With Effective Date of the FFCRA Looming, DOL Offers Answers to Pressing Paid Leave Questions

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By now, you’re likely aware of the Families First Coronavirus Response Act (FFCRA). This law, which will take effect on April 1, 2020, requires certain employers to provide employees with paid sick leave under the Emergency Paid Sick Leave Act (EPSL) or expanded paid family and medical leave under the Emergency Family and Medical Leave Expansion Act (expanded FMLA) for several reasons related to COVID-19. As a refresher, the FFCRA generally provides that employees of covered employers are eligible for one of the following:

- Two weeks (up to 80 hours) of paid sick leave at the employee’s regular rate of pay where the employee is (1) unable to work or telework because the employee is quarantined (due to a federal, state, or local government order or the advice of a health care provider) and/or (2) experiencing COVID-19 symptoms and seeking a medical diagnosis; or

- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee’s regular rate of pay where the employee is (1) unable to work or telework while caring for an individual subject to quarantine (due to a federal, state, or local government order or the advice of a health care provider), (2) unable to work or telework because of a need to care for a child (either a minor child under 18 years of age or an adult child who has a mental or physical disability and is incapable of self-care because of that disability) whose school or child care provider is closed for reasons related to COVID-19, and/or (3) experiencing a substantially similar condition as specified by the secretary of health and human services, in consultation with the secretaries of the treasury and labor; or

- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee’s regular rate of pay where an employee who has been employed for at least 30 calendar days is unable to work or telework due to a need to care for a child whose school or child care provider is closed for reasons related to COVID-19.

Private employers with fewer than 500 employees and certain public employers are covered. Small businesses with fewer than 50 employees may qualify for exemption, which is discussed below.

When the FFCRA was passed, the quickly drafted law left us with more questions than answers. Since then, you’ve probably heard a good bit of conjecture and conflicting opinions about, for example, whether leave can be taken intermittently and whether employees who have been furloughed are entitled to paid leave. Guidance from the US Department of Labor (DOL) finally offers some answers, just in time for the April 1 effective date. Let’s take a look at some of the questions we’re hearing from employers of varying sizes across a range of industries.

“What public-sector employees are entitled to paid sick leave?” Generally, all of them. Employees of a public agency, and employees of a unit of government such as the United States, a state, a city, a parish, or a similar government entity, are likely entitled. Federal employees are encouraged to seek guidance from their respective employers as to eligibility.

“What public-sector employees are entitled to expanded FMLA?” The answer to this one is different, and it depends on the circumstances. Generally, employees of a non-federal public agency are entitled to...
expanded FMLA. Again, federal employees are encouraged to seek guidance from their respective employers as to eligibility.

“My business has fewer than 50 employees. Do I have to provide paid sick leave or expanded FMLA?” Maybe. Your business is exempt from certain requirements if providing an employee with leave would jeopardize the viability of the business as a going concern. Put another way, a small business is exempt from mandated paid sick leave or expanded FMLA in cases where the following conditions are true:

- The employer employs fewer than 50 employees.
- The leave is requested because the child’s school or place of care is closed, or the child care provider is unavailable, due to reasons related to COVID-19.
- An authorized officer of the business has determined one of the following conditions is satisfied:
  - The provision of paid sick leave or expanded FMLA would result in the small business’s expenses and financial obligations exceeding available business revenues and would cause the small business to cease operating at a minimal capacity.
  - The absence of the employee(s) requesting paid leave or expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of the specialized skills, knowledge of the business, or responsibilities of the employee(s).
  - 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(s) requesting paid sick leave or expanded FMLA, and the labor or services are needed for the small business to operate at a minimal capacity.

The DOL does still encourage employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

“Who qualifies as a ‘health care provider’ who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?” Anyone employed by virtually any type of health care provider may be exempted from the paid leave provisions.

“How does the two weeks or up to 80 hours of paid sick leave under the EPSL work?” Receiving paid sick leave under the EPSL depends on whether the employee is full time (normally scheduled to work 40 or more hours per week) or part time (normally scheduled to work fewer than 40 hours per week).

A full-time employee gets paid sick leave for hours the employee normally would have been scheduled to work, even if that’s more than 40 hours in a week. But the paid sick leave caps at 80 hours, so if an employee typically works 50 hours a week, the employee can take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. While these overtime hours should be included in the overall count, there’s no obligation to pay a premium for overtime hours.

A part-time employee is entitled to leave for the average number of work hours in a two-week period. If the hours scheduled are unknown or vary, you can use a six-month average to get an average of daily hours. A part-time employee may take paid sick leave for this number of hours per day for up to a two-week period (and then expanded FMLA for the same number of hours, if applicable).

