EMPLOYMENT LAW UPDATE

The Families First Coronavirus Response Act: A User's Guide

On March 18, 2020, the President signed the Families First Coronavirus Response Act ("FFCRA"). The FFCRA contains two important developments affecting employers with fewer than 500 employees. First, the FFCRA mandates 80 hours of paid sick time for employees in several circumstances related to the coronavirus (COVID-19). Second, the FFCRA expands the Family and Medical Leave Act ("FMLA") to provide paid leave for employees required to miss work to care for a child whose school or daycare center has been closed as a result of COVID-19. Employers will be reimbursed for these payments through offsets of payroll taxes. Each of these is explained below, followed by a series of commonly asked questions.

The Effective Date

As of the date of this Alert (March 24, 2020), the Effective Date of the FFCRA remains an open question. The Act itself states that it will go into effect "*no later than*" 15 days after it is enacted, which would be April 2, 2020. On March 20, 2020, the IRS/Department of Treasury and the Department of Labor ("DOL") jointly issued a release (IR-2020-57), which stated:

> WASHINGTON- **Today** the U.S. Treasury Department, Internal Revenue Service (IRS), and the U.S. Department of Labor (Labor) announced that small and midsize employers **can begin** taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees. This relief to employees and small and midsize businesses is provided under the Families First Coronavirus Response Act (Act), signed by President Trump on March 18, 2020. (Emphasis added).

This would seem to suggest that FFCRA is now in effect, but some observers have suggested that it will not become effective until the DOL issues a more formal notice and/or regulations. A Model Notice is expected from the DOL on Wednesday, March 25, 2020.

In any event, the FFCRA is set to expire on December 31, 2020.

The Basics

Paid Sick Time. Encompassed within the FFCRA is the Emergency Paid Sick Leave Act ("EPSLA"). EPSLA provides that a full-time employee of an employer with fewer than 500 employees is entitled to up to 80 hours of paid sick time ("PST") (pro-rated for part-time employees) because the employee is unable to work (including telework) as a result of any of the following conditions:

(1) The employee is subject to quarantine or isolation under a local, state, or federal COVID-19 order;

(2) The employee has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns;

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(4) The employee is caring for an individual who (a) is subject to a quarantine/isolation order or (b) has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns;

(5) The employee is caring for a minor child whose school or childcare has been closed due to COVID-19, or whose childcare provider has become unavailable due to COVID-19; or

(6) The employee is experiencing a substantially similar condition specified by HHS.

An employee who is taking PST for conditions (1), (2), or (3) must be paid the employee's regular rate of pay, up to $511/day for 10 days (a total of $5,110). An employee who is taking PST for conditions (4), (5), or (6) must be paid 2/3 of the employee's regular rate of pay, up to $200/day for 10 days (a total of $2,000).

An employer may not require an employee to utilize or exhaust other paid leave prior to using their PST. Also, there is no minimum time period for which the employee must be employed prior to taking PST.

The employer, after making the payments, will then take a credit against the employer's payroll taxes owed for that calendar quarter. Excess amounts will be treated as an overpayment by the employer and refunded to the employer by the IRS.

An employer with fewer than 50 employees *may* be exempt from the PST requirement for condition (5) if it can establish that compliance with the EPSLA would jeopardize the viability of the business as a going concern under guidelines to be issued by the Department of Labor ("DOL"). Unfortunately, the precise nature of those guidelines will not be known until the DOL issues regulations, which the DOL has announced it plans to do in early April 2020.

FMLA Expansion for Childcare. Also included within the FFCRA is the Emergency Family and Medical Leave Expansion Act ("EFMLA"). The EFMLA provides that an eligible employee may take up to 12 weeks of leave because the employee is unable to work (or telework) in order to care for a minor child whose school or daycare has closed or whose childcare provider has become unavailable due to COVID-19.

Employers should note that unlike the regular FMLA, which requires 12 months of employment prior to eligibility, an employee with 30 days or more of employment is eligible for EFMLA.

