FFCRA'S REGULATIONS PROVIDE HELPFUL ADDITIONAL GUIDANCE ON PAID LEAVE

April 6, 2020

On the effective date of the Families First Coronavirus Response Act (FFCRA), April 1, 2020, the U.S. Department of Labor (DOL) announced a temporary rule issuing regulations pursuant to the new paid leave law.. The regulations, which are located in 29 CFR Part 826, are to be implemented immediately and will remain in place through the end of the calendar year. Fortunately for employers, the regulations are largely consistent with the informal DOL FFCRA guidance previously issued in March 2020 and provide additional definitions and clarity for covered employers who now must provide this new benefit to their employees.

As the Rule's Executive Summary and prior client advisories explain, the FFCRA creates two new emergency paid leave requirements in response to the novel coronavirus (COVID-19) global pandemic. Division E of the FFCRA, "The Emergency Paid Sick Leave Act" entitles certain employees to take up to two weeks of paid sick leave. Division C of the FFCRA, "The Emergency Family and Medical Leave Expansion Act" (EFMLEA), amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* (FMLA), and permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are partially paid, when an eligible employee is unable to work because of a need 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. On March 27, 2020, President Trump also signed into law the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136 (CARES Act), which amends and clarifies certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

In addition to offering emergency Family and Medical Leave (eFLMA), the FFCRA requires covered employers to provide eligible employees up to two weeks (10 work days) of paid sick leave (ePSLA) at full pay, up to a specified cap that is reimbursed, when the employee is unable to work for one of three reasons, including 1) because the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, 2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or 3) the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis. The FFCRA also provides up to the same two weeks (10 work days) of paid sick leave at partial pay, up to a specified cap that is reimbursed, for three additional reasons: when an employee is unable to work because of 1) a need to care for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; 2) because of a need 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; or 3) because the employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services.

COVERAGE AND EXEMPTION FROM THE FFRCA

While the 500-employee coverage cap is relatively straightforward, the regulations confirm that the employees of two or more employers need to be counted together in joint employment (for ePLSA) or integrated employer (for eFMLA) situations. 29 CFR 826.30. Note that the employee count is to be done at the time protected federal leave is taken, so layoffs or furloughs may impact whether an employer falls within the FFCRA's purview. An employer also may qualify for either ePSLA or eFMLA, but not both, as the tests used differ slightly. The joint

employer test, revised significantly earlier this year, is now a four-factor balancing test that analyzes whether the putative second employer:

- Hires or fires employees;
- Supervises and controls employees' schedules or other conditions of employment to a substantial degree;
- Determines employees' pay rates and the methods by which employees are paid; and
- Maintains employment records for the employees.

No single factor is dispositive, and it is clear the potential joint employer must actually exercise control to be treated as one with another organization for FFCRA and Fair Labor Standards Act (FLSA) purposes. See 29 CFR Part 791.

The alternate integrated employer test for eFMLA coverage, 29 CFR 825.104(c), provides that separate entities are deemed to be parts of a single employer for FMLA purposes when they integrated based upon a review of the entire relationship in its totality. Factors considered include:

- Common management;
- Interrelation between operations;
- Centralized control of labor relations; and
- Degree of common ownership/financial control.

Once an employer has determined that it is covered by the FFCRA, potential exemptions including the small business (fewer than 50 employees) and healthcare provider exemptions, may be evaluated based upon the new regulations.[1]. The employer coverage regulation, 29 CFR 826.40(b), establishes that a small business is exempt from ePLSA and eFLMA when an authorized officer determines the federal paid leave would result in the business's expenses and financial obligations exceeding available business resources and cause the small business to cease operating at a minimal capacity; or the absence of the employee(s) requesting leave would entail substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge or responsibilities; there are not sufficient workers who are able, willing and qualified, or who will be available at the time and place needed. Documentation of the decision should be retained by the business and not sent to DOL. While a small business employer may choose to exempt one or more of its employees using the criteria outlined, it still must post the required FFCRA notice. The same posting notice applies to employers of healthcare providers who exempt their employees. See 29 CFR 826.80.

