> Covid-19 Client Alert

DOL Issues Temporary Rule for Paid Leave Under the Families First Coronavirus Response Act

April 6, 2020

If you require any additional information about EPSLA or EFMLEA leave, any other aspect of FFCRA, or any other employment related issue, please contact any of the attorneys listed below:

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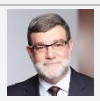

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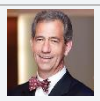

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The U.S. Department of Labor ("**DOL**") has released a 124-page "Temporary Rule: Paid Leave under the Families First Coronavirus Response Act," (the "**Rule**") to assist employers and workers navigate the leave provisions of the Emergency Paid Sick Leave Act ("**EPSLA**") and the Emergency Family and Medical Leave Expansion Act ("**EFMLEA**"), both part of the Families First Coronavirus Response Act ("**FFCRA**").

As set forth in our prior alert, the FFCRA requires private employers with fewer than 500 employees ("**Covered Employers**") to provide their qualifying employees with paid sick leave (under the EPSLA) and expanded paid family and medical leave (under the EFMLEA) if they cannot work or telework for various enumerated reasons related to COVID-19. Covered Employers are reimbursed with refundable federal tax credits for the cost associated with providing employees with FFCRA leave.

The FFCRA requires both EPSLA and EFMLEA leave to be offered between April 1, 2020 and December 31, 2020. The DOL previously issued Q&As, fact sheets, a webinar and informational posters regarding EPSA and EFMLEA leave. The DOL's new Rule takes effect immediately. This alert summarizes the key portions of the voluminous Rule.

Administration of Paid Sick Leave Under the EPSLA

The Rule details the circumstances under which a Covered Employer must provide paid sick leave to eligible employees under the EPSLA. Specifically, an employee may take up to 80 hours of paid sick leave under the EPSLA if the employee is unable to work or telework[1] because of any one of the following six qualifying enumerated reasons related to COVID-19:

1. **The employee is subject to a Federal, State, or local COVID-19 quarantine or isolation order**. The Rule provides that such 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. The operative determination is whether the employee would be able to work or telework "but for" being

[1] The Rule notes that "telework" is no less work than if it were performed at an employer's worksite. As such, employees teleworking as a result of COVID-19 must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the Fair Labor Standards Act ("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.

required to comply with a quarantine or isolation order. Notably, an employee subject to one of these orders may not take EPSLA paid sick leave where the employer does not have work for the employee due to a downturn in business or closure (temporary or indefinite) of the employee's place of employment.

2. **The employee has been advised by a health care provider to self-quarantine for a COVID-19 reason.** The Rule explains that the advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. Moreover, self-quarantining must prevent the employee from working. For example, an employee that is advised to self-quarantine, but is able to telework (and not suffering from serious COVID-19 symptoms that would prevent the employee from teleworking) may not take EPSLA paid sick leave for this reason.

3. **The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.** Paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Furthermore, the employee may not take EPSLA paid sick leave to self-quarantine without seeking a medical diagnosis. This reason would also not apply to those employees able to telework, where their symptoms do not prevent them from teleworking.

4. **The employee needs to care for an individual who is either: (a) subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19**. The individual being cared for must be an immediate family member, roommate, 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 self-quarantined or was quarantined.

5. **The employee needs to care for his or her child if: (a) the child's school or place of care has closed; or (b) the child care provider is unavailable due to COVID-19 related reasons.** Here again, the employee must be able to perform work (and have work to perform for their employer), but for the need to care for the child. An employee does not qualify for leave under this reason where there is another suitable individual to provide the care that the employee's child needs. Covered children include a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability (each, a "**Covered Child**").

6. **The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.** Such similar conditions may be specified at any time during the effective period of EPSLA leave. As of the time of this writing on April 6, 2020, no such additional conditions have been specified.

Administration of Expanded Family and Medical Leave under the EFMLEA

The Rule also provides guidelines for employees taking expanded paid family and medical leave under the EFMLEA. An employee may take EFMLEA leave only if the employee is unable to work or telework due to a need to care for his or her Covered Child if the child's school or place of care is closed, or the child care provider of such child is unavailable, for reasons related to COVID-19. As the Rule explains, ***the leave authorized by the EFMLEA is thus the same as the fifth reason outlined above for EPSLA leave***.

The EFMLEA provides up to 12 weeks of extended family and medical leave. The initial two weeks are unpaid, but the remaining duration of the leave must be compensated at a rate of at least 2/3 of the employee's regular hourly rate of pay times the number of hours the employee would be normally scheduled to work that day, up to $200 per day and $10,000 in the aggregate.

The EFMLEA provides that if an employee's schedule varies from week-to-week such that an employer cannot determine the number of hours the employee normally works, the employer must calculate his or her pay using a

six-month average ending on the date on which the employee takes leave. The Rule expands on this provision, noting that it also applies to work schedules that vary day-by-day, and makes certain technical corrections to the calculation method. Thus, the six-month average should be used to calculate leave compensation under the EFMLEA where an employee's schedule varies in any way and he or she has been employed for at least six months.

