

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

GENERAL SUMMARY OF THE DEPARTMENT OF LABOR QUESTIONS & ANSWERS

This Update is Part 2 of our continuing efforts to educate employers about responsibilities owed under the Families First Coronavirus Response Act.

Last week, we sent out a discussion of the leave provisions of the Families First Coronavirus Response Act, and its two sub-acts -- The Emergency Paid Sick Leave Act and The Emergency Family Medical Leave Expansion Act.

Earlier today you received a discussion of the Questions and Answers published by the U.S. Department of Labor applicable to The Emergency Paid Sick Leave Act.

This Update discusses the DOL's Questions and Answers related to --

PART 2: THE EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT (EFMLEA)

QUALIFYING EVENT

The EFMLEA requires an employer to provide paid leave to an employee under only *a single* qualifying event:

"The employee is unable to work (or telework) due to 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."

An employer is not required to provide EFML to an employee who is absent from work because the employee is sick with COVID-19, has been exposed to someone with COVID-19, or is caring for someone with COVID-19.

If an employer authorizes an employee to work remotely, and the employee is able to work remotely even though the employee has a child whose school is closed or childcare provider is unavailable, the employee does not qualify for EFML.

If an employee has been working remotely, and then cannot because the employee has a child whose school is closed or childcare provider is unavailable, the employee does qualify for EFML.

IMPORTANT NOTE: An employee may qualify for a regular unpaid leave under the Family Medical Leave Act.

Under the regular FMLA, an employee is entitled to a protected unpaid leave of absence for a "serious health condition," or to care for a family member who has a "serious health condition."

COVID-19 could be considered a "serious health condition" if an employee is diagnosed with COVID-19 and is hospitalized or requires continuing outpatient medical attention, of the employee has to care for someone requiring hospitalization or continuing medical care beyond isolation.

Such a leave would be unpaid, but employers need to be aware of the on-going requirements of the regular FMLA as it related to COVID-19.

IF COVID-19 turns into a "serious health condition," the rules regarding coverage for the regular FMLA remain the same:

Employees are eligible to take FMLA leave if they work for a covered employer and:

- have worked for their employer for at least 12 months;
- have at least 1,250 hours of service over the previous 12 months; and
- work at a location where at least 50 employees are employed by the employer within 75 miles.

THE EFMLEA IS NOT RETROACTIVE

An employer does not have to pay an employee for any time the employee took off work prior to April 1, 2020, because of the closure of a child's school or the unavailability of day care.

Example: Prior to April 1, 2020, if an employee used an unpaid leave of 40 hours off due a child's school closing. The employer does not have to pay the employee for this time under the EFMLEA.

If an employee used accrued paid time off prior to April 1, 2020, because of the closure of a child's school or the unavailability of day care, the employer cannot reduce the employee's bank of EFML hours.

Example: Prior to April 1, 2020, if an employee took 16 hours of paid leave because of the closure of a child's school or the unavailability of day care. The employer cannot reduce the employee's bank of EFML hours by 16 hours.

FURLOUGHS / LAY-OFFS / REDUCTIONS IN FORCE / REDUCED HOURS

An employee "sent home" or whose hours are reduced because of lack of work **PRIOR TO** April 1, 2020, is not eligible for EFML.

An employee "sent home" or whose hours are reduced because of lack of work **AFTER** April 1, 2020, is not eligible for EFML *even if employee requested leave prior to being sent home for lack of work.*

An employee furloughed or laid-off for lack of work while currently on EFML no longer qualifies for EFML. In other words, when employment ends, the obligation to provide paid leave ends.

Employer cannot select an employee for furlough / lay-off / reduction in force / reduced hours because the employee requested EFML.

Employer must be able to show that employee would have been selected furlough / lay-off / reduction in force / reduced hours even if employee had not requested EFML.

COMPANIES WITH FEWER THAN 500 EMPLOYEES

Companies must count full-time and part-time employees and must also include:

- Employees on paid or unpaid leave (the Q & As do not address whether employees on furlough or lay-off prior to April 1, 2020 must be counted)
- *Temporary employees who are jointly employed by you and another employer (regardless of whether maintained on only your or another employer's payroll); and*
- *Day-laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm).*

NOTE: There are legal theories under which the employees of separate companies will be aggregated for purposes of counting – the "joint employer" and "integrated employer" theories. These theories are too complex to present in this general summary, but parent companies and managing members of related limited liability corporations need to evaluate these theories in determining coverage of the EFMLEA.

SMALL BUSINESS EXCLUSION

Exempt from providing paid sick leave *due to school or place of care closures or childcare provider* if an authorized officer of the business has determined that:

(1) Providing paid sick leave would result in expenses / financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

OR

(2) The absence of the employee creates a substantial risk to the financial health / operational capabilities because of employee's specialized skills, knowledge of the business, or responsibilities;

OR

(3) There are not sufficient workers who are able, willing, and qualified, and who will be available to perform the work needed to operate at a minimal capacity.

