Davis & Gilbert
ADVANTAGE

US DOL Releases Regulations Clarifying Employer FFCRA Obligations

FOR MORE INFORMATION

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The Department of Labor (DOL) officially published rules and regulations on April 6, 2020 that provide further guidance on the paid leave requirements of the Families First Coronavirus Response Act (the FFCRA).

To recap, the FFCRA expands the federal Family and Medical Leave Act (FMLA) by allowing eligible employees to take up to 12 weeks of paid public health emergency leave (EFMLA Leave) and up to 2 weeks of emergency paid sick leave (EPSL).

Davis & Gilbert attorneys **Gregg Brochin**, **Shira Franco**, **Sharon Cohen**, **Rachel Rosenberg** and **Sabrina Worthy** address key takeaways for employers from the DOL's rules and regulations. If you have additional questions, please contact the authors or the D&G attorney with whom you have regular contact.

Q: What documentation is required for EPSL or EFMLA Leave?

A: Prior to taking EPSL or EFMLA Leave, employees are required to provide the following information:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- An oral or written statement that the employee is unable to work (either in person or remotely) because of the qualified reason for leave.

Additional documentation is required if the employee is requesting leave for the following qualifying reasons:

- An employee taking leave due to a quarantine or isolation order or to care for an individual subject to such an order must provide the name of the government entity that issued the order;

- An employee advised by a healthcare provider to self-quarantine or who is caring for an individual who is self-quarantining based on healthcare provider advice must provide the name of the healthcare provider;
- An employee caring for a child whose school or place of care is closed, or child care provider is unavailable (School Care Leave), must provide:
    1) Name of the child;
    2) Name of the school, place of care or child care provider that has closed or become unavailable;
    3) A statement that no other suitable person is available to care for the child; and
    4) If the child is over 14 years old, a statement that special circumstances exist requiring the employee to provide care.

In addition, the regulations state that the employer can also request additional information from the employee needed to support the employer's request for a tax credit under the FFCRA, and the IRS has noted in FAQs than an employer can request "written support" of the qualifying reasons for leave from the employee.

For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply. If an employee does not provide sufficient documentation, the employer is not required to provide leave.

Q: When must employees provide notice of the need for EPSL or EFMLA Leave?

A: When an employee requests School Care Leave, the employee must provide notice as soon as practicable, if the need for leave was foreseeable. For all other FFCRA leaves, employees are encouraged, but not required, to provide notice as soon as practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time. It is reasonable for an employer to request oral notice and sufficient information in order to determine whether the requested leave is covered by the FFCRA.

If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

Q: Can an employee use EPSL or EFMLA Leave while working remotely?

A: No. Telework is work for which normal wages must be paid and cannot be compensated under the paid leave provisions of the FFCRA.

Q: Is an employee eligible to take EFMLA Leave if s/he already took 12 weeks of FMLA leave within the applicable 12 month period?

A: No. If an employee has already taken 12 weeks of FMLA leave during the employer's applicable FMLA 12 month period, the employee may not take EFMLA Leave.

However, an employee who has exhausted his or her 12 week FMLA entitlement is not precluded from taking up to 2 weeks of EPSL. For example, if an employee took 12 weeks of FMLA leave due to the birth of his or her child beginning in December 2019, and then needs to take leave due to their child's day care closing, they would be ineligible for EFMLA Leave yet could take up to 2 weeks of EPSL.

Q: Can employers require employees to use existing leave entitlements concurrently with EPSL or EFMLA Leave?

A: Not for EPSL. Employers are expressly prohibited from requiring, coercing or unduly influencing employees to use their existing leave entitlements such as paid time off (PTO), vacation, or paid sick time prior to or concurrently with EPSL.

For EFMLA Leave, employers may require an employee (or an employee may choose) to apply existing leave such as PTO or vacation during the EFMLA Leave period. In such a situation, the employer must pay the employee a full day's pay for each day of the leave. However, the employer would still be capped at taking $200 a day or $10,000 in the aggregate of tax credits for EFMLA Leave.

Q: If an employee takes School Care Leave, how do EPSL and EFMLA Leave interact?

A: Any EPSL taken for School Care Leave runs concurrently with EFMLA Leave. If an employee has previously used up their EPSL entitlement for any reason other than School Care Leave and then, subsequently, needs to take EFMLA Leave, the first 10 days (or 2 weeks) of leave are unpaid. However, the employee may choose to apply accrued vacation or PTO towards such time.

Q: If a child's school or place of care has moved to online instruction or virtual learning, is it considered closed?

A: Yes. If the physical location where the child received instruction or care is now closed, the school or place of care is "closed" for purposes of EPSL and EFMLA Leave.

Q: Can employees take EPSL or EFMLA Leave intermittently?

A: Yes, but only if both the employer and employee agree. The agreement can be memorialized in writing (which is a preferred best practice for employers), although such writing is not required and a clear and mutual understanding between the parties is sufficient.

An employer may deny any request for intermittent EPSL or EFMLA Leave.

Q: Is an employer with fewer than 500 employees required to provide EPSL and EFMLA Leave?

A: Yes. The FFCRA requirements apply to employers with fewer than 500 employees. Employers in the private sector with 500 or more employees are not subject to FFCRA requirements.

Q: How does an employer calculate whether they have over or under 500 employees?

A: To determine if an employer is over or under 500 employees, the employer must count all full-time and part-time employees employed within the United States at the time an employee would take leave. For purposes of this count, every part-time employee is counted as if he or she were a full-time employee.

Additionally, all employees currently employed, regardless of how long those employees have worked for the employer, are counted.

Employers should also count:

1) Employees out on a leave of absence;

2) Employees of temporary placement agencies who are considered jointly employed under the FLSA; and

3) Temporary day laborers supplied by a temporary placement agency.

Employers are not required to count:

1) Independent contractors; or

2) Workers who have been laid off or furloughed and have not been subsequently reemployed.

Q: Is an employer with fewer than 50 employees required to provide EPSL and EFMLA Leave?

A: In general, yes. However, such businesses are exempt from the FFCRA if an authorized officer of the business determines that:

1) The leave requested would result in the expenses and financial obligations of the business exceeding available business revenues and cause the business to cease operating at a minimal capacity;

2) The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

To elect this small business exemption, the company must document that a determination has been made pursuant to the above criteria and retain that record in its files.

Q: What are the record retention requirements for documentation regarding FFCRA leave?

A: Employers must retain all records and documentation with respect to FFCRA leave for 4 years, regardless of whether leave was granted or denied. If an employee provides oral statements to support his or her leave request, the employer is required to document and maintain such information in its records for 4 years.