Families First Coronavirus Response Act Leave Department of Labor Temporary Regulations – Part III

The U.S. Department of Labor (DOL) released temporary regulations implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) provisions under the Families First Coronavirus Response Act (FFCRA). The EFMLEA provides qualifying employees with paid sick leave during the COVID-19 crisis to care for a child absent from school due to school closure or childcare unavailability. The EPSLA provides employees with paid sick leave for self-care and family care due to possible COVID-19 contraction and exposure, as well as paid childcare leave. Following the temporary regulations, the DOL released a correction to the temporary regulations that contained mainly non-substantive corrections, such as section numbering and referencing issues.

The regulations are effective April 1, 2020, through December 31, 2020, which corresponds to the effective and sunset dates for the FFCRA. The temporary regulations were issued by the DOL to provide immediate guidance prior to the publication of the FFCRA final regulations, and have the force of law. For an overview of the requirements of the EFMLEA and EPSLA, please review our UBA Advisor that covers the Families First Coronavirus Response Act and the Advisor dedicated to the Coronavirus Aid Relief, and Economic Security Act.

On August 3, 2020, the U.S. District Court for the Southern District of New York (court) invalidated certain provisions of the temporary regulations implementing the EPSLA and EFMLEA.

Under the temporary regulations, an employee can only take leave under the FFCRA if the employee has a qualifying reason for leave and the employer has work available for the employee. The court invalidated this work-availability requirement with respect to the qualifying reasons for taking leave under the FFCRA. Under the court's holding, an employer is not required to have work available for an employee as a condition for an employee to be eligible for leave. This potentially opens the door for employees to claim eligibility for leave even if they are

furloughed, temporarily laid off, or are not working because the employer has temporarily ceased operations.

Under the FFCRA, an employer may exclude health care providers from being eligible for leave. The court invalidated the DOL's definition of a "health care provider" which is defined 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[,]" as well as any "individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] 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."

The court also invalidated the requirement that an employer consent to an employee seeking to take leave intermittently when allowed under the temporary regulations.

Finally, the court invalidated the requirement for employees to submit documentation to the employer prior to taking leave. The court did not invalidate the documentation requirement in totality, just the requirement that an employee provide the documentation prior to taking leave.

The court's decision did not specifically limit the scope of its ruling, so employers nationwide should consult with their attorneys regarding providing and denying leave for employees under the FFCRA that does not comply with the court's ruling. Employers should stay apprised of future developments including any potential appeals or new guidance or regulations from the DOL.

The following is Part III to our first and second Advisors highlighting important information reflected in the regulations, which provide much needed clarity to the meaning of operative terms and to the employer mandates contained in the FFCRA.

Health Care Provider and Emergency Responder Exemption

An employer may exclude health care providers and emergency responders from eligibility for emergency Family and Medical Leave Act (FMLA) leave and emergency paid sick leave. An employer, however, is not required to exclude these employees from eligibility but may exercise its discretion. Employers that do not exclude such employees from eligibility for emergency FMLA leave and emergency paid sick leave may take advantage of the tax credit available under the FFCRA.

Employee Notice of Need for Leave

An employer may require notice of an employee's need to take a leave of absence under the FFCRA as soon as practicable after the first workday is missed, and may require that employees provide oral notice and sufficient information for an employer to determine whether requested leave is covered under the FFCRA. In this regard, an employer may require an employee to provide the following information prior to taking leave:

1. Employee's name
2. Dates for which leave is requested
3. Qualifying reason for the leave
4. Oral or written statement that the employee is unable to work because of the qualified reason for leave

An employer may require an employee to provide additional documentation depending on the qualifying reason for leave. See Part I of our Advisor for a list of the qualifying reasons for leave. For emergency paid sick leave under the first qualifying reason, the employee must provide the name of the government entity that issued the quarantine or isolation order. For the second qualifying reason, the employee must provide the name of the health care provider who advised him or her to self-quarantine. For the fourth qualifying reason, the employee must provide either the name of the government entity that issued the quarantine or isolation order to which the individual is subject or the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. For the fifth qualifying reason (and the qualifying reason for taking emergency FMLA leave), the employee must provide (1) the name of the child being care 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.

