BROOKS PIERCE

The Emergency Family and Medical Leave Expansion

COVID-19 Response Resource Center: Timely Counsel for your Business

By William Cary and Natalie Sanders on 04.13.2020
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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law. The FFCRA contains two key provisions for employers – the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both EFMLEA and EPSLA provide paid leave to employees for reasons related to COVID-19. On April 1, 2020, the U.S. Department of Labor (DOL) issued temporary regulations bolstering and clarifying these provisions of the FFCRA. Corrections to these regulations were later published on April 10, 2020. The DOL continues to publish guidance on its website concerning the FFCRA.

This article provides a comprehensive overview of EFMLEA for employers. A companion article discussing EPSLA is available on our website here.

Effective Date:

The effective date of the FFCRA is April 1, 2020. EFMLEA benefits are not retroactive, and an employer cannot deny an employee leave under the EFMLEA even if the employer provided paid leave to an employee for reasons related to COVID-19 prior to April 1, 2020 (but such prior leave could reduce the amount of leave; see discussion of Interaction with Regular FMLA below). Leave benefits under the EFMLEA expire on Dec. 31, 2020.

Covered Employers:

EFMLEA covers certain public employers and all private employers with fewer than 500 employees. Only employees working in the United States (including the District of Columbia and U.S. territories) are counted in determining whether an employer is covered under the EFMLEA. Additionally, the following individuals must be counted:

- Employees on leave;
- Temporary employees jointly employed by another employer; and
- Day laborers supplied by a temporary agency.

Independent contractors need not be counted.

Related corporations will need to assess whether their shared employees render them joint or integrated employers under the Fair Labor Standards Act (FLSA). A corporation (including its separate establishments or divisions) is considered a single employer. Two corporations are separate employers unless they are joint employers under the FLSA with respect to employees. The DOL has issued regulations explaining this test in detail. Links to more explanatory materials are available here. If two entities are joint employers, all of their common employees are counted as part of the employee population. Joint employment status is a fact-based inquiry that is not determined by an individual's tax treatment. In general, two or more entities are separate employers for purposes of EFMLEA unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA).

Small Business Exemption:

Employers with fewer than 50 employees may be exempted from providing leave under the EFMLEA if doing so "would jeopardize the viability of the business as an ongoing concern." This requires an authorized officer of the business to make a determination that:

- Providing the requested leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient 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 requesting leave under the EFMLEA, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses must document their determination to elect the small business exemption and retain supporting records in their files for four years. However, small businesses are not required to provide this documentation to DOL.

Eligible Employees: To be eligible for EFMLEA leave, employees (including both full-time and part-time employees) requesting leave must have been employed for at least 30 calendar days. Employees who were laid off or terminated on or after March 1, 2020, and are subsequently rehired by their employer on or before Dec. 31, 2020, are eligible for EFMLEA leave provided they were on the employer's payroll for 30 or more of the 60 calendar days prior to the date they were

previously laid off or terminated. EFMLEA is not available to employees whose employers permit them to telework and they do so.

Employers may exclude an employee who is a "health care provider" or an "emergency responder" from taking EFMLEA leave. The definition of "health care provider" is expansive and includes anyone employed at any doctor's office, hospital, health care center, clinic, nursing facility, retirement facility, nursing home, home health care provider, lab, pharmacy and other similar types of facilities or employers. This definition applies to any type of facility (permanent or temporary) where medical services are provided and includes people employed by entities that contract with these types of employers to provide services or maintenance to them. This definition also includes any individual employed by any entity that provides medical services, produces medical products or is otherwise involved in making COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

The definition of "emergency responder" is similarly expansive and includes any employee necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health officials, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, including individuals who work for such facilities.

Benefits Provided

EFMLEA provides up to 12 workweeks of job-protected leave to employees who are unable to work or telework because they have to care for a child (including children over the age of 18 who are unable to care for themselves due to a mental or physical disability) whose school or place of care or regular childcare provider has closed or is unavailable due to the COVID-19 public health emergency. This includes an employee's biological, adopted, or foster child, stepchild, legal ward, or any child for which they are standing in loco parentis (have day-to-day responsibilities to care for or financially support).

Interaction with Regular FMLA

Because EFMLEA only added an additional reason for taking leave under the FMLA, any available leave under the EFMLEA is reduced by prior leave taken under the FMLA. For example, if an employee had already taken four weeks of FMLA leave, the employee would only have eight remaining weeks under the EFMLEA (for a maximum of 12 weeks of leave).

