FFCRA Temporary Regulations on Paid Sick and Family Leave

The Secretary of Labor recently issued temporary regulations under 29 CFR Part 826 regarding public health emergency leave under the Family and Medical Leave Act (FMLA) and emergency paid sick leave, which was created under the Families First Coronavirus Response Act (FFCRA). The FFCRA and the temporary regulations expire December 31, 2020.

The new regulations further explain the FFCRA including "The Emergency Paid Sick Leave Act" (EPSLA), which entitles certain employees to take up to two weeks of paid sick leave, and "The Emergency Family and Medical Leave Expansion Act" (EFMLEA), which permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID-19.

Circumstances Qualifying Employees to Take Sick Leave

Section 826.20 lays out the circumstances under which a covered employer must provide paid sick leave and/or expanded family and medical leave for eligible employees.

Section 826(a) explains that an employee may take paid sick leave if the employee is unable to work because of any one of the following six qualifying reasons related to COVID-19:

1) Where an employee is unable to work because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order. However, an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. If the employer has no work for that employee, then the employee is not entitled to any such leave.
2) Where an employee is unable to work because he or she has been advised by a health care provider, as defined in 29 CFR § 825.102, to self-quarantine for a COVID-19 reason.
3) Where an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. The paid leave under this portion is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis.
4) Where an employee is unable to work because he or she 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. This reason applies only if but for a need to care for an individual, the employee would be able to perform work for his or her employer.
    a. 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.
    b. Additionally, the individual being cared for must: (a) be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised

by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

5) When the employee is unable to work because the employee needs to care for his or her son or daughter 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.
    a. Generally, an employee does not need to take such leave if another suitable individual— such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.
6) Where the employee is unable to work because 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.

An employee who is able to telecommute is generally not able to take this type of sick leave.

Section 826.20(b) explains that an employee may take expanded family and medical leave if the employee is unable to work due to a need for leave to care for his or her son or daughter if the child's school or place of care is closed, or the child care provider of such son or daughter is unavailable, for reasons related to COVID-19. The EFMLEA portion of the FFCRA defines "qualifying need related to a public health emergency" as 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." However, this definition could be more narrow than the definition under the FMLA which includes children under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability. The Secretary will issue separate rules regarding this definition.

Amount of Sick Leave

Section 826.21 explains how much paid sick an employee is entitled to under the EPSLA. The EPSLA does not define what it means to be a "full-time" or "part-time" employee. Because paid sick leave is designed to provide leave "over a 2-week period," and the EPSLA provides up to 80 hours of such leave to full-time employees, the Department believes a full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each workweek. The EPSLA applies to employees of covered employers regardless of how long an employee has worked for an employer.

Full-time employee defined

The Department defines a "full-time employee" as an employee who is normally scheduled to work at least 40 hours each workweek in § 826.21(a)(2). Under § 826.21(b), a "part-time employee" is an employee who is normally scheduled to work fewer than 40 hours each workweek or—if the employee lacks a normal weekly schedule—who is scheduled to work, on average, fewer than 40 hours each workweek. Many employers include employees who work 37.5 hours a week as full-time employees, however, under this regulation they would be considered part-time employees.

Part-time employees

Under § 826.21(b)(1), a part-time employee who works a normal schedule 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. The Department believes that a part-time employee whose weekly work schedule varies should be entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type. This computation is possible only if the employee has been employed for at least six months. Thus, § 826.21(b)(2) provides variable-schedule part-time employees with such an amount of paid sick leave. Different rules apply for employees who have been working part-time less than 6 months.

