Practical Issues for Employers in Navigating the New Federal Emergency Paid FMLA and Sick Leave Mandates

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Agenda

- Where We are **RIGHT NOW**
- Key Provisions of EPSL and FMLA+
- Practical Questions and Issues
- Disability and Reasonable Accommodation
The Families First Coronavirus Response Act (FFCRA)—H.R. 6201

- Enacted March 18, 2020 — took effect April 2, 2020
- Divisions of the Final Law
  A. Appropriations
  B. Nutrition Waivers
  C. **Emergency Family and Medical Leave Expansion Act (“FMLA+”)**
  D. Emergency Unemployment Insurance Stabilization and Access Act of 2020
  E. **Emergency Paid Sick Leave Act (“EPSL”)**
  F. Health Provisions
  G. **Tax Credits for Paid Sick and Paid Family and Medical Leave**
  H. Budgetary Effects

- DOL published a model notice that all covered employers must post
The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor’s (Department) Wage and Hour Division (WHD) administers and enforces the new law’s paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Generally, the Act provides that employees of covered employers are eligible for:

- Two weeks (up to 80 hours) of paid sick leave at the employee’s regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or 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 because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is 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; and

- 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 due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Covered Employers: The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. [1] Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Eligible Employees: All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19. [2]

Notice: Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.
Where Things Stand Right Now

- This thing moved quickly (first draft out of House, to enacted, in four days)
- DOL has issued temporary regulations
- DOL information pages:
  - https://www.dol.gov/agencies/whd/pandemic
  - https://www.dol.gov/agencies/whd/ffcra
Overview of Paid Leave Provisions

**FFCRA**

- **Emergency Paid Sick Leave**
  - Up to 80 hours (~first 10 days)
  - 6 different reasons
  - Full pay or 2/3 pay (depending on reason)—subject to caps

- **Emergency Paid FMLA**
  - Up to 12 weeks (~Days 11 – 60)
  - 1 reason only
  - Weeks 1-2: unpaid
  - Weeks 3-12: 2/3 pay—subject to caps
Emergency Paid Sick leave (EPSL)

*Paid Time Off for the First 80 Hours*
Employer Coverage for Both EPSL and FMLA+

• Which Employers are Covered?
  − A private employer with fewer than 500 employees;
  − A public agency (federal/state governments, political subdivisions, schools); and
  − [for EPSL only] “Any other entity that is not a private entity”
The Question of the Hour for Employers—How Do We Count “500” Under this Law?

• Why no larger (500+) companies?

• Counting the 500:
  - As of the date leave begins
  - Include temps and employees on leave
  - Absent integration, each company stands alone
Who is Eligible to Take EPSL?

- Who is an *Eligible Employee*?
  - Eligible on **DAY ONE** of employment

- How about:
  - Part-time/full-time employees?
  - Temporary or seasonal employees?
  - Staffing companies?
For What Reasons May an Employee take EPSL

Employee is unable to work or telework because:

1. Employee subject to a quarantine or isolation order related to COVID-19

2. Employee advised by a health care provider to self-quarantine because of COVID-19

3. Employee experiencing symptoms of COVID-19 and is seeking a medical diagnosis

4. The employee is caring for an individual subject or advised to quarantine or isolation

5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precaution (like FMLA+)

6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
How in the World is this Documented?

- Can employers require documentation?
- State/local paid sick leave laws and documentation
How Much EPSL Leave is Provided, and How is it Paid?

• How long
  - Full-time employees: 80 hours
  - Part-time employees: the number of hours that the employee works, on average, over a 2-week period
  - How do employers deal with a varying work week?

• How much?
  - EPSL Reasons 1/2/3: 100% of regular rate, max of $511 per day ($5,110 in total)
  - EPSL Reasons 4/5/6: Two-thirds of the employee’s regular rate, max of $200 per day ($2,000 in total)
Sequencing Leave – Paid Sick Leave, Then Employer Policy

- Employer must allow the employee to first use EPSL provided for under this new leave law
- The employer *cannot* require the employee to use accrued leave under an employer policy first
- What you already have provided doesn’t count against new law’s requirement—no matter how generous
- More generous options: no tax credit
Emergency Family and Medical Leave Act (FMLA+)

Could Be Weeks 1-12,
But Only Pays for Weeks 3-12
Key Principle of FMLA+ to Remember

**FFCRA does not expressly change a provision of the FMLA, it adds to it**

(i.e., FMLA classic rules apply, unless H.R. 6201 or DOL tells us otherwise)
Employer Coverage/Employee Eligibility FMLA+

- Which Employers are Covered?
- Which Employees are Eligible?
FMLA+: One Reason, Up to 12 Weeks

- Original version was all six reasons like EPSL—now just ONE reason
- Employee can take leave for “a qualifying need related to a public health emergency”—but there is only one qualifying need: when an employee is unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency
How Do the 12 Weeks Work?

- The first **80 hours** (two weeks) are unpaid FMLA+, but an employee has EPSL #5 for 2/3 wages during that time (both are running concurrently)
- The remaining **10 weeks**:
  - Paid at 2/3 of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work
  - Maximum payment of $200 per day and $10,000 total
Job Protection and Restoration Under FMLA+

- FMLA+ is job-protected like FMLA classic
More Remaining Issues and Questions

1. Intermittent EPSL or FMLA+?
2. EPSL/FMLA+ and state/local leave laws?
More Remaining Questions—What About Layoffs/Terminations?

What about terminations, layoffs, RIFs, etc. prior to and after April 2—do those employees still have paid leave rights under EPSL or FMLA+?

*Don’t forget compliance with federal, state and local laws concerning business closures, layoffs, and terminations*
FMLA+, EPSL, and Disability Accommodations
“Classic” FMLA In a New Light

- COVID-19 as a “serious health condition”
- Interplay between FMLA and FMLA+
“Classic” ADA In a New Light

- **Vulnerability to COVID-19**
  - Underlying impairments and other statuses creating – or possibly creating – “high risk” of severe symptoms if COVID-19 contracted
  - Current List (CDC):
    - Asthma
    - Chronic Lung Disease
    - Diabetes
    - Serious Heart Conditions
    - Chronic Kidney Disease (w/ dialysis)
    - Severe Obesity
    - Immunocompromised
    - Liver Disease
    - Age 65 or Above
    - Pregnant

- “Fear” of COVID – Anxiety and other mental health issues
- Disability-based objections to employer policy requiring wearing of masks, gloves, etc.
- EEOC’s Technical Assistance Questions and Answers (Last Updated 4/17/20)
Disability Accommodations

- Accommodation Process Strategy -- Requests to Be Excused from Workplace
  - Assess proper inquiry
  - Use proper *customized* ADA paperwork
Disability Accommodations

• Accommodation Process Strategy -- Requests to Be Excused from Workplace
  - Practical considerations
  - “Undue Hardship” Analysis
  - Employees 65 and older
  - Pregnancy accommodation requests
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