DOL Issues New Rule on COVID-19 Sick and Family Leave Pay

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On Wednesday, April 1, the U.S. Department of Labor (DOL) issued a temporary federal rule that provides additional guidance regarding how employers should implement the protections afforded under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), both part of the Families First Coronavirus Response Act (FFCRA), which became effective on April 1. The EPSLA provides for up to 80 hours of fully or partially paid sick leave for six enumerated reasons related to COVID-19, while the EFMLEA provides for up to 12 weeks of leave (ten weeks of which are partially paid) to care for a child whose school or childcare is closed or unavailable due to COVID-19. Guidance summarizing the paid leave provisions of the FFCRA generally is available **here**. The temporary rule provides additional information about?and in some instances, imposes changes to?previous guidance issued by the DOL. A summary of key topics addressed in the temporary rulemaking is provided below.

1. Which employers are covered under the FFCRA?

All private employers that employ fewer than 500 employees must comply with the EPSLA and the EFMLEA, unless they qualify for the small employer exemption outlined in Question # 4. This determination of employer coverage is dependent on the number of employees at the time an employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date for any qualifying reason, the employer must provide paid sick leave to that employee. If, however, another employee requests qualifying leave on August 3, 2020, and, due to new hires, the employer now employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to this second employee.

2. Who is an employee for the purposes of determining eligibility for leave?

29 C.F.R. 826.30 sets out the criteria for determining an employee?s eligibility to receive paid sick leave under the EPSLA and EFMLEA:

- *All employees* of a covered employer are eligible for 80 hours of paid leave under the EPSLA. There is no minimum duration of employment required prior to being eligible for this type of leave.

- To be eligible for twelve weeks of partially paid leave under the EFMLEA, an employee must have been employed by a covered employer for at least thirty (30) calendar days, meaning the employer had the employee on its payroll for the 30 calendar days immediately prior to the day that the employee?s leave would begin. In addition, Section 826.30(b)(1)(ii) provides that an employee who is laid off or otherwise terminated after March 1, 2020 and rehired prior to December 31, 2020 is eligible for EFMLEA leave upon rehire *if* the employee had been on the employer?s payroll for thirty or more of the sixty (60) calendar days prior to the date the employee was laid off or otherwise terminated. For example, an employee who was originally hired by an employer on January 15, 2020, is laid off on March 14, 2020, and subsequently rehired by the same employer on October 1, 2020, would be eligible for leave under the EFMLEA immediately, because the employee was on the payroll for at least 30 of the 60 days prior to being laid off.

3. Does the FFCRA apply equally to non-profits?

Yes. The FFCRA does not distinguish between for-profit and non-profit entities; employers of both types must comply with the FFCRA if they otherwise meet the requirements for coverage. *See* Section 826.40(a). As discussed below in Question #4, non-profits who employ fewer than 50 employees may be eligible for the small-employer exemption just as for-profit employers.

4. What is the small employer exemption to coverage?

Certain small private employers with fewer than 50 employees will be exempted from having to provide particular types of leave under the EPSLA and EFMLEA, when such leave would jeopardize the viability of the business as a going concern. This exemption *only* applies to leave taken to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19. Section 826.40(b)(1) imposes new objective criteria that a small employer must meet in order to make use of the exemption.

Specifically, to deny leave under the FFCRA, a small employer must be able to certify that: (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 provided by the employee or employees requesting leave, and such labor or services are needed for the small employer to operate at a minimal capacity. 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 to suffer one of the three enumerated consequences described above. The employer must maintain records documenting the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial.

5. Which employers qualify for the Health Care Provider (HCP) exemption to the FFCRA?

On March 28, 2020, the DOL issued Question and Answer No. 56 in its ?Families First Coronavirus Response Act: Questions and Answers.? It is excerpted below:

Question 56: Who is a ?health care provider? who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is 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, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state?s or territory?s or the District of Columbia?s response to COVID-19. To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

The temporary rule further underscores the broad definition of HCPs under the FFCRA in order to ensure that there are sufficient HCPs available to help combat the virus. It provides:

?The term ?health care provider? ? however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also *other workers who are needed to keep hospitals and similar health care facilities well supplied and operational***.** They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency.? (emphasis added).

6. When is an employee ?unable to telework? due to COVID-19 related reasons, what may employers require, and how is the ?workday? calculated when flexibly teleworking?

If an employer permits teleworking, then the employee is not ?unable to work? unless the employee is unable to telework because of a qualifying reason; for example, the employee is too sick to telework. If the employee is on leave to care for a son or daughter whose school or care facility is closed, then the paid sick leave and expanded family medical leave are not available to the extent that the employee is able to telework while caring for his or her child.