NOTE: Employers are cautioned to apply this exemption carefully. An employee may institute a complaint issued by the Wages and Hour Division of the Department of Labor and potentially a lawsuit.

ELIGIBLE EMPLOYEES

On employer's payroll for at least 30 days prior to day EFML would begin. The days the employee actually worked are not determinative.

Example: An employee is hired on February 15, 2020, but only works 28 on days before the need for EFML arises on April 15, 2020. The employee is eligible for leave because he has been on the employer's payroll for 30 days.

The 30 days does not have to be immediately prior to the date of EFML.

Example: An employee is hired on February 1, 2020, and works until March 15, 2020, at which time the employee is laid off. If the employee is called back after April 1, 2020, the employee is immediately eligible for EFML.

Example: An employee works for an employer from September 15, 2019 through September 30, 2019 and from February 1, 2020 through February 28, 2019. The employer re-hires the employee on April 15, 2020. The employee is immediately eligible for EFML.

If an employee had been working as a temporary employee and then is placed on the employer's payroll, the days worked as a temporary employee will count toward the 30-day requirement.

AMOUNT OF EMERGENCY FAMILY-MEDICAL LEAVE

An employee is eligible for up to 12 weeks of EFML. However, the actual allowance is measured in hours.

A full-time employee is entitled to 2/3 of the regular rate of pay for 40 hours for a 10-week period.

A part-time employee is entitled to 2/3 of the regular rate of pay for the number of hours per week the employee has been regularly scheduled to work.

An employee regularly working 32 hours per week is entitled to 2/3 of the regular rate of pay for 32 hours for a 10-week period.

The EFMLEA **DOES NOT** give an employee 12 weeks of leave in addition to the 12 weeks already that may be available to the employee under the regular FMLA.

If an employer is covered by the regular FMLA, and if an employee has already used 6 weeks of available FMLA for a qualifying event, such as the birth of a child or a serious health condition, the employee only has 6 weeks available for EFML.

PAY RATE

The first 10 days of EFML may be unpaid.

The employee may elect, but the employer cannot require, the employee to use accrued paid time off under employer's internal policy.

The employee may elect to use Emergency Paid Sick Leave during this 10-day period.

For any required leave beyond those 10 days, 2/3 of the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work subject to cap of \$200 per day and not to exceed \$10,000 total.

INTERMITTENT EMERGENCY PAID SICK LEAVE

An employee *IS NOT* allowed to use EFML intermittently *WITHOUT* the agreement of the employer.

If an employer allows an employee to use EFML intermittently, there is no established increment measure. The employer and employee may agree to any increment.

If an employer authorizes an employee to work remotely, and the employee is able to work remotely even though the employee has a child whose school is closed or childcare provider is unavailable, the employee does not qualify for EFML.

If an employee has been working remotely, and then cannot because the employee has a child whose school is closed or childcare provider is unavailable, the employee does qualify for EFML.

CONTINUED HEALTH CARE COVERAGE

An employer must continue an employee's group health coverage during an EFML under the same terms as any regular FMLA leave.

JOB RESTORATION (not discussed in the DOL Q & A's but important)

An employer is required to restore an employee to the same or an equivalent position on the completion of Public Health Emergency leave.

An employer with fewer than 25 employees is relieved from the requirement to reinstate employees after a Public Health Emergency Leave:

- (1) If the position no longer exists due to economic conditions or other changes in the operating conditions of the employer; and
- (2) The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay and other terms of employment.
- (3) If the reasonable efforts fail, the employer makes reasonable efforts to contact the employee if the same or an equivalent position becomes available.

TAX CREDIT

The question on the minds of all covered employers is the Tax Credit. An employer is able to obtain reimbursement for EPSL payments through a credit against payroll tax obligations. For employers entitled to such credits, the IRS has established a process very favorable to employers – retention and accelerated reimbursement.

To recoup EPSL payments, an employer may retain amounts it usually would deposit as payroll taxes:

- withheld federal income taxes
- employee share of Social Security and Medicare taxes
- employer share of Social Security and Medicare taxes

Example: If an eligible employer paid \$5,000 in EPSL and is otherwise required to deposit \$8,000 in payroll taxes, including the taxes for all its employees, the employer would only be required to deposit \$3,000 on its next regular deposit date.

If EPSL expenses exceed payroll taxes employers will be able file a request for an accelerated payment from the IRS which expects to process in two weeks or less.

Example: If an eligible employer paid \$10,000 in EPSL sick leave and was required to deposit \$8,000 in taxes, including the taxes for all its employees, the employer could retain the entire \$8,000 of taxes and file a request for an accelerated credit for the remaining \$2,000.

CONCLUSION

The Federal government is moving incredibly fast in addressing the dire consequences of the COVID-19 epidemic, and employers are being faced with a myriad of issues never faced before. We are keeping abreast of the federal government's efforts and offer our guidance should you need it.

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