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Labor & Employment Alert

DOL Paid Leave Regulations—Top Ten Takeaways

Effective: April 1, 2020
Expire: December 31, 2020
Address: FMLA Expansion Act and Emergency Paid Sick Leave Act

The Department of Labor issued temporary regulations on April 1 pursuant to the *Emergency Family and Medical Leave Expansion Act* (**EFMLEA**) and the *Emergency Paid Sick Leave Act* (**EPSLA**), both of which were part of the *Families First Coronavirus Response Act* (**FFCRA**), as amended by the *Coronavirus Aid, Relief and Economic Security Act* (**CARES Act**)—all of which became law within about a week of each other.

The regulations are combined in a single new part of the administrative code, but they address the particulars of each new law separately where required. The regulations are lengthy and detailed, but this Client Alert hits just the key points that add to (or detract from) the statutory language. Below are the **Top Ten Takeaways** from the regulations, along with a few "Honorable Mentions" at the end.

This alert assumes a basic knowledge of the statutory provisions and previous DOL informal guidance relating to the EPSLA and EFMLEA, so it should be read in conjunction with our previous alerts on these new laws, which can be found by **clicking here** (EFMLEA Act), **clicking here** (EPSLA), and **clicking here** (DOL Informal Guidance).

1. "But For" Standard to Qualify for Leave

- The regulations tighten the six categories of paid leave under the EPSLA and the single category under the EFMLEA by clarifying what "quarantine or isolation order" means and by introducing a "but for" qualifying standard.
- When the EPSLA was passed, Category 1 leave (not working due to quarantine or isolation order) was widely believed to cover employees who were at home because the employer's business was closed by the state. The regulations make clear that a "quarantine or isolation order" is not one that shuts down a business, but one that applies to an employee individually or categorically.
- The regulations also make clear that an employee does not qualify for Category 1 leave—even if he is subject to a "quarantine or isolation order"—unless he could work for the employer "but for" that order.
  - The governor's order precludes qualifying for Category 1 leave regardless of other qualifying factors for employees whose employer is shut down by the order.
- A similar standard is imposed in the regulations for other categories of EPSLA leave and for EFMLEA leave, to make clear that if the employer is closed for any reason, regardless of other qualifying factors, the employee is NOT entitled to leave.
- An important corollary is that employers who provide paid leave for non-qualifying reasons will not enjoy tax credits for that leave. Except for intermittent leave and employee exemptions (discussed below), if it is not mandatory under the EPSLA or EFMLEA, it is not "qualifying leave" and tax credits do not apply.

2. EPSLA and EFMLEA Payment Caps Are Cumulative

- The dollar caps for paid childcare leave under EPSLA Category 5 and EFMLEA are cumulative, so that the limits on an employer's paid leave obligations for this form of leave are the $200 per day and $2,000 aggregate amount under EPSLA (for the first ten days) PLUS the $200 per day and $10,000 aggregate under EFMLEA (for the remaining ten weeks).

3. May Require PTO Concurrently With EFMLEA Leave

- An employer **MAY NOT** require employees who qualify for EPSLA paid leave (the six categories of qualifying leave) to take PTO or other employer-provided leave concurrently with the EPSLA paid leave. EPSLA leave is in addition to employer-provided benefits.
- That is not new in the regulations, **BUT** the regulations do make clear that an employer **MAY** permit or require employees to take PTO or other employer-provided leave first or concurrently with EFMLEA leave.
  - Note, however, the tax credits for EPSLA and EFMLEA leave apply only to the portion of payments attributable to those two forms of leave, NOT to the portions attributable to employer PTO policies.

4. Benefits Are NOT Retroactive, but Eligibility IS

- Regardless of other qualifying factors, individuals who were laid off in March due to the COVID-19 crisis are NOT entitled to paid leave for March under either the EFMLEA or the EPSLA, and if they were separated from employment prior to April 1 (and not later rehired—see next bullet) they are not covered by either the EFMLEA or the EPSLA.
- However, employees who were separated from employment during March 2020 (before the effective date of the EPSLA and EFMLEA), they become eligible for EPSLA and EFMLEA paid leave for periods after April 1 if they otherwise qualify for those periods and if they are rehired at any time on or after April 1 and on or before December 31 of 2020.

5. Expansive Exemption for Healthcare Providers

- The EPSLA and EFMLEA both provide an exemption—if employers choose to use it—from leave benefits for healthcare providers and emergency responders, using broad language to describe those two categories.
- Unlike the narrowing function of the regulations as it relates to the categories of leave, discussed above, the new regulations significantly EXPAND the notion of what constitutes a "healthcare provider" for purposes of allowing employers to deny paid leave benefits to them.
- For instance, the regulations cite a litany of employers all of whose employees are healthcare workers for purposes of the exemption, including any college that offers "health care instruction," ***as well as anyone*** "employed by an entity that contracts with any of these institutions ... to provide services ... ." There is no apparent connection required between the type of "services" and "healthcare" as traditionally understood.
  - Arguably a lawn care service for a university that has a nursing school is exempt because it "provides services" to the university.
- A related exemption exists for emergency responders, and the regulations slightly expand that definition from the DOL's previous informal guidance, but it is not nearly as expansive as healthcare provider.
- Note, however, these are voluntary exemptions, but if the employer chooses NOT to exempt employees, the resulting leave is still "qualifying leave" and private employers still enjoy the accompanying tax credits.

