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The Families First Coronavirus Response Act: What We Know Now

The Families First Coronavirus Response Act ("FFCRA") became law on March 18, 2020. Since its enactment, there have been mixed interpretations of the requirements, causing confusion for employers. Recently, however, the DOL answered many practical questions and filled in gaps in the text of the law. With the benefit of this additional guidance and regulations from the DOL , here is what we have learned about FFCRA since its passage.

Background

The main tenets of the FFCRA have not been altered. The FFCRA provides for two new categories of leave. The Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA") apply to employers with fewer than 500 employees.

The EPSLA provides 80 hours (or two weeks if the employee is part time) of paid leave at 100% of the employee's regular rate capped at $511/day ($5,110 in aggregate) for employees that cannot work or telework because:

i. the employee is subject to a federal, state or local coronavirus quarantine or isolation order;

ii. the employee has been advised by a health care provider to self-quarantine due to coronavirus concerns;

iii. the employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis.

The EPSLA provides the same benefit, but paid at 2/3 the regular rate and capped at $200/day ($2,000 in aggregate) if the employee cannot work or telework because:

iv. the employee is caring for an individual described in (i) or (ii) above;

v. the employee is caring for a child whose school or place of care is closed, or the child care provider of the child is unavailable, due to COVID-19 precautions; or

vi. the employee is experiencing any other substantially similar condition specified by HHS in consultation with the Treasury and Labor Departments.

The EFMLEA provides twelve weeks of job protection (the first ten days are unpaid followed by ten weeks of paid leave to be paid at 2/3 of the employee's regular rate capped at $200/day and $10,000 in aggregate) for employees who cannot work or telework because of "a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." These payments are fully reimbursed by the government as a credit against certain payroll taxes owed by the employer.

How is the 500 employee threshold determined?

Generally, if an employer has less than 500 employees at the time the employee's requested leave will start, it is covered under FFCRA. The DOL then applies three different tests with respect to counting employees. First, in determining whether a worker is an employee or an independent contractor, DOL utilizes the existing framework for analyzing this question under the Fair Labor Standards Act ("FLSA"); in most jurisdictions this is a version of the economic realities test. Second, in determining whether a company is a joint employer of an employee (or group thereof) with another company the DOL again will apply the analysis of joint employer status under the FLSA. Third, to determine if two companies are so closely connected that they should be considered as one the DOL will apply the integrated employer test of the FMLA.

Are certain employers and employees exempt from the requirements of FFCRA?

Employers can exempt "health care providers" from all leave under FFCRA. For this purpose, a "health care provider" includes "anyone employed 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." This also includes any employee of an entity that contracts with the aforementioned institutions "to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility." If, however, the employer decides to include these

individuals, the employer may still receive tax credits for the leave paid to their health care provider employees under FFCRA.

Businesses with fewer than 50 employees can claim exemption from providing paid leave to employees out due to childcare under the EPSLA and under the EFMLEA if providing the leave jeopardizes the business's viability. Note, this is only available relevant to absences due to childcare needs. The business must have an authorized officer determine that (1) providing the leave would cause financial obligations to exceed revenues causing the business to cease operating at a minimal capacity, (2) the absence of the employee(s) and the related specialized skills/knowledge/responsibilities would create a substantial risk to the business's finances or operations, or (3) there are not sufficient workers to ensure that the business will be able to continue to operate at a minimal capacity.

What is a "quarantine or isolation order" for EPSLA purposes?

Quarantine or isolation orders include a broad 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, that cause an inability to work. The key question in this definition is whether the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order. In other words, is there work available for the individual? An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee due to slowdown or shutdown.

What type of care makes an employee eligible for paid leave?

The EFMLEA provides for leave for care of a "son or daughter under 18 years of age," however DOL is interpreting this to include older children with a disability and who are, as a result, incapable of self-care. The care provisions of the EPSLA apply to immediate family members, people who reside in the same home, or others where the relationship creates the expectation of care.

Can paid leave under EPSLA be taken with other forms of paid leave?