In addition, unlike the regular FMLA, which only applies to employers with 50 or more employees, the EFMLA applies to *all* employers with fewer than 500 employees. However, as with EPSLA, the Secretary of Labor can exempt small businesses with fewer than 50 employees when the imposition of the new law would "jeopardize the viability of the business as a going concern." Again, the conditions to qualify for this exemption will not be known until regulations are issued by the DOL, currently planned for early April 2020.

The first 10 days of this EFMLA leave is unpaid; however, an employee can utilize the new PST or can elect to use accrued PTO during this 10-day period if the employee chooses. After the 10-day period, the employee must be paid 2/3 of the employee's regular rate of pay, capped at $200/day or $10,000 in total.

As with the regular FMLA, at the end of the EFMLA period the employee is entitled to be reinstated to his or her prior position. There is a limited exception to this reinstatement requirement for small employers who employ fewer than 25 employees where:

- The employee's position does not exist due to "economic conditions or other operating conditions" as a result of the coronavirus;
- The employer has made a reasonable effort to restore the employee to an equivalent position (pay, benefits, and other terms/conditions); and
- If the employer's reasonable effort fails, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one year period beginning on the earlier of: (i) the date on which the qualifying need related to a public health emergency concludes; or (ii) the date that is 12 weeks after the date on which the employee's leave commenced.

Employers should remember, however, that under the FMLA regulations, an "employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."

Employer Tax Credit for PST and EFMLA Leave. Due to the significant financial obligations that the FFCRA places on small and medium-sized businesses, it is crucial for employers to understand how they can recoup the costs of providing employees with paid leave under either the EPSLA or the EFMLA.

Employers, after making the payments of PST and/or EFMLA to qualifying employees in a particular calendar quarter, will then obtain reimbursement by taking a credit against other payroll taxes due to the IRS in that calendar quarter. The amount of the credit is equal to:

(i) The amounts the employer pays to employees as PST (capped at the maximum amount that employees can receive, as described above – i.e., $511/day and $5,110 per employee or $200/day and $2,000 total per employee, depending on the condition supporting the PST);

(ii) The amounts the employer pays to employees as EFMLA (capped at the maximum of $200/day and $2,000 total per employee); and

(iii) The employer's share of health insurance premiums paid on behalf of employees receiving PST and/or EFMLA during their period of EPSLA or EFMLA leave.

The FFCRA, by its express terms, appears to limit the credit to the employer portion (but not the employee portion) of the Social Security tax (*i.e.*, the 6.2% employer portion). However, unexpectedly, the IRS/Department of Treasury and the DOL jointly issued a release on Friday, March 20, 2020 (IR-2020-57), which states:

> The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

Thus, notwithstanding the seemingly more limited statutory language, according to this Release, the payroll taxes that can be retained and used to fund these payments include: (i) federal

income taxes that have been withheld on all wages paid during the quarter; (ii) the share of Medicare and Social Security taxes withheld from all employees' wages during the quarter; and (iii) the share of Medicare and Social Security taxes otherwise due by the employer on all wages paid for the quarter.

If the amount for which the employer is claiming a tax credit in any given calendar quarter does not exceed the payroll taxes owed by the employer for that quarter, the employer only needs to pay the balance of the payroll taxes that are owed when it transmits its quarterly Form 941. On the other hand, if the amount for which the employer is claiming a tax credit in any given calendar quarter exceeds the payroll taxes owed by the employer for that quarter, the employer is eligible for reimbursement of the excess amounts paid in the form of a refund from the IRS. The exact timeline and method of issuing refund checks is not addressed in the Act, but the government has announced that employers will be able to ask for accelerated payments of these refunds, which are anticipated to be processed within 2 weeks or less.

Some Common Questions About the New Laws

Both Acts

Q1. When will further guidance be available from the DOL?

The DOL has announced that it intends to issue regulations in April 2020, but no more specific information has been made available at this time.

Q2. How is an employer supposed to inform its employees of their rights under EPSLA and EFMLA?

Employers must post a notice to employees informing them of their rights under the FFCRA that the DOL will develop and make available to employers. The DOL has announced that such a notice will be available no later than March 25, 2020.

Q3. In determining whether an employer meets the 500 employee threshold, can the employer combine all of its subsidiaries and affiliates if it operates through a variety of LLCs and subsidiary corporations?