6. Small Business Exemption for Childcare Leave is Self-Determined

- The regulations take up the invitation in the two statutes to provide an exemption from the childcare leave requirements of the EPSLA and EFMLEA for small employers (fewer than 50 employees) if providing the paid leave would "jeopardize the viability of the business."
- The regulations provide three criteria for business "jeopardy," any of which justifies a small employer claiming the exemption. In short, an employer can establish business jeopardy if providing the paid leave would:
  - Cause expenses and financial obligations to exceed available business revenues;
  - Entail a substantial risk to business operations due to the absence of employees requesting leave;
  - Result in insufficient workers to maintain minimal operations of the business.
- The employer effectuates this exemption by making the above determination, and then by documenting that determination internally (no need to submit anything to the DOL).

- Basically, this exemption operates on the "honor system," and the regulations offer no guidance about how to challenge it, so long as the employer makes the "determination" and "documents" that determination.

7. Intermittent Leave is Voluntary

- The regulations include a detailed section on "intermittent leave" for both the EPSLA and the EFMLEA. This is a familiar concept under the FMLA, but the significance of the regulation is that, while it discusses intermittent leave, employers are not required to allow it.
- An employee may take intermittent leave under the EPSLA and EFMLEA "only if the Employer and Employee agree." The employee may do this for any category of EPSLA and EFMLEA leave if the employee is teleworking, but if the employee is reporting to the employer's worksite, intermittent leave is permitted only for Category 5 leaves under the EPSLA and EFMLEA leave—even if the employer agrees to intermittent leave under Categories 1 through 4 and 6.
- It appears the reason for this "voluntary" intermittent leave is to allow employers to be flexible while retaining the tax credits for offering intermittent leave—that is, although it is not mandated, it is still "qualifying leave."

8. Employees Must Request and Justify Leave

- The regulations make clear that an employee must affirmatively request EPSLA and EFMLEA leave, and that an employer may require employees to show that the leave meets the qualifying criteria.
- For childcare leave (EFMLEA and Category 5 under EPSLA), the employer may require a representation that "no other suitable person will be caring for" the child during the period of the requested leave and that no other "suitable person" is available to care for the child during this time.
- Briefly summarized, an employer may require employees to submit the type of documentation required for private employers to obtain the tax credits for the paid leave. The failure of an employee to provide the required documentation is grounds to deny the leave.

9. Exceptions to Return to Work Rights

- The regulations discuss in detail the rights of employees to "return to work" after their EPSLA and EFMLEA leave "in the same or equivalent position" as the one they held prior to the leave, similar to the reinstatement rules that currently exist under the FMLA.
- Employees are not protected by EPSLA or EFMLEA leave from the vagaries of business, so if their position is eliminated or they otherwise would no longer be employed, there is no right to reinstatement.
- Special rules apply for "key employees" returning to work after a leave, and for employees returning to work at a small employer with fewer than 25 employees.

10. Mandated Leave Has Limits

- EPSLA and EFMLEA leaves are available only during the period of the temporary regulations, from April 1 to December 31 of 2020.
- Employees who otherwise qualify may receive up to 12 weeks of EFMLEA leave (to the extent not used for other forms of FMLA leave), regardless of how many employers they work for during the period that EFMLEA leave is available, and regardless of whether a new 12 month FMLA period begins during that timeframe.
- That is, employees do NOT get to refresh the available EFMLEA leave if the employee's FMLA leave year renews during the period of the temporary regulations (April to December 2020).
- An employee gets only the stated maximum periods of leave under the EPSLA and EFMLEA (ten days and 12 weeks if not otherwise used under the FMLA), even if the employee works for successive employers during the period of the temporary regulations.
    - That is, an employee does not renew his leave allotment if he changes jobs. The second employer is only obligated to provide EPSLA and EFMLEA leave to that employee to the extent he has not already exhausted his leave rights with the previous employer.

- Employees have no right to a payout for unused EPSLA or EFMLEA leave at the end of employment or the end of the period of the temporary regulations.
- EFMLEA leave is available only to the extent FMLA leave has not already been used.
  - If an employee has exhausted FMLA unpaid leave, the employee is NOT entitled to any paid or unpaid leave under the EFMLEA (but still gets the two weeks of childcare leave under EPSLA Category 5).

Honorable Mention:

- **Continued Health Benefits During Leave**
  - Employers are required to provide health benefits to employees on EPSLA and EFMLEA leave on the same basis (regarding contribution) and to the same extent (regarding level and types of benefits) provided before the leave (or as the employer is providing to other employees who are not on leave).
- **Small Employers Not Subject to Private Lawsuits Under EFMLEA**
  - There is no private right of action against small employers or those who do not otherwise qualify as employers under the FMLA for violation of the leave requirements of the EFMLEA.
- **Recordkeeping is Important**
  - The regulations describe specific records that must be kept and for how long, but this is not simply an administrative duty—the employer must maintain the records to justify the corresponding tax credits that follow from providing qualifying leave under the EPSLA and EFMLEA.
- **Integrated and Joint Employer Tests May Affect Employer Coverage**
  - "To determine the number of Employees employed, all common Employees of joint employers or all Employees of integrated employers must be counted together."
  - This rule applies to employer coverage under both the EPSLA and EFMLEA.

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