UBA
Compliance Advisor

What every HR leader should know about compliance

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

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 about 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

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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.

In response to the court's decision, the DOL released additional temporary regulations that reaffirm certain portions and revises certain portions of its regulations described in Part I, Part II, and Part III of this Advisor series on the FFCRA leave regulations. The DOL reaffirms that paid sick leave and expanded medical leave may only be taken by an employee when the employer has work for the employee to perform. The DOL also reaffirms that when intermittent leave is permitted under the FFCRA regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently. The DOL revises its definition of "health care provider" to mean employees defined as health care providers under the Family and Medical Leave Act of 1993 and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care. The DOL clarifies that the information the employee must provide to the employer to support the employee's need for leave should be provided as soon as practicable, not necessarily prior to when leave is taken. Finally, the DOL clarifies when an employee may be required to give notice of expanded family and medical leave to his or her employer.

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The additional temporary regulations will become effective on the date of publication in the Federal Register, currently scheduled for September 16, 2020.

The following is Part II to our first Advisor 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.

Counting Employees

For purposes of counting employees to determine whether a private employer is subject to emergency FMLA leave and emergency paid sick leave (private employers with fewer than 500 employees), the employer must count the employees at the time an employee would take leave under the FFCRA. The employer must count full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors do not count toward the 500-employee threshold. Also, employees who have been laid off or furloughed and have not subsequently been reemployed do not count. Employees must be employed within the U.S., including U.S. territories, to be counted. Joint or integrated employers must combine employees when counting employees. Employers must apply the Fair Labor Standards Act's test for joint employer status and the Family and Medical Leave Act's (FMLA) test for integrated employer status when determining who is a joint or integrated employer.

Expanded FMLA Leave

Any time taken by an employee for emergency FMLA leave will count toward the 12 weeks of FMLA leave that an employee is entitled to. Also, any FMLA leave that has already been taken will reduce the 12 weeks of emergency FMLA that is available in that year. Employees are limited to a total of 12 weeks of emergency FMLA leave even if the applicable time period for which such leave is available (April 1, 2020, to December 31, 2020) spans two 12-month FMLA periods. If an employee is eligible to take leave under traditional FMLA to care for a service member and is eligible for emergency FMLA leave, the amount of leave available will be determined under the rules that apply to FMLA leave for caring for a service member.

If an employee qualifies for both emergency FMLA leave and emergency paid sick leave, the employee can choose to first take the two weeks of emergency paid sick leave which would run concurrently with the first two weeks of unpaid emergency FMLA leave. If a full-time employee is concurrently taking emergency FMLA leave and emergency paid sick leave, the employee is entitled to 80 hours of emergency paid sick leave for ten work days and then paid leave under emergency FMLA leave.

Under the temporary regulations, and clarified by the correction to the temporary regulations, an employee may elect, or an employer may require, an employee to use accrued paid leave (i.e., vacation or paid time off) that is available to the employee to care for a child concurrently with expanded FMLA leave after the first two weeks of unpaid expanded FMLA leave. Therefore, an employee can elect, or an employer may require, an employee's accrued paid leave to

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supplement the two-thirds pay under expanded FMLA leave so that the employee receives the full amount of their normal pay. Even if the employee is receiving full pay due to substituted paid leave while on expanded FMLA leave, the employer's eligibility for tax credits is still limited to the cap of $200 per day or $10,000 in the aggregate.

To ensure consistency with emergency FMLA leave and emergency paid sick leave, the DOL provides that the unpaid period for emergency FMLA leave lasts for two weeks rather than ten days. However, as a practical matter, the unpaid period of emergency FMLA leave for employees that work regular Monday through Friday schedules would still be ten days because that is the number of days they would work in two weeks.

Rate of Pay Calculation

To calculate the amount of pay an employee will be entitled to while on expanded FMLA leave or emergency paid sick leave, the employer must calculate the employee's average scheduled hours per day. See our prior Advisor regarding the calculation of hours for full-time and part-time employees. The employer would then multiply the scheduled hours by the rate of pay. The rate of pay is calculated by using an average of the employee's regular rate over multiple workweeks. The average will be weighted by the number of hours worked each workweek.

The temporary regulations provide an example of an employee that receives $400 of non-excludable compensation in one week and works 40 hours that week and receives $200 of non-excludable compensation in the next week and works 10 hours that week. The regular rate in the first week is $10 per hour ($400 ÷ 40 hours), and the regular rate for the second week is $20 per hour ($200 ÷ 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ÷ 50 hours). The DOL has provided a fact sheet regarding the amounts that should be included and excluded when determining an employee's rate of pay.

The example above uses two weeks for the calculation period; however, the employer must use the six-month period ending the day the employee takes leave (the same period of time used to calculate the average number of hours per day for full-time and part-time employees).

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