It depends. The relevant test comes from the FMLA regulations (29 CFR § 825.104) which states that "[s]eparate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test." . . . Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;
(ii) Interrelation between operations;
(iii) Centralized control of labor relations [HR]; and
(iv) Degree of common ownership/financial control.

Employers with multiple LLCs and subsidiaries should apply this test to determine if they meet the 500 employee threshold.

Emergency Paid Sick Time (PST) under EPSLA

Q4. With regard to condition no. 2 (employee has been advised to self-quarantine), is the employee entitled to take PST if the employee is able to telework?

No, PST is available only "to the extent" that the employee is *unable to work or telework* as a result of his/her condition. Of course, if the employee contends that he/she is experiencing symptoms commonly associated with COVID-19 (a dry cough, for example), it will be difficult for the employer to challenge that contention.

Likewise, while it is understandable that an employee with a 7-year-old child who is home as a result of the school system having closed might find it difficult to telework, it would seem unlikely that an employee with a 15-year-old child could contend that he/she is unable to telework simply because the employee's 15-year-old is not in school (unless some special circumstances are present, such as the 15-year-old being disabled).

Q5. With regard to condition no. 2, can an employee be required to provide documentation from a medical professional that he/she has been "advised by a healthcare provider to self-quarantine"?

Probably not, although the law does not speak to this question, and this will likely be fleshed out in the DOL regulations that will be issued. Given the current public health situation, and the concomitant stress on the medical profession, it is unlikely that the DOL will allow employers to require that the employee obtain a doctor's note, and thus employers will simply need to take the employee's word that he/she has been advised to self-quarantine by a healthcare provider. Employers may ask if the employee has an email or other message (e.g., through an online portal) from the healthcare provider advising the employee to self-quarantine, but employers should be careful about denying an employee the law's benefits if the employee cannot produce such documentation.

Q6. With regard to condition no. 3 (the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis), can an employee be required to describe the symptoms and explain the process by which the employee is seeking a diagnosis?

Again, the law is not clear, but the answer is probably not. The employer can ask the employee these questions, but if the employee declines to respond, it would be unwise for the employer to deny the employee the PST on those grounds.

Regrettably, because the intent of the law is well-meaning, this particular condition will allow almost any employee to avail themselves of the PST. For example, if an employee says that he/she has a dry cough and a mild headache, and is hoping to get tested, that will be enough for the employee to invoke the right to the PST.

Q7. With regard to condition no. 4 (caring for another person who is subject to a quarantine or isolation order or has been advised to self-quarantine), must the other person be a related family member?

No. The law very specifically uses the phrase "an individual." This means that if the employee contends that he/she is taking time to care for a friend, neighbor, or colleague who has been advised to self-quarantine, the employee would qualify for the PST.

Q8. What does it mean to be "caring for" another person?

Again, the law provides no guidance at this point. For example, if an employee is running errands for a housebound neighbor, such as picking up groceries and prescriptions and dropping them at the front door, would this qualify as "caring for" another person? The answer most likely is yes, and therefore the employee could utilize PST to cover these activities.

Q9. Can an employee be required to exhaust the employee's previously accrued paid sick leave or PTO before being allowed to access the PST?

No, the law specifically prohibits such a practice. However, the employee can elect to do so if the employee so chooses.

Q10. Can an employee be required to provide notice that he/she is taking PST?

Yes, after the first workday (or portion thereof) an employee receives PST, an employer may require the employee to follow "reasonable notice procedures" (not defined in the law) in order to continue receiving such paid sick time.

Presumably this means that the employer can require the employee to call-in each morning that the employee is planning to use PST; however, it is likely that if the employee informs the employer that the employee has been directed to self-quarantine for 14 days, the employee needs to give no further notice.

On the other hand, if the employee is using the PST on a sporadic basis, for example, if the employee and her husband are taking turns staying home with the kids, the employer has the right to require the employee to provide notification reasonably in advance that the employee will not be working that day, and will instead be taking PST.

Q11. Can the PST be taken in less than full day increments?