For those part-time employees with varying schedules that have been employed for less than six months, the EFMLEA provides that compensation for leave purposes should be calculated using "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." The Rule explains that such "reasonable expectation" is best evidenced by an agreement between the employer and employee at the time of hiring. In the absence of such an agreement, however, the Rule states that the actual average number of hours the employee was scheduled to work each workday over the entire period of employment meets the "reasonable expectation" standard.

Because the initial two weeks of EFMLEA leave are uncompensated, employees may choose to use accrued paid personal or sick leave (including paid sick leave under the EPSLA under the fifth qualifying reason) during this time. The Rule further provides that employers may require an employee to use their accrued leave concurrently with the expanded family and medical leave under the EFMLEA. Notably, where an employee has already taken some leave pursuant to the Family and Medical Leave Act ("FMLA") in the current twelve-month measuring period, the maximum twelve weeks of EFMLEA leave is reduced by the amount of the FMLA leave entitlement taken in that year.[2] If an employee has exhausted his or her twelve workweeks of FMLA or EFMLEA leave, he or she may still take EPSLA leave for a qualifying reason.

Additional Commentary from the Rule

The Rule clarifies and details numerous other topics under both the EPSLA and EFMLEA, including, among other things, (i) employee eligibility; (ii) employer coverage and small employer exception; (iii) intermittent leave; (iv) notice; (v) documentation of need for leave; (vi) maintenance of health care coverage; and (vii) returning to work. We discuss each briefly below.

- **Employee eligibility.** All employees employed by a Covered Employer are eligible to take paid sick leave under the EPSLA regardless of their duration of employment. However, employees must have been employed by a Covered Employer for at least thirty calendar days to be eligible to take expanded family and medical leave under the EFMLEA. The EPSLA and EFMLEA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements, and defines each term broadly.

- **Employer coverage; Exemption for small employers.** As set forth above, Covered Employers under the EPSLA and the EFMLEA are those private employers with fewer than 500 full-time and part-time employees (including employees on leave, temporary employees, and day laborers supplied by a temporary agency). The determination as to whether the employer is under the 500 employee-threshold is made at the time an employee seeks to take leave. Employers with fewer than 50 employees are exempted from providing EPSLA and EFMLEA leave, if the imposition of such leave requirements would jeopardize the viability of the employer as a going concern. The Rule sets out concrete criteria that employers need to consider in determining whether they qualify for such exemption, and requires employers claiming such exemption to document their qualification under the applicable criteria, accordingly.

[2] Importantly, while the amount of leave is the same under the EFMLEA and the FMLA (up to twelve weeks), the eligibility requirements are not. Employees need only to have been employed for 30 calendar days for an employer with fewer than 500 employees in order to be eligible for expanded family and medical leave under the EFMLEA. In contrast, to be eligible for FMLA leave for provided under that law, employees generally need to have worked for the employer for at least 12 months, have 1,250 hours of service in the twelve-month period prior to the leave, and work at a location where the employer has at least 50 employees within a 75 mile radius. Additionally, unlike the last 10 weeks of EFMLEA leave, FMLA leave is unpaid.

- **Intermittent leave.** Employees may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, but only if their employer agrees to such an arrangement. Such an agreement need not be reduced to writing, but there must be a clear and mutual understanding between the parties.

- **Notice.** The FFCRA requires that employers post and keep posted a notice of the EPSLA and EFMLEA requirements. A model notice created by the DOL can be accessed here. As far as notice by an employee, the Rule explains that it is reasonable for employers to require employees to provide notice of the need for leave as soon as practicable after the first workday is missed. Employers may also require that employees provide sufficient information for the employer to determine whether the requested leave is covered by the FFCRA.

- **Documentation of need for leave.** An employee must provide his or her employer with documentation in support of EPSLA or EFMLEA 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 may need to provide additional documentation depending on their qualifying reason for leave (*e.g.,* name of health care provider who advised the individual to self-quarantine or name of school or place of care that closed due to COVID-19 reasons).

- **Health care coverage.** The FFCRA provides that an employee who takes EPSLA or EFMLEA leave is entitled to continued coverage under the employer's group health plan (if one exists) on the same terms as if the employee did not take leave.

- **Return to work.** In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave. However, the FFCRA does not protect an employee from employment actions, such as layoffs, that would have otherwise affected the employee regardless of whether the leave was taken. In such an instance, the employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. Moreover, the restoration requirement does not apply to an employer who has fewer than twenty-five employees if all four of the following conditions are met:

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

    (b) The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.,* due to COVID-19 related reasons) during the period of the employee's leave;

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

    (d) If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or twelve weeks after the employee's leave began, whichever is earlier.

- **Recordkeeping.** The Rule states that an employer is required to retain all documentation provided in connection with an employee's leave request for four years, regardless of whether leave was granted or denied. Such documentation is also important for Covered Employers seeking refundable tax credits under FFCRA for providing EPSLA and EFMLEA leave.

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Morrison Cohen LLP has also created the COVID-19 Resource Taskforce, a multidisciplinary taskforce comprised of attorneys with deep expertise in a broad range of legal areas, to assist clients navigating the challenging and uncertain business and legal environment caused by the COVID-19 pandemic. We encourage clients to utilize our capabilities by reaching out to their primary Morrison Cohen attorney contact, who will put you in touch with the appropriate Taskforce person. You may also reach out directly to Joe Moldovan and Alec Nealon, the Taskforce co-chairs:

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