New DOL Guidance Narrows New Paid Leave Requirements and Provides Welcome Clarity for Employers

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The Department of Labor has updated its Families First Coronavirus Response Act (FFCRA) question and answer website three different times in a five-day period, including on Saturday, March 28, 2020, to address some of the most pressing questions facing employers leading up to the April 1, 2020 effective date of the FFCRA's two leave laws. These leave laws, the Emergency Paid Sick Leave Act (EPSLA) and the Expanded Family Medical Leave Act (EFMLA), were summarized in our prior alert on this topic. To briefly recap, after April 1, the EPSLA would allow employees who work for most public agencies and employers with fewer than 500 employees to take 80 hours of paid leave, subject to monetary caps, for certain qualifying COVID-19 related reasons. Likewise, the EFMLA would allow employees to take up to 10 weeks of paid leave, subject to caps, to care for the employee's son or daughter due to closure of the child's school or place of care. The original leave laws, however, left numerous questions unanswered and the new guidance finally provides some clarity for employers.

Summary of the Key Areas Addressed

To date, there are 59 separate questions and answers addressed by the DOL. The following are some key issues facing employers that were recently clarified:

- Interpretation of whether Michigan's stay-at-home order entitles workers to use EPSLA after April 1st.
- Outlining the circumstances in which intermittent leave may be available under either EPLSA or EFMLA.
- Providing guidance on how businesses with fewer than 50 employees may attempt to opt out of the leave laws.
- Clarifying whether 12-week threshold under standard FMLA applies to either the Emergency Paid Sick Leave Act or the Expanded Family Medical Leave Act.

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- Exempting many healthcare providers from the leave laws.
- Identifying when the 500 employee threshold is determined.

Analysis of What These Answers Mean for Employers

The DOL has clarified that EPSLA and EFMLA leave are not available to employees whose worksites were closed before April 1 and this would include Michigan's Stay at Home Executive Order. (Questions 23-27)

The shelter-in-place order in effect in Michigan does NOT provide a reason to take leave under the new Paid Sick Leave Act provision. The DOL states, in question 23, that:

If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

The DOL further clarified that the same reasoning applies if a worksite is closed after April 1, 2020, noting "[i]f your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits." (Question 24). The takeaway from the DOL is that if there is no work for an employee, then there is no leave from work.

No intermittent leave without agreement by both employer and employee. (Questions 20-22)

Many employers wondered whether the new leave entitlement could be taken intermittently or whether it must be taken in blocks of time. The DOL clarified that intermittent leave depends on whether the employee is teleworking or working onsite.

For employees that are teleworking, intermittent leave may be provided if agreed to by the employer. (Question 20). However, if the employee is working onsite, intermittent leave can again be agreed upon by the employer but only for two limited circumstances: if taken for school closure or childcare unavailability. (Question 21). According to the DOL, the reason for this limitation is because "the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others."

Finally, if agreed to by the employer, the intermittent leave can be for less than full-day increments.

There is no concurrent PTO pay but employees may choose to supplement paid time off with existing PTO. (Questions 31-33, 46).

Under the FFCRA, an employer cannot force employees to use PTO available under current state law or policy for protected reasons under the new leave laws and the new leave is in addition to any existing PTO. Employees, however, may choose to utilize paid time or to supplement partially paid leave. The

DOL provided the following example:

If you are receiving 2/3 of your normal earnings from paid sick leave or expanded family and medical leave under the FFCRA and your employer permits, you may use your preexisting employer-provided paid leave to get the additional 1/3 of your normal earnings so that you receive your full normal earnings for each hour."

Smaller businesses, with under 50 employees, may be able to opt out of providing paid leave for employees who seek leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons.

An "authorized officer" of an employer with under 50 employees would have to self-designate for this exemption and meet (and document) at least one of the following factors:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The expanded FMLA is a total of 12 weeks – employees cannot use the traditional FMLA and expanded FMLA to go beyond the 12 week total. (Questions 44-45)

The DOL clarified that regardless of traditional FMLA or the new EFMLA, an employee is still limited to a total of 12 weeks of leave within a 12 month period.

The 12-week limitation, however, does not necessarily apply to the Emergency Sick Leave Act. According to the DOL, "[p]aid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap.: But, if the employee chooses, this leave can be applied toward the first 10 days of normally unpaid EFMLA.

Health care providers are broadly exempt from the new leave laws.

In welcome news to health care employers who were left wondering whether they would have trouble fielding a workforce after April 1, the DOL has broadly exempted health care workers from the new paid leave laws. The new guidance notes that exempt health care providers include:

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.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

500 Employee Threshold Applies from the Date Employees Seek Leave

To determine if your organization has more than 500 employees, a company would count the number from the date an employee seeks leave. Thus, if a business had over 500 employees before April 1 but has fewer than 500 after April 1 when an employee requests leave, the business would be subject to the new laws. (Question 50).

* Note, the DOL Q&A is "guidance" by the agency and does not carry the force of law. While this guidance may well make its way into the final regulations, the DOL can also change these answers on the fly and employers relying on the Q&A should print the relevant sections for its files in the event of a change of course by the DOL later.

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