If an employee is eligible for EPSLA, an employer may not require them to first use or exhaust other accrued paid leave. An employee may elect to supplement their EPSLA leave though. The DOL explains, "[d]uring the first two weeks of unpaid expanded family and medical leave, you may not simultaneously take paid sick leave under the EPSLA and preexisting paid leave, unless your employer agrees to allow you to supplement the amount you receive from paid sick leave with your preexisting paid leave, up to your normal earnings. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, however, you may elect—or be required by your employer—to take your remaining expanded family and medical leave at the same time as any existing paid leave that, under your employer's policies, would be available to you in that circumstance."

How does leave under EFMLEA interact with FMLA leave in general?

If the employer was previously subject to the FMLA prior to FFCRA, then the EFMLEA leave available to the employee will be reduced by any FMLA leave used by the employee in the applicable twelve-month period. In other words, EFMLEA leave and any other FMLA leave are limited to a combined twelve weeks in an applicable twelve-month period.

Can leave be taken intermittently?

With respect to telework only, the answer is yes if the employer permits it; such intermittent leave may be taken in any agreed-upon increment. With respect to work at the ordinary worksite, intermittent leave is generally not allowed, except when leave is being taken to care for a child, but is permitted in full-day increments. If an employer agrees to it, an employee may take EPSLA or EFMLEA leave to care for a child intermittently in any agreed upon increment of time.

Does FFCRA prevent business owners from making business decisions about its labor force?

No. If an employer closes, shuts down a department, or generally applies a layoff or furlough that impacts an employee on FFCRA leave, then the leave benefit would cease on the date that the work was no longer available to the employee. FFCRA leave cannot be used to make unpaid leave due to lack of work paid or fill a gap left by a reduction in hours either.

Does the credit include an allowance for health insurance paid by the employer?

The credits are increased to include amounts employers pay for the employee's health plan coverage while they are on leave. The amounts must be "properly allocated" to the qualified emergency leave and sick leave wages of the employee, meaning they are calculated on a pro rata basis (among covered employees and periods of coverage).

How do employers get reimbursed?

The IRS has worked to put money for paid leave back in employers' pockets as quickly as possible. As such, instead of seeking a reimbursement from quarterly payroll taxes, employers can simply refrain from depositing the amount of FFCRA leave paid from quarterly federal employment taxes. Employers can also seek an advance if the amount of the leave paid is greater

than the tax obligation.

What documents must employers maintain?

No FCCRA forms have been promulgated yet, but we recommend creating internal forms. Employers must somehow document the name of an employee requesting leave, the dates of the leave sought, the reason for the leave, and a statement from the employee that the stated reason prevents the employee from being able to work. If the leave is related to a quarantine or isolation order, employers should also document the government entity that issued the order. Likewise, if the leave is based on an order from a health care provider to self-quarantine, employers should document the name of the health care provider. Employers do not need nor should they require a note from the health care provider. Lastly, if the leave is based on care for a child, employers should document the name of the child, the name of the school/place of care/provider that is not available, and a statement from the employee that no other suitable care is available. Employers should also document the method of calculating and the amount of paid leave so that it can seek reimbursement. These records must be maintained for four years.

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As an accomplished labor and employment attorney and Department Chair, Mr. Berger provides business counsel to employers on employee matters and is well-versed in litigating in both state and federal courts. Russell Berger is the trusted legal counsel every business owner needs to feel confident in their decision-making and secure with their assets. As a Practice Group Director at Offit Kurman, Mr. Berger has direct experience with managing other managers, which he draws from in advising his clients. He is a pragmatic problem-solver that works efficiently and tirelessly to present his clients the best possible solutions to their most complicated issues. He represents employers, businesses, and professionals in employment disputes across the nation

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Ms. Batista is a Labor & Employment attorney that assists her clients when deciding issues like: If my employee has exhausted her FMLA leave and remains out, am I required to hold her position open? Can I terminate my employee for testing positive for marijuana? Will this non-compete agreement be enforced? She helps her clients answer these and similar questions, and vigorously defends their decisions. She represents businesses, such as restaurants, hotels, banks, retailers and health care providers, in the spectrum of employment and labor claims. Specifically, Ms. Batista successfully defends employers against claims of discrimination and harassment, retaliation, wrongful terminations and wage and hour violations. An employee's post-separation conduct often requires legal advice and action too. Ms. Batista commonly represents her clients in bringing actions for breach of restrictive covenants and contractual interference, as well as defends them against such claims. Employment and labor law is ever changing. Employers need to feel secure in how they manage their employees so they can focus on their business. Ms. Batista affords her clients that security.