Yes. The law does not specify but provides the employee with 80 hours of PST, which presumably means that the employee can use it on an hourly basis. For example, assume the employee's parents are able to watch the children for six hours a day while the employee teleworks, after which the employee must take leave to be on childcare duty (since the school system is closed). The employee could take two hours of PST to cover that time.

Q12. Are part-time employees covered by the EPSLA, and, if so, how much PST do they receive under the law?

Yes, part-time employees are covered. They are entitled to a number of hours equal to the number of hours that the employee works, on average, over a two-week period.

Q13. Can the employer require the employee to find someone to cover the employee's shift?

No, the law specifically prohibits requiring the employee to find a coworker to cover the employee's hours.

Q14. Are employers who serve as healthcare providers or emergency responders subject to the law?

Employers who are health care providers or emergency responders may exclude employees from the emergency paid sick leave provisions. The Secretary of Labor also has authority to issue regulations excluding certain health care providers and emergency responders from coverage, including by allowing the employer of such health care providers and emergency responders to opt out of the law.

Q15. When does an employee's entitlement to PST end?

An employer may terminate an employee's PST beginning on the employee's next scheduled work day after the need for the leave has terminated (*i.e.*, the order to self-quarantine has expired or their child's school has reopened). For example, with respect to an employee at home caring for a minor child, if a county announces that schools will re-open on Tuesday, the employee is expected return to work on Wednesday.

The entire EPSLA sunsets on December 31, 2020.

Q16. What are the consequences if an employer refuses or fails to pay the PST?

The employer is considered to have failed to have paid the employee minimum wages and may be subject to liquidated damages for such failure.

Q17. What are the consequences if an employer terminates or disciplines an employee who has taken PST?

The employer can be liable under the anti-retaliation provisions of the Fair Labor Standards Act. The text of the EPSLA is particularly disturbing in this regard because it does *not* require a showing of any intent or causation (*i.e.*, that the employer disciplined or discharged the employee *because* the employee took PST). Rather, it simply states that it "shall be unlawful" for the employer to discharge an employee who "takes leave in accordance with the Act."

The consequences of this poor drafting are significant, because on the face of the statute, once an employee has taken PST, they cannot be discharged. Surely, this was not intended by Congress, especially at a time when so many employers are having to terminate employees due to economic reasons.

Q18. Can employers with fewer than 50 employees qualify for an exemption from the requirements of the EPSLA?

The FFCRA allows the Secretary of Labor to issue regulations to exempt small businesses (fewer than 50 employees) from the provisions of the EPSLA *only* pertaining to PST related to condition no. 5 (employee unable to work due to caring for a minor child where the child's school or childcare has been closed due to COVID-19). However, at this point,

there are no guidelines by which a small employer can determine whether it is exempt from the requirements of the EPSLA. The DOL has announced that it intends to issue regulations in April 2020 to set forth the parameters of the exemption.

Q19. Is a small employer (under 50 employees) required to pay the PST while it awaits a determination as to whether it is exempt from the EPSLA?

Regrettably, the answer to this question is entirely unknown at this point. The small employer community can hope that the Department of Labor issues regulations as soon as possible to answer this question.

Q20. Can an employer elect to pay an employee his/her full rate of pay during the time that the employee is utilizing PST?

Yes, nothing prevents an employer from doing so, but the employer will not be able to seek reimbursement in the form of tax credits for amounts exceeding the cap (either $511/ day or $200/day depending on the circumstance), cap on the PST (either $511/day or $200/day depending on the circumstance), plus the employer's share of health insurance premiums paid on behalf of the employee receiving PST during their period of EPSLA leave.

Emergency Family and Medical Leave Expansion Act ("EFMLA").

Q21. What employees are eligible under the EFMLA? Do they have to have 12 months of service as is the case under the FMLA?

Any employee who has been employed for 30 days or more is eligible to receive the benefits of the EFMLA. The 12 month requirement does not apply to the EFMLA. Similarly, the 50-employees-within-75-mile-radius-of-the-employee requirement also does not apply to the EFMLA.

Q22. Does the EFMLA also cover people having to stay home because they are self-quarantined or taking care of someone who is sick with the coronavirus?