Amount of Pay Due

Section 826.22 explains the amount of pay due to employees who take paid sick leave. If the employee takes paid sick leave because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order; has been advised by a health care provider to self-quarantine for COVID-related reasons; or is experiencing COVID-19 symptoms and seeking a medical diagnosis, the employer must pay the employee his or her regular rate of pay for each hour of paid sick leave taken. If an employee takes paid sick leave because of any other COVID-19 qualifying reason, the employer must pay the employee two-thirds of the employee's regular rate of pay. The amount an employer is required to pay is capped at $511 per day of paid sick leave taken and $5,110 in total per covered employee for all paid sick leave pay. Furthermore, where an employee is taking paid sick leave at two-thirds pay, the amount of pay is subject to a lower cap of $200 per day of leave and $2,000 in total per covered employee for all paid sick leave that is paid at two-thirds pay.

Definitions of Health Care Providers and Emergency Responder

The Rule defines which employees are "health care providers" or "emergency responders," who employers may exclude from eligibility for the EPSLA and the EFMLEA's leave requirements. 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.

The Department's definition of "emergency responder" include those categories of employees who (1) interact with and aid individuals with physical or mental health issues, including those who are or may be suffering from COVID19; (2) ensure the welfare and safety of our communities and of our Nation; (3) have specialized training relevant to emergency response; and (4) provide essential services relevant to the American people's health and wellbeing. The definition allows for the

highest official of a state or territory to identify other categories of emergency responders, as necessary.

Employer Coverage:

Section 826.40(a) explains which private employers must provide paid sick leave and expanded family and medical leave to their employees. Specifically, it explains that, subject to the exemption described in § 826.40(b), all private employers that employ fewer than 500 employees at the time an employee would take leave must comply with the EPSLA and the EFMLEA.

Section 826.40(b) describes the small employer exemption pursuant to the Secretary's regulatory authority to exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave. The exemption applies when an employee takes leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, and only when such leave would jeopardize the viability of the business as a going concern. To address objective criteria for this exemption, the Department issued Section 826.40(b)(1) explaining that a small employer is exempt from the requirement to provide such leave when:

> (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 the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

Intermittent Leave:

Section 826.50 outlines the circumstances and conditions under which paid sick leave or expanded family and medical leave may be taken intermittently under the FFCRA. One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently is that they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently. That agreement does not have to be written but in the absence of a writing, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both.

Section 826.50(c) provides that if an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. This section intentionally affords teleworking employees and employers

broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business.

Employees who continue to report to an employer's worksite may only take paid sick leave or expanded family and medical leave intermittently and in any increment— subject to the employer and employee's agreement—in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite. Therefore, an employer and employee who reports to an employer's worksite may agree that the employee may take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19.

Subsection (b)(2) prohibits employees who report to an employer's worksite from taking paid sick leave intermittently, notwithstanding any agreement between the employer and employee to the contrary, if the leave is taken because the employee:

(1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
(3) is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;
(4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
(5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

<u>Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection between the EPSLA and the EFMLEA</u>:

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 child care provider is unavailable, due to COVID-19 related reasons. Section 826.60 sets forth how the requirements of the EFMLEA and the EPSLA interact when an employee qualifies for both types of leave. Generally, when an employee qualifies for leave under both Acts, an employee may first use the two weeks of paid leave provided by the EPSLA. This use runs concurrent with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is paid under the EFMLEA. Section 826.60 further explains that where an employee has already taken some FMLA leave in the current twelve-month leave year as defined by 29 C.F.R. § 825.200(b), the maximum twelve weeks of EFMLEA leave is reduced by the amount of the FMLA leave entitlement taken46 in that year. 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 COVID-19 qualifying reason.

Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability – Intersection between the EFMLEA and the FMLA:

Section 826.70 addresses the interaction between the new entitlement to take FMLA leave to care for an employee's child due to school or place of care closure or child care unavailability under the EFMLEA and an employee's entitlement to take FMLA leave for other reasons, such as bonding with a newborn or newly placed child, for the employee's own serious health condition, or to care for a covered family member with a serious health condition. The EFMLEA amended the FMLA to add a sixth reason to take the twelve-week FMLA entitlement: to care for an employee's son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons.

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