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The Families First Coronavirus Response Act
Frequently Asked Questions Based Upon The New (4/1/2020) DOL Regulations

By Tina M. Maiolo, Esq.

Q: If an employee takes paid sick leave under the FFCRA for one of the medical related reasons and then needs leave to take leave to care for a child whose school is closed or otherwise has no childcare because of the virus, do they get paid for the first 10 days of extended family and medical leave?

An employee can only take the paid sick leave once. So, if they exhaust the leave for one reason, they do not get another two weeks if another qualifying reason arises. In that case, the first ten days (or two weeks, see below) of the leave would be unpaid. For example, if an employee takes paid sick leave because they were told to self-quarantine and then needs to take extended family leave to care for a child whose school is closed or does not have child-care because of the COVID-19 virus, the first two weeks of the extended family leave would be unpaid. The employee can, however, elect or be required to use accrued paid leave to cover that time.

Q. What is the definition of "quarantine or isolation order" under the FFCRA?

According to the DOL, 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.

Q. If I hire a new employee, do I have to give them the 80 hours of paid sick leave if they have a qualifying reason?

Yes, but only if the employee was not provided the 80 hours of paid leave by his/her previous employer. Once an employee takes the maximum 80 hours of paid sick leave, he or she is not entitled to any paid sick leave from a subsequent employer. If an employee changes positions before taking 80 hours of paid sick leave, then his or her new employer (if covered by FFCRA) must provide paid sick leave until the employee has taken 80 hours of paid sick leave total regardless of the employer providing it.

Q. Can an employee elect to use accrued paid leave to supplement income while out on FFCRA leave?

Yes, an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off, concurrently.

Q. If an employee elects, or is required, to use accrued paid leave while on FFCRA leave because of a need to care for a child, does the employer still get the tax credit?

Yes. If expanded family and medical leave is used concurrently with another source of paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken, even if that amount is greater than $200 per day or $10,000 in the aggregate. But the employer's eligibility for tax credits is still limited to the cap of $200 per day or $10,000 in the aggregate.

Q. Can an employer require an employee to use accrued paid leave before they are allowed to use paid sick leave under the FFCRA?

No. Paid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before the EPSLA became effective on April 1, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave.

Q. What type of enforcement proceedings are available under the FFCRA?

An employer who violates the paid sick leave requirements or who violates the prohibition on discharge, discipline, or discrimination under the paid sick leave requirements is considered to have violated the Fair Labor Standards Act. Therefore, with respect to such violations, the relevant enforcement provisions of the FLSA apply.

For purposes of the EFMLEA, employers are subject to the prohibitions that apply with respect to all FMLA leave. Specifically, employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under the FMLA, including the EFMLEA; discriminating against an employee for opposing any practice made unlawful by the FMLA, including the EFMLEA; or interfering with proceedings initiated under the FMLA, including the EFMLEA. Therefore, for any such violations, employers are subject to the enforcement provisions set forth in section 107 of the FMLA.

There is one exception, however, for employers with less than 50 employees within a 75 mile radius: an employee may not bring a private action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA. In other words, an employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year, as required by section 101(4)(A)(i) of the FMLA.

Q. Does an employer have any record-keeping requirements under the FFCRA?

Yes. An employer is required to retain all documentation related to requests and approval of leave under the FFCRA for four years, regardless of whether leave was granted or denied. If an

Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years. If an employer denies an employee's request for leave pursuant to the small business exemption, the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.

Q. What type of documentation can an employer request/does an employee have to provide to support leave under the FFCRA?

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. Such documentation must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. An employee requesting paid sick leave because the government has issued a quarantine or isolation order, the employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. An employee requesting paid sick leave because a health care provider advised him or her to self-quarantine for COVID-19 reasons, the employee must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons. An employee requesting paid sick leave to care for an individual subject either of those two reasons, must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave under or expanded family and medical leave to care for his or her child must provide the following information: (1) the name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.

Q. Can an employee take FFCRA on an intermittent basis?

Yes, but only if the leave is taken with employer consent and if there is minimal risk that the employee will spread the disease. So, if the employee is teleworking and has the employer's approval, the employee can take leave on an intermittent basis regardless of the qualifying reason for the leave. If, the employee is coming to work, however, leave can only be taken on an intermittent basis if the qualifying reason for the leave is to care for a child whose school is closed or the child-care provider is unavailable because of COVID.

