2020, it would not restart an employee’s EFMLEA benefit eligibility. If an employee had already utilized 12 weeks of EFMLEA prior to July 1, they would not be eligible to take more EFMLEA despite the new “benefit period”.

Employee Notice. For EFMLEA, employees should provide notice of the need for leave as soon as practicable. Thereafter, employees can be required to follow reasonable notice procedures (typically usual and customary reporting requirements). If an employee fails to follow the proper notice requirements, the employer must give the employee notice of the failure and an opportunity to provide the required notice prior to denying the request.

Notice Requirements. Unlike traditional FMLA, employers are not required to respond to employees who request EFMLEA with Notices of Eligibility, Rights and Responsibilities, or Designation, but employers with such established practices may continue to use such notices.

Required Documentation. Employees requesting leave under the EFMLEA must provide a statement with the employee’s name, dates of leave requested, COVID-19 qualifying reason (i.e. that the employee is needed to care for the employee’s child whose school or place of care is closed, or childcare provider is unavailable, for COVID-19 reasons), a statement that employee is unable to work, including telework, because of the school/place of care/provider unavailability, the name(s) of the child(ren), the age(s) of the child(ren), the name(s) of the relevant school(s), place(s) of care, or child care provider(s), a representation that no other person will be providing care for the child during the period the employee is receiving the leave. With respect to a request for leave to care for a child during daylight hours who is older than 14, a statement that special circumstances exist requiring the employee to provide the care. Employers should retain such documentation for four years, regardless of whether the leave is granted or denied.

30-Day Eligibility Period. Employees are eligible for EFMLEA if, at the time their requested leave is to commence, a) they have been on the employer’s payroll for at least the 30 calendar days prior to the leave commencement, or b) they were laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer’s payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated.

THE EMERGENCY PAID SICK LEAVE ACT

Related Regulations

“Subject to a Federal, State, or local quarantine or isolation order related to COVID-19”.

For purposes of the EPSLA, the phrase “subject to 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 causes 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 has advised categories of citizens (e.g., of certain age ranges or medical conditions), to shelter in place, stay at home, isolate, or quarantine, causing those employees to be unable to work even if their employers have work for them.

Where many State and local governments have issued such orders, it would seem that the vast majority of employees would be eligible for Emergency Paid Sick Leave, but they are only eligible if, *but for being subject to the order*, the employee would have been able to perform work that is otherwise allowed or permitted by their Employer. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business, a cashier previously employed there who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home, so he is not eligible for Emergency Paid Sick Leave. This is true even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay home due to such an order, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.

“Experiencing Symptoms of COVID-19 and Seeking Medical Diagnosis”. The regulations make clear that employees experiencing COVID-19 symptoms, alone (e.g., an employee with a cough), will be ineligible for Emergency Paid Sick Leave. To be eligible for Emergency Paid Sick Leave for this purpose, the employee must also be *taking affirmative steps to obtain a medical diagnosis for COVID-19*, such as making, waiting for, or attending an appointment for a test for COVID-19.

“Caring for an individual who is subject to a quarantine or isolation order or health care provider advisory”. Under the regulations, an “individual” is defined as an employee’s immediate family member, a person who regularly resides in the employee’s home, 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 were quarantined or self-quarantined. For this purpose, “individual” does not include persons with whom the Employee has no personal relationship. Employees may not take Emergency Paid Sick leave for this purpose unless, *but for the need to care for an individual*, the employee would be able to perform work (including telework) for their employer.

Emergency Paid Sick Leave Calculation - Two Workweeks. The regulations offer an update on the calculation of Emergency Paid Sick Leave entitlement for part-time employees (those who work fewer than 40 hours per week):

If the part-time employee lacks a normal weekly schedule, there are two methods upon which to calculate their emergency sick leave entitlement – one method for employees employed for more than six months and another for those employed less than six months. For an employee has been

employed for at least six months, the employee is entitled to up to the number of hours of Emergency Paid Sick Leave 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 Emergency Paid Sick Leave, including any hours for which the employee took leave of any type.

For the employee who has been employed for less than 6 months, the employee is entitled to up to the number of hours of Emergency Paid Sick Leave 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. If there is no such agreement, the employee is entitled to up to the number of hours of Emergency Paid Sick Leave 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.