The FFCRA and the DOL?s temporary rule encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work,*potentially at unconventional times* (i.e., outside of core hours), while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons.

But the DOL?s continuous workday guidance generally provides that all time between performance of the first and last principal activities is compensable work time. *See* 29 CFR §790.6(a). Applying this guidance to employers with employees who are teleworking for COVID-19 related reasons would disincentivize and undermine the very flexibility of 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 employer may request an employee to work the following modified schedule to balance personal and work needs: 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 DOL?s guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID-19 related reasons.

Employers are given latitude regarding the information they can request of employees to demonstrate their ?inability? to telework, even under unconventional and flexible teleworking arrangements like the one mentioned above. *See, e.g.,* Question #11 regarding inability to work due to childcare obligations.

7. Can an employer require an employee who is requesting paid leave under the EFMLEA or EPSLA to use accrued and unused Paid Time Off (PTO) concurrently with the paid leave?

There has been significant confusion regarding this issue. The short answer is, ?it depends.? It depends on several factors, including the type of leave being requested, the order in which EFMLEA leave and EPSLA leave are taken by the employee, and the employer?s policy.

Under the EFMLEA, an employee is eligible for up to 12 weeks of leave from April 1, 2020 to December 31, 2020 to care for the employee?s son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.

The first two weeks of leave under the EFMLEA are unpaid and the remaining 10 weeks are paid at two-thirds of the employee?s regular rate of pay, capped at $200 per day and $10,000 in the aggregate.

To the extent the employee has not already used his or her two weeks of Paid Sick Leave under the EPSLA, the first two weeks of unpaid leave under the EFMLEA are actually paid under the EPSLA at the same two-thirds of the employee?s regular rate of pay, capped at $200 per day and $2,000 in the aggregate. Recall that one of the qualifying events for Paid Sick Leave under the EPSLA is the same as the qualifying event under the EFMLEA, and the benefits provided by the EPSLA run concurrently with those provided under the EFMLEA. However, if the employee has already used two weeks of EPSLA Paid Sick Leave ? perhaps the employee previously missed two weeks of work due to self-quarantine based on the advice of his or her doctor because of concerns related to COVID-19 ? the first two weeks of EFMLEA leave are unpaid. Stated another way, although Paid Sick Leave under the EPSLA may be used to cover the first two unpaid weeks of the EFMLEA leave, it is feasible that the employee may have used some or all of his or her Paid Sick Leave under the EPSLA prior to needing and qualifying for EFMLEA leave.

In this scenario, if the employee has already used his or her EPSLA Paid Sick Leave, the employee may choose to substitute earned or accrued PTO during the initial two-week period of EFMLEA leave that otherwise would have been unpaid. When PTO is used during this period, the employee should receive his or her full pay pursuant to the employer?s PTO policy.

During the first two weeks of unpaid expanded family and medical leave under the EFMLEA, an employee may not simultaneously take Paid Sick Leave under the EPSLA and use preexisting PTO unless the employer agrees to allow the employee to supplement the amount employee receives from Paid Sick Leave with PTO, up to the employee?s normal earnings. See Question #31, *FFCRA Questions and Answers* **here**.

Thus, if an employee has already exhausted his or her two-week Paid Sick Leave entitlement under the EPSLA, the employee may choose to use PTO during the initial two-week unpaid EFMLEA period. On the other hand, if the employee has not used his or her paid sick leave entitlement under the EPSLA, the first two weeks of leave under the EFMLEA are paid pursuant to the EPSLA and the employer may allow the employee to supplement the $200 daily capped amount with PTO to bring the employee?s pay up to the employee?s normal daily earnings.

After the initial two-week period under the EFMLEA, the employer may require the employee to use his or her PTO concurrently with EFMLEA leave for the remainder of the 10-week period, during which time the employee would receive his or her full pay, provided the employer?s FMLA policy provides for concurrent use of PTO with FMLA leave. If the employee exhausts his or her PTO, the remainder of the 10-week period must still be paid at two-thirds of the employee?s regular pay up to the $200 daily cap and $10,000 in the aggregate. The regulations also provide that the employee may elect to unilaterally utilize PTO after the initial two-week period under the EFMLEA. With respect to tax credits under the EFMLEA, the employer is capped at $200 a day or $10,000 in the aggregate.