“When can employees telework under the FFCRA?” Employees may perform work while at home or at a location other than the normal workplace whenever their employer permits. Of course, telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA. This means you need to provide clear guidelines about what constitutes time worked and to ensure employees have timekeeping mechanisms in place so they can accurately record all time worked.

“What if an employee says work or telework isn’t possible?” You need to gather information about why the employee is unable to work. If you have work for the employee but one of the COVID-19-qualifying reasons set forth above prevents the employee from being able to perform that work, the employee may be entitled to paid leave.

“Can the company ask for documentation to support the need for paid leave?” Yes. When an employee takes paid sick leave under the EPSL, you can require that employee to provide appropriate documentation in support of the reason for leave, such as the qualifying reason for requesting leave, a statement that the employee is unable to work or telework for that reason, and the date(s) for which leave is requested. You can also request documentation of the reason for leave, such as a note from a doctor advising the employee
You can also require appropriate documentation in support of an employee’s decision to take expanded FMLA. This might be a screenshot from a school’s website notifying of the school’s closure, an email from an employee or official of the school, or a notice on a child care website, for example. You should maintain this documentation, especially if you plan to claim a tax credit for payment of the sick leave wages or the expanded FMLA. We recommend keeping it in a separate, confidential file just as you would for routine Family Medical Leave Act documentation.

Remember that if your business is a covered employer under the typical unpaid FMLA provisions, the traditional FMLA rules on documentation apply if the employee needs FMLA leave for traditional reasons. For instance, if the employee requests leave beyond the initial two weeks of paid leave under the EPSL for the employee’s own serious health condition related to COVID-19, you may require the typical FMLA medical certifications.

“Can an employee take paid sick leave or expanded FMLA intermittently while working at the regular worksite (not teleworking)?” It depends. If the employee is not teleworking but is working at the regular worksite, and is taking EPSL leave (which covers the initial two weeks, or up to 80 hours, of paid sick leave) for any of the following reasons, the employee may not take that leave intermittently:

- Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Employee 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 COVID-19 concerns.
- Any other substantially similar condition specified by the secretary of health and human services.

Unless the employee is teleworking, if the employee begins taking EPSL leave for any of the above reasons, the employee must continue to take paid sick leave until it runs out, or the employee no longer has a qualifying reason for taking EPSL leave. The EPSL leave must be taken in full-day increments under these circumstances. The DOL explains that the intent of this law is to keep an employee who is sick, possibly sick, or caring for someone who is sick or possibly sick away from the worksite, and thus prevent the employee from spreading the virus.

If the employee is not teleworking but is working at the regular worksite, and is taking EPSL leave to care for a child whose school or place of care is closed because of reasons related to COVID-19, the employer may (but does not have to) allow the employee to take the EPSL leave and/or expanded FMLA intermittently. The DOL encourages collaboration and flexibility, including allowing intermittent leave in less than full workday increments under this circumstance. If leave will be taken intermittently, the DOL suggests employers and employees agree on a schedule. We recommend that the company document any agreement reached with the employee regarding intermittent leave and the schedule for same.

“Can an employee take paid sick leave or expanded FMLA intermittently while teleworking?” Yes, if the employer agrees. If an employee is unable to telework during the normal schedule of hours due to any qualifying reason under the EPSL or the expanded FMLA, the employer may agree to permit EPSL and expanded FMLA to be taken intermittently while the employee is teleworking. The intermittent leave may be taken in any increment the employer and the employee agree upon. The DOL encourages collaboration and flexibility.

“If an employee already has used some or all allotted leave under the FMLA, does the employee qualify for leave for a reason related to COVID-19?” An employee is still entitled to paid sick leave under the EPSL regardless of how much FMLA leave has been taken. But eligibility for expanded FMLA depends on how much leave the employee has already taken during the 12-month period the employer uses for FMLA leave. An employee can take only a total of 12 weeks of FMLA and expanded FMLA, not 12 weeks of each type.

“If the company has temporarily shut down, are employees still eligible for paid sick leave or expanded FMLA?” No. This is true regardless of whether the worksite is closed for lack of business or because it is required to close pursuant to a federal, state, or local order. And it doesn’t matter whether the company closes the worksite before April 1, on April 1, or after April 1. If an employee happens to be on leave at the time the workplace is closed, the employee is due any paid sick leave or expanded FMLA used before the business closed, but the employee is no longer entitled to any paid leave after the worksite closes.