An employer must retain the above documentation for a period of four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for leave, the employer is required to document and retain such information for four years.

Health Plan Coverage

An employee who takes emergency FMLA leave or emergency paid sick leave is entitled to continue group health plan coverage on the same terms as if the employee did not leave. If an employer provides a new health plan or changes benefits or plans while an employee is taking leave, the employee is entitled to the new plan or changed benefits/plans to the same extent as if the employee was not on leave. An employee is responsible for paying the same portion of the plan premium that the employee paid prior to taking leave. If premiums are adjusted, the employee taking leave is required to pay the adjusted premium on the same terms as other employees. For unpaid leave or when the pay provided under emergency FMLA leave and emergency sick leave is insufficient to cover the employee's premiums, the employer should follow the rules that apply to collecting payment from employees while on traditional FMLA. If an

employee does not retain coverage while taking leave, upon returning from leave, the employee is entitled to have his or her coverage reinstated on the same terms as prior to taking the leave.

Multiemployer Collective Bargaining Agreement

An employer that is party to a multiemployer collective bargaining agreement (CBA) may satisfy its leave obligations under the FFCRA by contributing to a multiemployer fund, plan, or program. The contributions must be based on the amount of emergency FMLA leave and emergency paid sick leave to which the employee is entitled based on each employee's work under the multiemployer CBA. The fund, plan, or other program must allow employees to obtain their pay for the leave to which they are entitled under the FFRCA. Alternatively, an employer that is part of a multiemployer CBA may choose to satisfy its obligations under the FFCRA through another method that is consistent with the CBA.

Return to Work

Generally, an employee is entitled to be restored to the same or an equivalent position upon return from taking leave under the FFCRA in the same manner that an employee would return to work after traditional FMLA leave. Similar to traditional FMLA leave, an employee is not entitled to have his or her position restored after leave if the employee would have been laid off even if he or she had not taken leave. Under emergency FMLA leave, an employer may deny job restoration to key employees, as defined under the FMLA, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. Also, under emergency FMLA leave, an employer is not required to comply with position restoration provisions if the employer has fewer than 25 employees and the following conditions are met:

1. The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable.
2. 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.
3. The employer made reasonable efforts to restore the employee to the same or an equivalent position.
4. 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.

Prohibited Acts and Enforcement

Employers are prohibited from taking adverse employment actions, such as discharging, disciplining, or discriminating against any employee because the employee took emergency paid leave. An employer that violates the requirements under emergency paid sick leave is considered to have failed the minimum wage requirement under Section 6 of the Fair Labor

Standards Act (FLSA) and an employer that takes adverse employment actions against an employee for taking emergency paid leave is considered to have violated Section 15(a)(3) of the FLSA. Employers are also prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under emergency FMLA leave. Employers are generally subject to the enforcement provisions in Section 107 of the FMLA for violations of emergency FMLA leave requirements.

Emergency paid sick leave is not a substitute for other sources of leave which the employee has already accrued and may not count against an employee's balance or accrual of any other source of leave. An employee is entitled to the full two weeks of emergency paid sick leave regardless of how much other leave an employee has taken before the employee takes emergency paid sick leave. An employer's voluntary offer of other leave does not count against the employee's entitlement to emergency FMLA leave and emergency paid sick leave. However, an employer may prospectively terminate other voluntary additional paid leave on April 1, 2020, or after, provided that the employer had not already amended its leave policy to reflect the voluntary offer.

Employees do not have any right to use emergency FMLA leave or emergency paid sick leave retroactively for leave taken before April 1, 2020. Also, an employer has no obligation to provide financial compensation or other reimbursement for unused emergency paid sick leave or unused emergency FMLA leave in the event that an employee's employment ends after April 1, 2020, or after the FFCRA's expiration on December 31, 2020. Employees that change positions with the same employer or under a new employer during the period during which the emergency paid sick leave is in effect, or have used the maximum 80 hours and then change positions, are not entitled to another period of emergency paid sick leave.

The regulations provide that the FFCRA should not impact an employee's exempt status under the FLSA.

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