With respect to paid leave under the EPSLA, an employer cannot require an employee to use PTO, nor

can the employer require that the employee?s PTO run concurrently with EPSLA Paid Sick Leave. However, if the employer and employee agree, the employee may use PTO concurrently with Paid Sick Leave under the EPSLA to supplement the amount he or she receives from Paid Sick Leave, up to the employee?s normal earnings. However, the employer will only be able to claim a tax credit of up to the capped amounts set forth in the statute.

8. What about employees who identify an inability to work due to childcare obligations for older minor children, like teenagers?

Both the EPSLA and the EFMLEA permit an employee to take paid leave when needed to care for his or her son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, due to COVID-19 related reasons. *See* § 826.60 of the FFCRA.

Questions will undoubtably arise as traditional school calendars end, traditional summer breaks approach, and employees identify potential childcare needs for older children. Generally, it is reasonable to assume that, absent individualized needs, a 16 or 17-year-old teenager requires less attention, supervision, and ?care? than a toddler. Neither the FFCRA nor the temporary rule provide bright-line rules on this issue.

However, employers may consider asking employees standardized, non-discriminatory questions to better understand the particular childcare needs of an employee, and having employees certify that their responses to such inquiries are true and accurate. One example of this is as follows:

I am caring for my child, _____ [name], age _____, whose primary or secondary school or place of care, _____ [name], has been closed, or my childcare provider is unavailable due to COVID?19 precautions. I represent that no other person will care for my child during the leave. Complete as applicable: The special circumstances which require me to care for my child who is older than 14 during the hours of _____ on the days of_____ are: _____.

9. What symptoms trigger FFCRA rights for employees who are seeking a COVID-19 related medical diagnosis?

The temporary rule confirms the specific symptoms that will trigger FFCRA rights for employees who claim benefits when they are actively ?seeking a medical diagnosis? based on their symptom presentation. Not every sneeze or symptom of the common cold will suffice.

Section 826.20(a)(4) of the FFCRA explains that symptoms that could trigger this are: (1) fever, (2) dry cough, (3) shortness of breath, or (4) other **COVID-19 symptoms** identified by the U.S. Centers for Disease Control and Prevention (CDC).

10. Is an employer required to provide paid leave under either the EFMLEA or the EPSLA when the employer does not have work available?

An employee is not eligible to take Paid Sick Leave under the EPSLA or expanded leave under the EFMLEA if the employer does not have work for the employee, and the employee:

- Is subject to a quarantine or isolation order related to COVID-19;
- Is caring for an individual who is subject to a quarantine or isolation order related to COVID-19;
- Is caring for an individual who has been advised by a health care provider to self-quarantine due to COVID-19; or
- Is caring for his or her son or daughter due to school or daycare closure, or unavailability of a childcare provider.

Similarly, if an employer furloughs employees because it does not have enough work, a furloughed employee is not entitled to take Paid Sick Leave or expanded family and medical leave. In these circumstances, the employee may be eligible for unemployment benefits under state law and enhanced unemployment benefits under the CARES Act.

11. What are the employer?s obligations to restore an employee to his or her job after returning from paid leave under the EFMLEA or EPSLA?

Generally speaking, an employee who is ready to return to work from Paid Sick Leave (under the EPSLA) or expanded family medical leave (under the EFMLEA) must be restored to the same or an equivalent position as the position he or she was in prior to the taking of such leave.

There are three exceptions to the general job restoration rule:

- If the employee would have been furloughed or laid off regardless of whether the employee took leave, the employee does not need to be reinstated. Employers should ensure that the decision to lay-off or furlough such employee is not related to the employee?s exercise of his or her leave rights under the EFMLEA or EPSLA, but rather, is necessitated by legitimate and nondiscriminatory business reasons. As noted in the Executive Summary of the regulations, ?[t]he employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.?
- An employer may deny job restoration to a *key employee* if the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. A *key employee*, as defined under the FMLA at 29 CFR §825.217, is a salaried, FMLA-eligible employee who is among the highest paid ten percent (10%) of all the employees (including salaried and non-salaried employees) employed by the employer within 75 miles of the employee?s worksite.
- For employers who employ fewer than 25 employees, an employer may deny job restoration to an employee who has taken EFMLEA if all four of the following conditions are met:
    - The employee took leave to care for his son or daughter whose school or place of care was closed, or whose child care provider was unavailable, for COVID-19 related reasons;
    - The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and that are caused by a Public Health Emergency during the period of the leave;
    - The employer makes reasonable efforts to restore the employee to an equivalent position

with equivalent benefits, pay, and other terms and conditions of employment; and

- If the employer?s reasonable efforts to restore the employee to the same or equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave related to the Public Health Emergency concludes or the date 12 weeks after the employee leave began.

