

Labor & Employment Law Alert: USDOL Issues Temporary Regulations Implementing the Families First Coronavirus Response Act

In a previous [alert](#), we discussed the Families First Coronavirus Response Act (FFCRA) and the creation of two new paid leave requirements due to COVID-19, the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLA). The United States Department of Labor (USDOL) has now issued temporary regulations which clarify the requirements and exemptions of those acts.

Covered Employers

The FFCRA applies to all public sector employers, regardless of size, and to private employers with less than 500 employees at the time an employee requests leave under the FFCRA.

In determining whether a private employer meets the 500-employee threshold to be exempt, employers should include all full-time employees, part-time employees, employees who are out on leave and employees who are jointly employed with another entity. Independent contractors should not be counted.

Private sector employers with less than 500 employees and public sector employers may qualify for various exemptions as detailed below.

Health Care Provider Exemption

Employers who qualify as a health care provider may exempt employees from coverage under the FFCRA. The term “health care provider” is broadly defined to include medical professionals and “other workers who are needed to keep hospitals and similar health care facilities *supplied and operational*” and those “who are involved in research, development, and production of equipment, drugs, vaccines and other items needed to combat” COVID-19. Overall, an employee 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...or entity” is considered a health care provider for purposes of the FFCRA.

Emergency Responder Exemption

Employees who are emergency responders may also be excluded from coverage under the FFCRA. An “emergency responder” is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.” Emergency responders include “military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel,

emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and ***whose work is necessary to maintain the operation of the facility.***”

Small Business Exemption

Earlier USDOL guidance stated that businesses with fewer than 50 employees may be exempt from the FFCRA if compliance would jeopardize the viability of the employer’s business. However, regulations substantially limit this exemption, which only applies to leave to care for an employee’s son or daughter whose school or place of care is closed, or whose child care provider is unavailable, for reasons related to COVID-19. Additionally, this exemption is only available when: (1) such leave would cause the employer’s expenses and financial obligations to exceed available business revenue and cause the employer to stop operating at a minimal capacity; (2) the absence of the employee requesting leave would pose a substantial risk to the financial health or operational capacity of the employer given the employee’s responsibilities, specialized skills, or knowledge of the business; or (3) the employer cannot find enough other individuals who are able, willing, qualified and available to perform the services the employer needs and those needs are necessary for the employer to operate at a minimal capacity.

Employers who deny leave under this exemption must document the reasons that justified the denial of leave. Employers should not send such documentation to the USDOL but must retain it in the employee’s personnel file, subject to the recordkeeping requirements discussed below.

Significantly, the small business exception is not available and paid leave must be provided when an employee: (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Intermittent Leave

Intermittent leave is available under both the EFMLA and the EPSLA, but only if the employer and employee agree on the terms of such leave. Without an agreement between an employer and employee, leave under the FFCRA may not be taken intermittently.

Employers must keep in mind that intermittent leave must be consistent with the goal of reducing the spread of COVID-19. Therefore, where an employee must continue to report to work, intermittent leave under the FFCRA is available only when it is needed to care for an employee’s son or daughter whose school or place of care is closed because of reasons related to COVID-19. The regulations prohibit an employee from taking intermittent leave under the EPSLA if the employee: (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care

provider to self-quarantine due to concerns related to COVID-19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Intermittent leave may also be available for employees who are working remotely. The regulations provide “teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer’s business.”

Calculating Regular Rate for Leave Payment

Employers must provide paid leave under the FFCRA at the employee’s regular rate of pay. The time period for calculating an employee’s regular rate differs from calculating the regular rate of pay under the FLSA. Instead, an employee’s regular rate of pay should be representative of the employee’s regular rate from week to week. Employers should compute an employee’s regular rate of pay based upon the employee’s average number of hours worked per day over a six-month lookback period, or in the case of an employee who has been employed for less than six months, the employee’s entire period of employment.

Leave to Care for a Child

For purposes of determining whether an employee is eligible for leave under the FFCRA to care for his or her son or daughter whose school or place of care is closed, or child care provider is unavailable due to COVID-19, employers should be aware of that children includes not only children under 18 years old, but also individuals 18 years of age or older who are incapable of self-care as a result of a mental or physical disability.

Leave Under the EFMLA

Although the EFMLA provides that the first ten days of an employee’s leave may be unpaid, the regulations provide that this ten-day unpaid period should be considered two work weeks. Employees may supplement this unpaid two-week period with paid leave under the EPSLA, or other accrued or paid leave provided by an employer.

Additionally, the regulations and prior guidance from the USDOL confirm that an employee’s eligibility to take leave under the EFMLA may be impacted by the employee’s prior use of leave under the existing Family and Medical Leave Act (FMLA). For example, if an employee has already taken 12 weeks of typical FMLA leave as a result of the employee’s own serious health condition, the employee would not be eligible to take additional leave under the EFMLA. However, that employee could still qualify for paid leave under the EPSLA.

Leave Under the EPSLA

As previously noted, an employee is eligible for leave under the EPSLA if the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. The regulations broadly define a quarantine or isolation order to include a vast “range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.” Yet, the regulations make clear that an employee is not eligible for leave under the EPSLA, even if subject to a quarantine or isolation order, if the employer has work for the employee and the

employee can perform the work remotely.

Leave under the EPSLA is also available where an employee is caring for an **individual** subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns. However, the regulations clarify that this leave is limited to caring for: (1) an employee's immediate family member; (2) a person who regularly resides in the employee's home; or (3) a similar person with whom the employee has a relationship that creates an expectation that the employee would care for this individual if he or she were self-quarantined or quarantined.

Employee Notice

An employee requesting leave under either the EFMLA or the EPSLA must provide an employer with documentation in support of the leave request that includes a signed statement with: (1) the employee's name; (2) date(s) for which the leave is requested; (3) the qualifying reason for leave; and (4) a statement indicating why the employee is unable to either work in person or work remotely because of the qualifying reason.

Additionally, other information may be required depending on the reason for leave. For instance, an employee requesting leave under the EPSLA as a result of a health care provider advising the employee to quarantine must provide the name of the health care provider. An employee requesting leave under the EFMLA or EPSLA to care for the employee's son or daughter whose school or place of care is closed or child care provider is unavailable for reasons related to COVID-19 must provide: (1) the name of the child; (2) the name of the school, place of care or child care provider that is closed or unavailable; and (3) a statement that no other suitable person is available to care for the child during the period of requested leave.

Posting and Recordkeeping Requirements

As discussed in another **alert**, employers are required to post notice of an employee's rights under the FFCRA in a conspicuous place where employees or applicants may view the posting. The FFCRA regulations also permit employers to e-mail the notice or post it on the employer's internal website. An employer can mail the notice to employees who cannot access it at the employer's worksite, via e-mail or online.

Employers must retain documents related to leave under the FFCRA for at least four years. Where an employee provides oral statements in support of a leave request, an employer must memorialize the employee's statements and keep those records for four years as well.

The USDOL's regulations implementing the FFCRA are complex and this alert is not intended to cover every issue addressed in the regulations. Labor and employment issues surrounding the COVID-19 pandemic are rapidly evolving and as both the New York State and federal governments offer further guidance on these issues, we will endeavor to update clients accordingly.

As employers navigate these issues, our Firm's labor and employment attorneys are standing by to provide legal advice.