KEY REGULATIONS GOVERNING EPSLA

The qualifying reasons for paid sick leave are described in greater detail in Section 826.20. For example, the new regulations state that when a quarantine or isolation order is the reason for ePSLA, this broadly includes "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders" that cause the employee to be unable to work. Orders that advise only certain categories of citizens (such as of individuals in specific age ranges or of who have specified medical conditions) to shelter in place or stay at home qualify an employee for ePSLA leave.

In addition, a covered employee who has been advised by a healthcare provider to self-quarantine is entitled to ePSLA only if it is documented the healthcare provider gave such advice based upon a belief that 1) the employee has COVID-19, 2) the employee may have COVID-19, or 3) the employee is particularly vulnerable to COVID-19. Therefore, a recommendation to self-quarantine to protect other family members does not fall within the Act. Similarly, an employee who seeks ePLSA based upon their intent to seek a medical diagnosis for COVID-

[1] The healthcare provider exemption is found in the employee eligibility regulation, 29 CFR 826.30(c) and the test utilized is the same broad definition previously described in the DOL's guidance. However, note that in an April 1 letter from Senator Patty Murray and Congresswoman Rosa L. DeLauro to Secretary of Labor Eugene Scalia, the Department's expansive interpretations of this exclusion has been challenged. The preamble to the rule also includes some non-binding commentary that is more limited. We will continue to monitor for future developments of the scope of this exemption.

19 qualifies for leave only if they are experiencing one or more of the symptoms outlined in the regulation: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.

When an employee requests ePSLA to care for an "individual" subject to a quarantine order or who is self-quarantined, the employer should confirm the individual either is an immediate family member of the employee, a person who regularly resides in the employee's home, or "a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined." Section 826.20(5). The regulations make clear that "individual" does not include persons with whom the employee has no personal relationship.

The fifth reason for ePSLA, caring for a son or daughter whose school, place of care or childcare provider is unavailable due to COVID-19, also is clarified in the regulations. The term "childcare provider" includes not only providers who receive compensation for providing childcare on a regular basis but also a family member, friend, or neighbor who regularly cares for an employee's child with or without compensation. An impacted "place of care" is broadly defined to include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs. See 29 CFR 826.10. It is noteworthy that under the regulations, an employee is defined as having a childcare related need for ePSLA or eFMLA only when "no other suitable period is available to care for the son or daughter during the period of such leave." With widespread furloughs and layoffs, some employees may not qualify for such leave therefore, because other suitable individuals can provide the care necessary.

The taking of ePSLA or eFMLA shall not impact an employee's exemption from minimum wage and overtime requirements under the FLSA, whether or not the employee receives his or her full salary for workweeks of leave. 29 CFR 826.20(c).

KEY REGULATIONS GOVERNING EFMLA

As anticipated, the regulations confirm that eFMLA is another type of protected family and medical leave that is counted within the employee's annual twelve-week period. The FFCRA regulations confirm the initial unpaid two weeks of eFMLA may be funded using available ePSLA, or no ePSLA is available because it has already been exhausted by the employee, the employee may choose to utilize accrued paid time off under the employer's existing paid time off policies concurrently with the eFMLA.

As with FMLA, while an employee is taking eFMLA or ePSLA, the employer must maintain the employee's coverage under any group health plan on the same conditions as if the employee had been continuously employed and working during the leave period. Any plan changes which apply to all company employees will also apply to employees on leave. Employees on ePSLA or eFMLA remain responsible for paying their portion of health care premiums. While perhaps unusual, an employee may choose not to continue group health plan coverage while taking ePSLA or eFMLA. The employee who makes this choice is entitled to be reinstated to the plan on the same terms as before the leave began without any additional qualifying period, physical examination or exclusion of pre-existing conditions.

For the second paid period of eFMLA, an employer and an employee may mutually agree that accrued paid time off may be used to supplement the partial pay for eFMLA, so that the employee may receive their regular pay rather than the two-thirds provided by the Act. Employers who agree to this arrangement will only be entitled to a tax credit up to the statutory cap amount ($200/day).

The new regulations unfortunately conflict over whether an employer can require an employee to use accrued paid time off to supplement the second paid period of eFMLA. Specifically, consistent with the existing FMLA rules, Sections 826.23 and 826.160 of the regulations provide that an employee elect or an employer may require an employee to use accrued paid time off concurrently with the partially paid eFMLA. In contrast, section 826.70(f) provides that the FMLA rules for substitution of company paid time off does not apply because the second period of eFMLA is partially paid. To ensure compliance with the FFCRA and its regulations, employers should agree to

allow qualified employees to supplement eFMLA with one-third hour of accrued paid time off for each hour of eFMLA utilized but should not mandate this. When an employee elects to use paid time concurrently to supplement paid eFMLA, the regulations require that an employee be paid the additional amount for a full day and not just an increment or partial day. 29 CFR 826.24(d).

