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DOL Issues Guidance on Concurrent Use of Available Employer-Provided PTO under FFCRA

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The Department of Labor (DOL) has released guidance that answers employers' questions about whether and when employees can be required to use accrued employer-provided paid time off ("PTO") concurrently with leave taken under the Families First Coronavirus Response Act ("FFCRA").

Under the FFCRA, employers with under 500 employees are subject to two new acts that provide for leave: the Emergency Family and Medical Leave Expansion Act ("EFMLA") and the Emergency Paid Sick Leave Act ("EPSLA"). According to the DOL, an employer can force an employee to use available PTO concurrently with paid time off under the EFMLA, but cannot force current PTO use under the EPSLA.

The EFMLA provides up to twelve (12) weeks of leave to employees who have been employed for at least 30 days and are unable to work or telework because he or she is caring for their child whose school or place of child care is closed or unavailable. The first ten days (or the first 80 hours) of emergency family medical leave are presumptively unpaid unless the employee elects to use any leave entitlement under the EPSLA or paid leave available to them under employer-provided PTO, but the employer may not require that they do so. For the remaining ten (10) weeks, however, employers *may* force PTO to run concurrently, paying the employee's full pay until the employee's PTO is exhausted. Thereafter, employees will receive any remaining emergency paid family medical leave at 2/3 of the employee's regular rate of pay, capped at \$200 per day or \$2,000 in the aggregate.

The EPSLA serves to provide all full-time employees up to eighty (80) hours of paid sick leave based upon certain qualifying COVID-19-related reasons ("emergency paid sick leave"). (Entitlement to emergency paid sick leave for part-time employees is calculated based upon an average of hours

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worked over a typical two-week period.) The amount of pay and the corresponding cap is dictated by the reason for the COVID-19-related leave needed. The EPSLA is intended to provide employees with additional paid sick leave *on top of* any employer-provided PTO already accrued. For that reason, employers are not permitted to require that employees run such PTO concurrently with emergency paid sick leave entitlements.

The FFCRA's paid leave provisions became effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

Please contact your Butzel Long attorney for assistance modifying your paid leave policies. We are here to help.

Brett Miller

313.225.5316

millerbr@butzel.com

Hannah Treppa

313.983.6966

treppa@butzel.com