No. The version of the FFCRA that passed the House on March 14, 2020 included such a provision, but it was stripped out on March 16, 2020 before the bill was sent to the Senate in order to ensure passage by the Senate. Consequently, the EFMLA only covers employees who are *unable to work (including telework)* because they must be home to care for a minor child whose school or daycare is closed due to COVID-19. (Please note, however, that the regular FMLA may cover these other situations).

Q23. Can *any* eligible employee who has a child at home due to school or daycare closure collect benefits under the EFMLA?

No, as noted in the answer to Q4 above, an employee must be able to establish that the employee is unable to work, including telework, as a result of "a need for leave to care" for the minor child. Thus, an employee who has only teenage children would likely have some difficulty in establishing he/she cannot work due to the need to provide childcare.

Q24. If the EFMLA covers a period of 12 weeks, why are the first 10 days not paid?

The first 10 days of the EFMLA are not paid because presumably the employee will be covered by the EPSLA for that period of time.

Q25. Can an employee use accrued sick leave or PTO during the first 10 days of the EFMLA period instead of the PST (since the PST is capped)?

Yes, the FFCRA specifically notes that the employee may elect to utilize any accrued vacation leave, personal leave, or medical or sick leave during that 10-day period.

Q26. Can EFMLA leave be taken on an intermittent leave basis?

In early versions of the bill, intermittent leave was expressly included, but that provision was eliminated in the final version. This could give the impression that the EFMLA cannot be taken intermittently – *and*, once the employee commences EFMLA, the employee is off for 10 weeks or until the employees circumstances change, but it is unlikely that the Department of Labor would adopt such a draconian application of the law. This will likely be addressed in DOL regulations in the next couple of weeks.

Q27. How much is the paid EFMLA?

After the initial unpaid 10-day period, an eligible employee will be paid 2/3 of the employee's regular rate of pay, capped at $200 a day or $10,000 in the aggregate.

Q28. Can an employer elect to pay an employee his/her full rate of pay during the time that the employee is utilizing EFMLA?

Yes, nothing prevents an employer from doing so, but the employer will not be able to seek reimbursement in the form of tax credits for amounts exceeding the cap ($200/day).

Q29. What rights does the employee have under the EFMLA in addition to receiving pay during the 10-week time period?

As with the regular FMLA, an EFMLA covered employee is entitled to be restored to his/her former position or a substantially similar position, at the end of the leave period, and to remain an active participant in the employer's group health plan.

Q30. Can employers with fewer than 50 employees qualify for an exemption from the requirements of the EFMLA?

The FFCRA allows the Secretary of Labor to issue regulations to exempt small businesses (fewer than 50 employees) from the provisions of the EFMLA. However, at this point, there are no guidelines by which a small employer can determine whether it is exempt from the requirements of the EPSLA. The DOL has announced that it intends to issue regulations in April 2020 to set forth the parameters of the exemption.

Q31. Is there any exemption for small employers from the job restoration provisions of the EFMLA?

Yes, employers with fewer than 25 employees can be exempted from the job restoration requirements, but, regrettably, it is a very limited exemption. In short, the small employer must show that

- The employee's position does not exist due to "economic conditions or other operating conditions" as a result of the coronavirus;
- The employer has made a reasonable effort to restore the employee to an equivalent position (pay, benefits, and other terms/conditions); and
- If the employer's reasonable effort fails, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one year period beginning on the earlier of: (i) the date on which the qualifying need related to a public health emergency concludes; or (ii) the date that is 12 weeks after the date on which the employee's leave commences.

Q32. What if an employer fails or refuses to comply with the terms of the EFMLA?

Employers with 50 or more employees, who are covered by the regular FMLA, are subject to investigation or penalties for failure to comply with the EFMLA by either the DOL or in a civil action by the affected employee.

However, employers with fewer than 50 employees are subject to investigation/penalties by the DOL for alleged EFMLA violations, but are not subject to civil action by the affected employee, *i.e.*, there is no private right of action in court, so the employee's only recourse is to pursue a claim through the DOL.

Q33 How soon can we expect further regulations and guidance?

Further guidance from the DOL and IRS is expected within the next two weeks.

More Questions? We are here to help.

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