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Didn't See That Coming: Unexpected Results of FFCRA Paid-Leave 'Temporary' Regulations

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The world continues to combat the devastating COVID-19 global pandemic. Many businesses have been forced to lay off and/or furlough untold numbers of valued employees. Still, many employers are able to continue operating, if at limited capacity. Such employers, and those who we hope will soon resume more-or-less "normal" operations, must understand and comply with the "Families First Coronavirus Response Act" of 2020 ("FFCRA").

The U.S. Department of Labor ('DOL') has recently issued 'temporary regulations' to implement the requirements of the Emergency Paid Sick Leave Act ('EPSLA') and Emergency Family and Medical Leave Expansion Act ('EFMLEA') of the FFCRA.

Not all of the temporary regulations' requirements are intuitively obvious. *Employers must carefully navigate them to avoid inadvertent violations of the FFCRA*.

The temporary regulations were issued by the Wage and Hour Division of the DOL on April 1, 2020. They are effective from April 2 through December 31, 2020, and are quite substantial. There are 24 separately-numbered regulations. For a thorough understanding of them, there is no substitute for reading them. They address such critical issues as "Paid Leave Entitlements," "Employee Eligibility for Leave," "Employer Coverage," and "Documentation of Need for Leave." That may sound pretty dry, but a clear-eyed understanding of the rules is like insurance: A luxury, until you need it. And, if you are an employer with fewer than 500 employees, then you will, at some point, almost certainly need it.

A few **selected** highlights of the temporary regulations of which we believe all employers affected by the FFCRA should be aware, *some of which are not obvious from the FFCRA itself*, are set forth below. They presume basic familiarity with the requirements and terms of the FFCRA regarding paid "public health emergency leave" and "emergency paid sick leave," which you can acquire by reading our previous articles here and here.

Meaning of Quarantine or Isolation Order

The FFCRA requires covered employers to provide *emergency paid sick leave* to their employees if such employees are unable to work (or telework) because they are subject to a quarantine or isolation order. The FFCRA does not define quarantine or isolation order, but the regulations indicate that such terms include quarantine, isolation, containment, ***shelter-in-place, or stay-at-home*** orders issued by any federal, state, or local government authority. Employers in states with more restrictive shelter-in-place or stay-at-home orders that impede employees' ability to access their workplaces are particularly vulnerable to such a broad definition. Employers who have no work for such employees to do *as a result* of such quarantine or isolation orders, however, need not provide such employees with emergency paid sick leave.

Return to Work

Employees who are covered and protected by the FMLA of 1993 generally have a right to return to work after taking job-protected leave, and employers are generally required to restore such employees to the same or equivalent positions after the taking of such leave under the EPSLA or EFMLEA. The FFCRA, however, does not protect employees from certain adverse employment actions (*g.*, layoffs). Employers will not violate the EPSLA or EFMLEA by failing to restore employees to their previous positions ***if*** such employees would have been laid off even if they had ***not*** taken the paid sick leave or expanded family and medical leave (and, perhaps more importantly, ***if*** the employer can prove it). The typical "job restoration" requirements also do not apply to highly-compensated "key" employees under the FMLA, or to employers who employ fewer than 25 employees, so long as the following circumstances/requirements are met:

1. The employee took the leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
2. The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.,* due to COVID-19 related reasons) during the period of the employee's leave;
3. The employer made reasonable efforts to restore the employee to the same or an equivalent position; **and**
4. The employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year, starting on the date that the leave related to COVID-19 concluded or the date on which the twelve weeks after the employee's leave began, whichever is earlier.

Concurrent Use of Leave

The DOL recently published corrections to its temporary regulations that clarify the concurrent use of accrued or preexisting paid leave (*e.*, paid time off) and EFMLEA leave. The clarification indicates that an employee may elect to use, or an employer **can require** its employees to use, the preexisting paid leave concurrently with EFMLEA leave so long as:

1. The employee is not taking leave under the EPSLA simultaneously; and
2. The employer's policy for preexisting leave allows employees to take the preexisting leave to care for a son or daughter.

The DOL's clarification clears up contradictions in the FFCRA and provides employers with more flexibility to keep employees from accumulating significant amounts of paid leave. Employers, however, must bear in mind that the tax credits provided by the FFCRA can be claimed *only* for the leave taken under the Act. So an employer is limited to receiving tax credits up to the applicable pay caps under the EFMLEA and EPSLA.

50 Employees or Less

Small employers have anxiously awaited the DOL's clarification of how they may exempt themselves from the FFCRA's paid leave requirements "when the imposition of such requirements would jeopardize the viability of the business as a going concern." The "Employer coverage" temporary rule explains how an "authorized officer of the business" may establish this exemption, but two obscure points are worth noting. *First*, the three-part determination pertains **only** to burdens caused by employees who take FFCRA leave **necessitated by childcare needs**—not the other qualifying reasons prescribed by the EPSLA. *Second*, regardless of whether a small business chooses to exempt one or more employees from the FFCRA, the business must still post a notice of FFCRA rights in the workplace (or via electronic means).

Two Weeks or 10 Days

Childcare-related leave runs concurrently under the EPSLA and EFMLEA. An eligible employee may take up to 12 weeks of emergency paid family leave (10 weeks of which is ***paid*** leave) for childcare-related reasons under the EFMLEA. The EFMLEA provides that the "**first 10 days** . . . may consist of unpaid leave" (emphasis added). However, the temporary rule provides that the first **two weeks (up to 80 hours)** of EFMLEA leave may be unpaid. This differs from the FFCRA statutory text limiting unpaid leave to 10 days, but practically speaking, the temporary rule aligns with how the FMLA permits concurrent substitution of paid leave.

Conclusion

Employers, as you can see, should not "wing it" when it comes to compliance with the paid-leave requirements of the FFCRA. The DOL has said that it (with some exceptions) would "not bring enforcement actions against any . . . employer for violations of the Act" until **April 18, 2020**, if "the employer . . . made reasonable, good faith efforts to comply with the Act", but that "limited stay of enforcement" has already come to an end: The DOL will now "fully enforce violations of the Act, as appropriate and consistent with the law."

Practical advice about the requirements of the FFCRA in this rapidly evolving field is therefore now more important than ever. If you have questions or concerns, contact our labor and employment attorneys or a member of our COVID-19 Response Team.

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