Q. Are employers with less than 50 employees exempt from the FFCRA?

Maybe. First, the exemption only applies to employers with less than 50 employees who provide leave for reasons of childcare and school closures related to COVID-19, and who can prove that providing paid leave to those individuals would jeopardize the viability of the business. An "authorized officer" of the business must determine whether it meets this criteria, according to the guidance.
The viability of the business would be in jeopardy when: (1) such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

If a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

Q. The CARES Act clarified that employees laid-off or terminated after March 1, 2020, can be eligible for leave under the EFMLEA, in what circumstances would that apply?

An employee who was laid off or otherwise terminated by the Employer on or after March 1, 2020, and rehired or otherwise reemployed by the Employer on or before December 31, 2020, may claim leave while the Act remains in effect, and provided that the Employee had been on the Employer's payroll for thirty or more of the sixty calendar days prior to the date the Employee was laid off or otherwise terminated.

Q. My employees work three days a week, 12-hour shifts, so they would get sick days of paid leave under the EPSLA, does this mean that they have to have 4 days of unpaid leave before they can use EFMLEA leave?

No. To avoid this very type of situation, the DOL has decided that the proper interpretation of

the unpaid period under the EFMLEA should be "2 weeks" instead of 10 days. So, in this situation provided the person has been given two weeks of paid sick leave under the Act, with weeks defined as the employee's normal workweek, they do not have to take any unpaid leave under the EFMLEA.

Q. Is leave under the EFMLEA in addition or on top of the 12 weeks of leave allowed under the FMLA?

No. EFMLEA does not expand the total number of weeks available. Any time taken by an eligible employee as expanded family and medical leave counts towards the twelve workweeks of FMLA leave to which the employee is entitled under section 102 of the FMLA and 29 CFR 825.200.

Q. What does it mean to be "unable to work" under the FFCRA?

An employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work. According to the DOL, an example of an "extenuating circumstance" would be a power outage. The DOL also said an employee is "able to work" if required to use their own computer or similar equipment.

With regard to being unable to work because the employee has to care for a child, the employee is only "unable to work" when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child-care provider—is available to provide the care the employee's child needs.

Q. Is an employee "able to work" if the employer gives them flexible hours?

Yes, an employee is "able to work" if the employer gives them flexible hours, provided the employee can actually work those flexible hours.

Q. Are there any changes to the FLSA requirements for "teleworking" under the FFCRA?

According to the DOL, telework is no less work than if it were performed at an employer's worksite. As a result, employees who are teleworking for COVID-19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the FLSA. However, an employer is not required to compensate employees for unreported hours worked while teleworking for COVID-19 related reasons, unless the employer knew or should have known about such telework.

While the Department's regulations and interpretations of the FLSA generally apply to

employees who are teleworking for COVID-19 related reasons, the Department has concluded that § 790.6 of the FLSA and its continuous workday guidance are inconsistent with the objectives of the FFCRA and CARES Act only with respect to such employees. The FFCRA and the DOL regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons. But section 790.6 and the DOL's continuous workday guidance generally provide that all time between performance of the first and last principal activities is compensable work time. The DOL has determined that applying this guidance to employers with employees who are teleworking for COVID-19 related reasons would disincentives and undermine the very flexibility in teleworking arrangements that are critical to the FFCRA framework Congress created within the broader national response to COVID-19. As a result, the DOL has determined that an employer allowing such flexibility during the COVID-19 pandemic shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID-19 related reasons on the following schedule: 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays. This allows an employee, for example, to help teach children whose school is closed or assist the employee's parents who are temporarily living with the family, reserving work times when there are fewer distractions. Of course, the employer must compensate the employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between the employee's first principal activity at 7 a.m. and last at 9 p.m. Section 790.6 and the Department's guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID-19 related reasons.

Q. Can an employee take FFCRA leave to care for someone else's child whose school is closed or child-care is unavailable because of the COVID-19 virus?

The FFCRA specifically says the protections only apply to care for the employee's son or daughter under age 18. However, it should be noted that the DOL has expanded the definition to include not only the employee's son or daughter under the age of 18, but also sons/daughters over the age of 18 who are not capable of self-care. The remaining definition of son or daughter provided by the FMLA is adopted: biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.

Q. If I have less than 25 employees, do I have to reinstate to the same or similar position following FFCRA leave?

Maybe. Employers with less than 25 employees can be exempted from the requirement to restore an employee to the same or similar position if it can prove it: (a) had to make organizational changes as a result of this COVID-19 crisis; (b) tried to restore the employee after FMLA leave but no longer has a position to put him/her in because of the reorganization, and (3) made reasonable efforts the employee for 12 months following the leave should the position or a

substantially similar one become available.