Amount of Leave Pay

The first two workweeks (usually 10 workdays) of EFMLEA leave is unpaid. The remaining ten weeks of EFMLEA are paid at an amount of at least 2/3 of the employee's average "regular rate" of pay, up to a maximum of $200/day and no more than $10,000 in the aggregate. Like the EPSLA, the "regular rate" is the employee's average for the last six months, or the average for the employee's entire employment if the employee has not been employed for six months. "Regular rate" includes the amounts the employer included in calculating the employee's overtime rate (*e.g.*, performance and attendance bonuses, tips, commissions, and piece rates). That rate is applied to the number of hours the employee would have worked (including anticipated overtime) during the period of the leave. For example, if an employee is normally scheduled for 50 hours during a week, then paid leave for that week would be 50 hours (but each hour of leave is paid at the "average regular rate" and no additional premium is paid for hours over 40 in a week).

Interaction with EPSLA and Coordination with Other Employer-provided Leave

An employee may choose to utilize applicable employer-provided paid leave (*e.g.*, PTO) or EPSLA leave in order to receive compensation during the otherwise unpaid first two weeks of EFMLEA leave. While employers cannot mandate that employees take employer-provided leave (*e.g.*, PTO) or EPSLA leave during the first two workweeks of EFMLEA, employers may require employees to use employer-provided leave (*e.g.*, PTO) concurrently with EFMLEA after the first two weeks. Even if this results in the employee receiving full compensation for some or all of that time, the employer may only take a tax credit up to 2/3 of the employee's compensation up to the maximum of $200 per day.

Intermittent Leave:

EFMLEA leave may be taken intermittently provided that an employer and employee mutually agree to an intermittent leave arrangement. To prevent the spread of COVID-19, the DOL has prohibited the use of intermittent leave by an employee who is unable to telework and who is taking EFMLEA leave for reasons that indicate they may be infected or exposed to COVID-19.

Employee Documentation Needed for Leave:

An employee is required to provide his or her employer documentation containing the following information prior to taking EFMLEA leave:

(1) The employee's name;

(2) The date(s) for which leave is requested;

(3) A qualifying reason for the leave; and

(4) An oral or written statement that the employee is unable to work because of the qualified reason for leave.

Additionally, an employee requesting EFMLEA leave must provide documentation containing:

1. The name of the child being cared for;
2. The name of the school, place of care, or child care provider that has closed or become unavailable;
3. A representation that no other suitable person will be caring for the child during the period for which the employee takes EFMLEA leave; and
4. With regard to a child who is over the age of 14, a statement describing the special circumstances that require the employee to provide care for the child during daylight hours.

Notice Requirements to Employees:

All covered employers (including small businesses claiming the hardship exemption) are required to conspicuously post the FFCRA workplace poster published by the DOL on their premises. Alternatively, recognizing that many employees are currently teleworking, the DOL has permitted employers to meet the notice requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. The notice must be distributed to all current employees and all subsequently-hired employees.

Return to Work Following EFMLEA Leave:

Upon returning from EFMLEA leave, an employee generally has a right to be restored to the same or an equivalent position. This does not apply to employers with fewer than 25 employees if all four of the following conditions are met:

(1) The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;

(2) The employee's position no longer exists due to economic or operating conditions that affect employment and are caused by COVID-19-related reasons;

(3) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and

(4) If the employer's reasonable efforts to restore the employee fail, the employer must make reasonable efforts for one year to contact the employee if an equivalent position becomes available.

Consistent with the FMLA, certain "key employees" may be denied reinstatement following the conclusion of their EFMLEA leave. A key employee is a salaried FMLA-eligible employee who is among the highest paid 10% of all the employees employed by the employer within 75 miles of the employee's worksite.

Notwithstanding the above, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave.

Recordkeeping:

Employers are required to retain all employee documentation related to EFMLEA leave for four years, regardless of whether leave was granted or denied. If an employer elects the small business exemption, the determination made by its authorized officer (discussed above) should be documented in its records and retained for four years. Additionally, in order to claim tax credits from the IRS (for information on employer tax credits under the FFCRA, please see this client alert), employers are advised to maintain the following records for four years:

- Documentation to show how the employer determined the amount of EFMLEA benefits paid to employees who are eligible for leave, including records of work, telework, and the amount of leave taken;
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and
- Other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Implications of Furloughs and Closures:

Furloughed employees, or employees whose worksites have been closed even for a short period of time, are not entitled to leave under EFMLEA during the furlough or closure, although they may be entitled to unemployment benefits. This is true even if the employer closed pursuant to a federal, state, or local directive. If an employer closes while an employee is taking EFMLEA leave, the employer must only pay for leave used before closing. A reduction of an employee's hours due to lack of work does not constitute a qualifying reason for leave under EFMLEA.

If you have any questions about the EFMLEA, please contact Natalie Sanders, Bill Cary or James Bobbitt, linked below.

Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our COVID-19 Response Resources page.

Tags: Emergency Family and Medical Leave Expansion Act, Fair Labor Standards Act, Families First Coronavirus Response Act, U.S. Department of Labor