FAQ UPDATE

The Department of Labor (DOL) has issued revised **rules** (the Revised Rules) clarifying its prior rules on the Families First Coronavirus Response Act (FFCRA). The FFCRA provides eligible employees with up to 2 weeks of emergency paid sick leave (EPSL) and up to 12 weeks of paid public health emergency leave (EFMLA Leave) for certain covered reasons. The Revised Rules, which took effect on September 16, 2020, were promulgated in response to a Southern District of New York (SDNY) court decision that struck down various aspects of the DOL's original FFCRA rules.

This Alert includes the following updated FAQs based on the Revised Rules.

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FAQ: US DOL Releases Regulations Clarifying Employer FFCRA Obligations

The Department of Labor (DOL) officially published rules and regulations on April 6, 2020 that provided guidance on the paid leave requirements of the Families First Coronavirus Response Act (the FFCRA). On April 10, 2020, the DOL issued corrections to the rules. In addition, on September 16, 2020, the DOL published revised rules further clarifying employers' FFCRA obligations, in response to a SDNY court decision that struck down certain aspects of the rules (discussed in our prior Alert).

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

Davis & Gilbert attorneys Gregg Brochin, Shira Franco, Sharon Cohen 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.

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

A: For EPSL, employees cannot be required to provide advance notice and may only be required to provide notice as soon as practicable after the first workday of taking leave. For EFMLA Leave, employers can require advance notice as soon as is practicable, and where the need for leave is foreseeable, that will generally mean providing notice before taking leave.

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.

What Employers Can Do Right Now

Employers with under 500 employees should review their FFCRA policies and practices to ensure compliance with the revised rules. Employers should also gather necessary documentation from employees who have taken, or will take, FFCRA leave so that employers may take the associated tax credit.

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

A: 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 whose child care provider is unavailable (Child 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.

Such documentation need not be provided prior to taking leave and should be provided as soon as practicable, which in most cases will be when the employee provides notice of leave.

In addition, the regulations state that the employer can 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.

3. 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.

4. Q: Can employees take EPSL or EFMLA Leave intermittently?

A: Employer approval is needed to take FFCRA leave intermittently, which the rules only authorize for Child Care Leave. Intermittent leave is unavailable for all other covered leaves (i.e., those leaves that correlate to a higher risk of spreading the virus), unless the employer permits such employees to telework intermittently.

5. 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 Leave.

6. 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 Leave.

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.

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

A: Any EPSL taken for Child Care Leave runs concurrently with EFMLA Leave. If an employee has previously used up their EPSL entitlement for any reason other than Child 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.

8. 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.

9. Q: If a child's school is operating on a hybrid-attendance basis and an employee needs to care for the child on the days that the child is not physically in school, may the employee take Child Care Leave for such days?

A: Yes, as long as there is no option for full in-school instruction. For purposes of the FFCRA, the school is effectively closed on the days that the child is not permitted to attend school in person. In addition, because each day of absence is a separate leave, this is not considered intermittent leave. If there is an option to attend school full-time, then the school is not "closed" and Child Care Leave is not available.

10. 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.

11. 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.

12. 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.

13. 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.

14. Q: Are furloughed employees eligible for EPSL or EFMLA Leave?

A: Under the rules' "work-availability requirement," EPSL and EFMLA Leave are only available if the employee has work from which to take leave. If there is no work for an employee to perform due to circumstances other than a qualifying reason for leave, such as the employer's worksite was shut down or the employee is furloughed due to a business downturn, the employee is ineligible for leave. That being said, employers cannot avoid granting leave by purporting a lack of work, such as by placing an employee on furlough in response to a leave request, as that would be deemed retaliatory and an interference with an employee's FFCRA rights.

15. Q: Which employees are considered "health care providers" who are ineligible for EPSL or EFMLA Leave?

A: A "health care provider" employee who is exempt from EPSL and EFMLA Leave is defined as: (1) employees who are health care providers under the FMLA's regulations (*e.g.*, physicians, nurse practitioners, physicians' assistants, podiatrists, dentists, clinical psychologists, optometrists, nurse-midwives, clinical social workers, and chiropractors), and (2) employees who are capable of providing health care services, meaning they are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care (including nurses, nurse assistants, medical technicians, and, laboratory technicians).

"Health care provider" does not includes IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records mangers, consultants and billers.

For More Information

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