The answer remains the same even if the company closes for a short period of time and intends to reopen at some point in the future. However, if the company reopens and the employee resumes work, the employee would
then be eligible for paid sick leave or expanded FMLA as warranted.

“If the company is open but furloughs an employee on or after April 1, is the employee entitled to paid leave?” No. If employees are furloughed on or after April 1 because there is not enough work for the employees, regardless of whether the company remains open, those furloughed employees are not entitled to take paid sick leave or expanded FMLA.

“If the company has less work and thus reduces employees’ work hours, are the employees entitled to paid sick leave or expanded FMLA for the hours the employees are no longer scheduled?” No. Employees can’t use paid sick leave or expanded FMLA to make up for the reduction in hours if the reduction is due to a lack of work. Put another way, these employees aren’t prevented from working those hours due to a qualifying reason related to COVID-19 (even if the lack of work is related to COVID-19). But if the employees aren’t able to work their full schedule because of a qualifying reason related to COVID-19 (as opposed to a reduction in hours due to a lack of work), then the employees can take paid sick leave or expanded family leave to make up the difference between the normal work schedule and the reduced work schedule.

“Does the company have to return employees who take paid sick leave or expanded FMLA to work?” Generally, yes — employers must provide the same (or an equivalent) job to an employee who returns to work following leave. This means the company can’t fire, discipline, or otherwise discriminate against an employee for taking paid sick leave or expanded FMLA, filing a complaint or proceeding under the FFCRA, or having or intending to testify in any such proceeding.

But employees aren’t protected from employment actions like a layoff for legitimate business reasons (such as closure of the worksite) that would have affected them regardless of whether leave was taken. You will have to demonstrate that you would have taken the same action if the employee hadn’t taken leave, so be sure to sufficiently document all adverse employment actions. Yes, you should always do this, but given how hectic things are during this pandemic, it bears repeating that you should pay particular attention to your documentation while the FFCRA is in effect.

You can also refuse to return a highly compensated “key” employee (as defined under the FMLA) to work in the same position, but this is a very narrow exception that should be used only in consultation with your employment lawyer. Additionally, if your company has fewer than 25 employees, and an employee took leave to care for a child whose school or place of care was closed or whose child care was unavailable, you can refuse to return the employee to work in the same position if all the following hardship conditions are met:

- The position no longer exists due to economic or operating conditions that affect employment and/or due to reasons related to COVID-19 during the period of leave.
- The company makes reasonable efforts to restore the employee to the same or an equivalent position.
- The company makes reasonable efforts to contact the employee if an equivalent position becomes available.
- The company continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 concludes or on the date 12 weeks after the employee’s leave began, whichever is earlier.

Frankly, these conditions sound like a nightmare for employers to keep up with, especially while also trying to return to some semblance of normality, so we recommend relying on this approach sparingly, if possible.

“Can the company supplement an employee’s paid leave under the FFCRA with paid leave available under company policy?” Only if the company and the employee agree. An employee can’t simultaneously take both paid sick leave or expanded FMLA and existing paid leave available under company policy (e.g., paid sick leave, vacation, or paid time off) without the company’s permission. The company isn’t obligated to provide supplementary pay, though, and won’t receive tax credit for the supplemental amounts. On the flip side, the company can’t make an employee use existing paid leave under company policy to supplement the amount due under the FFCRA. And paid sick leave under the EPSL is in addition to other leave provided by applicable law, a collective bargaining agreement, or the company’s existing policy, so any paid sick leave would not count against other paid sick leave to which the employee is entitled.

“What if the company wants to pay extra?” That’s fine and generous of you during these uncertain times, but keep in mind that you won’t receive tax credit for those excess payments.

“What can an employee do if the company refuses to provide paid sick leave and/or expanded FMLA?” The DOL is encouraging employees to first discuss their concerns with their employer. But regardless of whether an employee raises the issue with you, the employee can go to the Wage and Hour Division (WHD) of the
DOL to complain. And in most cases, the employee will be able to file a lawsuit against your company directly, without contacting WHD. (Public-sector employees may face additional hurdles.)

With COVID-19 testing on the rise, there will inevitably be more employees (and their family members) testing positive and thus requesting paid leave under the FFCRA. Similarly, restrictions continue to be placed on which businesses are allowed to operate, and as most people revert to staying at home, your business may slow down. Whether an employee is entitled to paid leave under the FFCRA is a determination best made after consulting with your employment lawyers. Getting this wrong may subject your business to penalties or litigation, creating an impact that’s likely to last beyond the pandemic itself.

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