Employee Notice. For Emergency Paid Sick Leave, employees can be required to follow reasonable notice procedures (typically usual and customary reporting requirements) after the first workday, or portion of the workday, on which they took leave. Employers cannot require that employees give notice in advance. If an employee fails to follow the proper notice requirements, the employer must give the employee notice of the failure and an opportunity to provide the required notice prior to denying the request.

Required Documentation. Employees requesting leave under the EPSLA must provide a statement with the employee's name, dates of leave requested, COVID-19 qualifying reason, a statement that employee is unable to work, including telework, because of the COVID-19 qualifying reason, name of the government entity that issued the quarantine or isolation order (if applicable), or name of the health care provider who advised the employee to self-quarantine (if applicable). For leave due to school/daycare closure/childcare provider unavailability, the employee must provide: the name(s) of the child(ren), the age(s) of the child(ren), the name(s) of the relevant school(s), place(s) of care, or child care provider(s), a representation that no other person will be providing care for the child during the period the employee is receiving the leave, and, with respect to a request for leave to care for a child during daylight hours who is older than 14, a statement that special circumstances exist requiring the employee to provide the care. Employers should retain such documentation for four years, regardless of whether the leave is granted or denied.

Emergency COVID-19 Programs. In anticipation of the COVID-19 pandemic, many employers proactively put in place emergency leave and other benefit programs to protect their employees. In light of the FFCRA's enactment and the benefits provided thereunder, employers may, without violating the FFCRA, terminate such emergency leave and/or benefit programs prospectively, but may not reverse pay/benefits already provided under these policies.

Regulations Applicable to both the EFMLEA and the EPSLA

Consistency of Terms - EPSLA and EFMLEA. To ensure consistency between the EPSLA and EFMLEA, the regulations treat similar terms to mean the same thing for purposes of both Acts. For example, the first "10 days" of EFMLEA is treated the same as "two weeks" under the EPSLA.

Likewise, the childcare-related qualified reason for leave under the EPSLA will be treated the same as the qualifying reason under the EFMLEA.

Calculation of 500 or Fewer Employees. The regulations clarify that for the purposes of determining whether an employer employs “fewer than 500 employees,” employees who are on leave are to be counted, but employees who have been laid off or furloughed are not. Therefore, if an employer has 600 employees, but 200 are currently furloughed, it has “fewer than 500 employees” and today is a covered employer under the FFCRA. If the employer recalls all 200 workers next week, it will no longer be a covered employer so long as it retains 500 workers or more.

Telework. This term means work the employer permits or allows an employee to perform while the employee is at home or at a location other than the normal worksite. An employee is able to telework if: (a) his or her Employer has work for the Employee; (b) the Employer permits the Employee to work from the Employee’s location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms or qualified childcare responsibilities) that prevent the Employee from performing that work. Telework may be performed during normal hours or at other times agreed by the Employer and Employee.

The Fair Labor Standards Act Rules. The FFCRA regulations and accompanying Executive Summary explain that some of the usual Fair Labor Standards Act (“FLSA”) rules for calculating hours worked will be relaxed under the FFCRA. For example, the FLSA ordinarily requires employers to count as “hours worked” all time between the employee’s first and last activity of the workday. This is not the case under the FFCRA; but employers must compensate employees for time actually worked. The regulations also state that the taking of Paid Sick Leave or Expanded Family and Medical Leave *shall not impact* an employee’s exempt status under the FLSA.

Caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19. Employees may only take Emergency Paid Sick Leave or Emergency Family and Medical Leave for this purpose *if no suitable person is available to care for their son or daughter during the period of such leave.*

Small Business Exemption. With respect to the exemption for businesses with fewer than 50 employees discussed in Q&A 26 [here](#), the regulations offer the additional guidance that if any of reasons a), b), or c) apply, 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, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively. If a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child’s school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth to justify such denial. The employer should not send such material or documentation to the Department of Labor, but rather should retain such records for its own files.

Please note that the above guidance is based on information available as of the date of this publication. The DOL may continue to alter or modify its position on some of these topics; please be



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mindful that the information in this alert may not be current, depending on when you view it. As always, employers with questions about FFCRA, the regulations, sample leave request forms, FMLA, other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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