12. When are employees entitled to paid leave under the EPSLA due to a ?quarantine or isolation order??

The EPSLA provides for paid sick leave when an employee is unable to work because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order. 29 C.F.R. 826.20(a) explains that ?quarantine or isolation orders? include a broad range of governmental orders, such as orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.

Though the definition is broad, Section 826.20(a)(2) limits the scope of this leave entitlement by explaining that an employee may take paid sick leave for this purpose *only if* the employee could work (or telework) *but for* being subject to the order. This means that if the employer does not have work for the employee, the employee may not take sick leave. For example, if the employee?s workplace is closed because of the pandemic, he or she may not take paid leave because there would be no work for the employee regardless of any order applicable to the employee. This is true even if such closure is due to the quarantine or isolation order itself (i.e., if the employer is ordered to close).

13. How is the paid leave benefit calculated for employees (including calculation of full-time/part-time status, hours worked, and regular rate of pay)?

Generally speaking, the EPSLA entitles employees to up to 80 hours of paid sick leave. The pay rate for EPSLA leave depends on the reason for the leave. An employee who takes paid sick leave because he or she is subject to a quarantine or isolation order, has been advised to self-quarantine by a health care provider, or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, must be paid *the greater of* the employee?s regular rate of pay *or* the applicable minimum wage (federal, state, or local), up to $511 per day and $5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason under the EPSLA is entitled to be paid two-thirds of that amount, up to $200 per day and $2,000 in the aggregate. Separate from the EPSLA, the EFMLEA entitles employees to 12 weeks of partially paid leave, the first two weeks of which are unpaid, and the remaining 10 weeks of which are paid at two-thirds of their regular rate of pay or applicable minimum wage (whichever is higher), up to $200 per day and $10,000 in the aggregate.

The temporary rule expands upon previous guidance by setting forth the correct procedures for calculating the paid leave entitlements outlined above, including generally imposing a six-month lookback period for determining an employee?s regularly scheduled hours:

- *How many hours of leave is a full-time employee entitled to under the EPSLA?* A full-time employee is entitled to 80 hours of leave under the EPSLA. An employee is deemed ?full time? if

he or she is normally scheduled to work at least 40 hours per workweek. An employee whose schedule varies is ?full-time? if he or she has been scheduled to work at least 40 hours per workweek on average during the six month period preceding the date of leave or, if employed less than six months, during the entire period of employment.

- *How many hours of leave is a part-time employee entitled to under the EPSLA?* A part-time employee is entitled to paid sick leave equal to the number of hours he or she is normally scheduled to work over a two-workweek period. A part-time employee whose schedule varies is entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day during the six-month period preceding the date of leave. A part-time employee with a varying schedule employed less than six months is entitled to fourteen times the expected number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. This is equal to twice the average number of hours that the employee would be expected to work each workweek. In the absence of an agreement regarding the expected number of hours worked each day, a part-time employee with a varying schedule who has been employed for fewer than six months ?is entitled to up to the number of hours of paid sick leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.? An employer may also use twice the number of hours that an employee was scheduled to work per workweek, on average, over the six-month period.
- *How must employers calculate leave entitlement under the EFMLEA?* For each day of expanded family and medical leave after the initial two-week period, the employer must pay an employee taking such leave two-thirds of the employee?s regular rate of pay times the number of hours the employee would normally be scheduled to work that day, up to a maximum of $200 per day or $10,000 in total for the additional ten workweeks. If the employee?s schedule varies, then the employer must compute pay per day of expanded family and medical leave based on the average number of hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type. For an employee with a varying schedule of hours who has been employed for fewer than six months, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work should be used to compute the amount of pay for each day of expanded family and medical leave he or she takes after the initial unpaid period. In the absence of an agreement regarding the expected number of hours worked each day by an employee with varying hours employed less than six months, the employer should use the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.
- *What is an employee?s ?regular rate of pay??* An employee?s ?regular rate of pay? for the purposes of determining his or her paid sick leave rate under either the EPSLA or the EFMLEA is calculated by averaging the employee?s ?regular rate of pay? for each workweek during the six month period ending on the date on which the employee takes leave. The regular rate of pay for each workweek in the lookback period is calculated in accordance with the DOL?s existing regulations for calculating regular rate of pay for overtime purposes, as outlined in 29 C.F.R. Parts

531 and 778. Employers should be sure to include all types of compensation that would otherwise be included when calculating the regular rate of pay, including but not limited to salary or hourly wages, commissions, non-discretionary bonuses, etc.