Note that while an employee may use ePSLA and eFMLA concurrently, this will not always occur. For example, pursuant to Section 826.60(4), it is clear that an employee who already has exhausted his or her FMLA leave is not precluded from taking ePSLA.

Finally, the regulations address military family leave under the FMLA which may last up to 26 weeks per service member cared for during a 12-month period that begins on the date leave begin. 29 CFR 825.127(e). To the extent an employee is using the 26 weeks of military family leave during the period the FFCRA applies, no more than 12 weeks of eFMLA may be used together with the balance of the permitted military family leave. Section 826.70 also makes clear that if an employee's 12-month FMLA calendar year ends during the FFCRA period of April through December 2020, an employee may only take a maximum of 12 weeks of eFMLA.

INTERMITTENT LEAVE

In concept, an employee may take ePSLA or eFMLA intermittently (in separate periods of time rather than one continuous period) only if the employer and employee mutually agree. While some written memorialization of this agreement is recommended, the regulations only require a "clear and mutual understanding" between the parties. See Section 826.50(a).

Qualified employees who are working remotely with employer agreement may take intermittent ePSLA or eFMLA. There is "broad flexibility" for employers and teleworking employees in reaching their agreements as employees who telework do not present a risk of spreading COVID-19 to their fellow employees.

The regulations further provide, however, that intermittent ePSLA only may be taken by employees reporting to work due to absences based upon an employee's need to care for his son or daughter whose school or place of care has been closed for a period of time due to COVID-19 related reasons. Once an on-site employee begins taking FCCRA paid sick leave, the employee must use the ePSLA consecutively until the leave is extinguished or the Employee no longer has a qualifying reason to take protected leave so no longer poses a risk to coworkers.

NOTICE REQUIREMENTS

Unlike some of the FMLA's notice requirements, the FFCRA regulations state that ePSLA or eFMLA notice of the need for leave may not be required in advance. An employee is required to provide notice "as soon as practicable" and if an employee fails to provide proper notice, an employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave. 29 CFR 826.90. When an employee is unable to personally provide notice, employers should allow the employee's spokesperson (spouse, adult family member, or other responsible party) to communicate on the employee's behalf.

While oral notice is sufficient initially, employers will need documentation relating to paid leave to support their use of tax credits. For ePSLA and eFMLA, the employee is required to provide documentation including their name, date(s) for which leave is requested, qualifying reason for the leave, and an oral or written statement that the employee is unable to work due to the reason for leave. For ePSLA due to a quarantine or isolation order, the employee must additionally provide the government entity that issued the order or the name of the healthcare provider who advised the employee to self-quarantine. To use ePSLA or eFMLA to care for a son or daughter, the employee must provide the name of the child being cared for, the name of the school, place of care, or child care provider that has closed or become unavailable, and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee uses FFCRA leave. Any additional IRS requirements to support a request for tax credits also may be adopted.

Current FMLA certification requirements continue to apply for leave taken 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. DOL or company forms used for FMLA notice, designation and medical certification should be provided consistently with the employer's current policies.

Employers must keep all documentation for FFCRA paid leave for four years, regardless of whether leave is granted or denied. Any pertinent oral statements made by employees to support a request for ePSLA or eFMLA must be documented in some form and also maintained by the employer. See Section 826.140. Employers that utilize the small business exception must retain documentation showing it is was eligible for the same four-year period.

To satisfy IRS requirements, the regulations advise employers to maintain these records for four years as well:

- Documents showing how the employer determined the amount of ePSLA and eFMLA paid to eligible employees, including records of time worked, telework, and leave;
- Documents showing the amount of qualified health plan expenses that the Employer allocated to wages claimed;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS; and
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS.

Hancock Daniel's Labor and Employment team is prepared to assist with any issues or questions related to the coronavirus and the Families First Coronavirus Response Act. Our COVID-19 Taskforce will advise and assist employers on all concerns arising from the pandemic.