14. When may employers allow FFCRA leave to be used intermittently?

The temporary rule again makes clear that employers are not required to allow an employee to use either EPSLA or EFMLEA leave intermittently. An employer may, however, allow intermittent leave use on a case-by-case basis, based on business needs and the nature of the position. Generally speaking, an employee who is able to telework (see Question # 6) may be permitted to use paid sick leave intermittently while teleworking, regardless of the reason for the leave, provided the employer agrees. However, the DOL imposes more stringent restrictions on intermittent leave for employees who are not able to telework. Employees who are unable to telework (and thus, can only work while physically present on the employer?s premises) may only use intermittent leave for childcare loss-related leave. For all other types of leave under the EPSLA or EFMLEA, an employee who is unable to telework must take his or her leave continuously.

15. What documentation may employers require in support of employee leave?

An employee must provide documentation to support the need for leave under the EPSLA and/or EFMLEA. As provided in 29 C.F.R. 826.100, such documentation must include a signed statement from the employee 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.

Depending on the qualifying reason for leave, additional information can also be required, as follows:

- An employee requesting EPSLA leave due to being subject to a quarantine or isolation order must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
- An employee requesting EPSLA leave due to being placed on self-quarantine for COVID-19related reasons must provide the name of the health care provider who advised him or her to self-quarantine.
- An employee requesting EPSLA leave to care for an individual subject to a quarantine or isolation order or placed on self-quarantine must provide either (1) the name of 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 EPSLA and/or EFMLEA leave to care for his or her child must provide the following information: (1) the name of the child being cared 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.

16. Does an employer need to maintain any records regarding tax credits for paid leave and qualifying wages under the FFCRA and CARES Act?

An employer must retain the following for at least four years:

- Documentation showing how the employer figured the amount of qualified sick and family leave wages eligible for the credit;
- Documentation showing how the employer figured the amount of the employee retention credit;
- Documentation showing how the employer figured the amount of qualified health plan expenses that were allocated to wages for purposes of the credits;
- Documentation showing how the employer determined that the employees were qualified toreceive sick and family leave wages;
- Documentation showing the employer?s eligibility for the employee retention credit based on suspension of operations or a significant decline in gross receipts; and
- Copies of completed Form(s) 7200, Advance Payment of Employer Credits Due to COVID-19.

17. Will health information privacy restrictions under the Health Insurance Portability and Accountability Act (HIPAA) prevent an employee from providing information about a COVID-19 diagnosis, physician?s isolation order, and/or COVID-19 symptoms?

No, HIPAA does not prevent an employee from disclosing his or her own health information. An employer may request an employee provide the COVID-19 information necessary to establish entitlement to leave under the FFCRA.

18. Must group health coverage be offered to employees who are taking paid sick leave or expanded family and medical leave?

Yes. Employees on leave must be offered group health coverage on the same conditions as the coverage would have been offered if the employee had not taken paid sick and/or expanded family and medical leave.

19. What are the penalties if an Employer fails to comply with the leave provisions under the EFMLEA or EPSLA?

Under the EPSLA, employers are prohibited from:

- Discharging, disciplining, or discriminating against any employee because such employee took Paid Sick Leave under the EPSLA;
- Discharging, disciplining, or discriminating against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding, under or related to the EPSLA, or has testified or is about to testify in any such proceeding.

Employers who violate the Paid Sick Leave requirements are considered to have failed to pay minimum wage as required by the Fair Labor Standards Act (FLSA).

Under the EFMLEA, employers are subject to the same prohibitions that apply to FMLA leave in general. Specifically, employers are prohibited from:

- Interfering with, restraining, or denying an employee?s exercise of, or attempt to exercise, rights under the FMLA, including the EFMLEA;
- Discriminating against an employee for opposing any practice made unlawful by the FMLA, including the EFMLEA; and,
- Interfering with proceedings related to an employee?s leave under the EFMLEA.

The Secretary of Labor has the same broad powers to investigate potential violations under the EFMLEA and EPSLA as under the FLSA and the FMLA.

In addition to the authority of the Secretary of Labor to bring an enforcement action against an employer for violations of the EPSLA and the EFMLEA, employees also have a private cause of action for such violations. However, an employee may not bring a private action against an employer under the EFMLEA if the employer is not otherwise subject to the FMLA (the employer employs fewer than 50 employees).

If an employer is found to have violated the EPSLA or EFMLEA, the aggrieved employee(s) may recover their unpaid wages for each hour of paid leave denied, plus an additional equal amount as liquidated damages as well as their attorneys? fees. For willful violations, the employer may also be subject to civil penalties.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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