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Inside This Issue

Expanded Sick and Family Leave in the Families First Coronavirus Response Act: Its Impact on California Public and Private Sector Employers

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Introduction

In response to the COVID-19 global pandemic, Congress passed H.R. 6201, the Families First Coronavirus Response Act (FFCRA),[1] which was signed into law by the President on March 18, 2020. The FFCRA provides Emergency Paid Sick Leave and expands the Family and Medical Leave Act to address situations where employees may need to take leave as a result of COVID-19.

This legislation provides some relief to employees who are impacted by state and local governmental responses to slow the impact of the pandemic, such as Stay at Home or Shelter in Place orders. In California, Governor Newsom ordered all Californians to stay home except for essential trips. Schools were closed for the remainder of the 2019-2020 school year. Non-essential business such as bars, gyms, movie theaters, childcare centers, and other businesses where people tended to congregate were shuttered.[2] Most companies directed staff to work from home.

For some employers, this created a manageable level of disruption. Many businesses already had robust

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[1] H.R. 6201, 116th Cong. (2020), Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020).

[2] Businesses such as grocery stores, pharmacies, dry cleaners, banks and, obviously, health care providers were excepted from the Stay at Home order even if routine appointments and elective procedures were canceled or rescheduled. Restaurants could serve food, but only for take-out or delivery.

(Continued on page 125)

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(Continued from page 123)

telecommuting policies and infrastructure in place to support it. Others rushed to create projects that could be completed from home, drafted *ad hoc* telecommuting policies, and taxed their Information Technologies departments to find enough laptops and cellphones to cover staff.

For other employers, Stay at Home or Shelter in Place means laying off employees because the work or services provided were not the kind that could be provided from home or without customers. Throughout all of this, employees were dealing with the "new normal," – feeling ill, caregiving for those who were ill, caring for young children, or becoming teachers due to childcare and school closures. Some employers provided employees with paid time off or administrative leave straight away, perhaps in the belief that Stay at Home or Shelter in Place orders would be lifted quickly. Now that Governor Newsom's March 20, 2020 order is in its third week and many local stay-at-home orders have been extended to the beginning of May 2020, employers have to seriously consider the impact of such orders on their business and their employees.

Families First Coronavirus Response Act (FFCRA)

The FFCRA, which became effective April 1, 2020,[3] is designed to address some of the short- and long-term impacts of the COVID-19 pandemic on employers. For example, it provides enhanced unemployment benefits that increase the amount of the weekly unemployment insurance payment and extend the time period that people may receive such payment. It also provides private-sector employers with tax reimbursement for providing Emergency Paid Sick Leave and Expanded Family and Medical Leave benefits to their employees.

The FFCRA applies to employers with fewer than 500 employees and any public agency covered by the Fair Labor Standards Act (FLSA).[4] The main provisions of the FFCRA that will be discussed in this article are the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

Emergency Paid Sick Leave Act

The provisions of the FFCRA relating to Emergency Paid Sick Leave (EPSL) require employers to provide each employee paid sick time to the extent that the employee is unable for work (or telework) for the following reasons:

1) Employee is subject to federal, state or local quarantine or isolation order[5] related to COVID-19;
2) Employee has been advised by a health care provider to self-quarantine related to COVID-19;
3) Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4) Employee is caring for an individual who is subject to an order as described in (1) or has been advised as described in (2);
5) Employee is caring for a son or daughter whose school or place of care has been closed (or childcare provider is unavailable) due to COVID-19 precautions; or
6) Employee is experiencing any 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).

All employees on the employer's payroll on the effective date of the FFCRA are eligible for EPSL. Employers

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[3] The Families First Coronavirus Response Act (FFCRA) states that the law is effective no later than 15 days after enactment, which would be April 2, 2020. However, the Department of Labor (DOL) has apparently declared the law effective a day earlier, on April 1, 2020.

[4] Pub. L. No. 116-127, § 5110, 134 Stat. 178, 199. Small businesses with fewer than 50 employees are exempt from the FFCRA if compliance would jeopardize the viability of the business. Pub. L. No. 116-127, § 5111(2), 134 Stat. 178, 201.

[5] The DOL regulations, issued on April 1, 2020 to provide guidance on the FFCRA, states that Shelter in Place or Stay at Home orders are included in the definition of state or local quarantine or isolation orders. *See* 29 CFR § 826.10.

may elect to exclude health care providers or emergency responders from these provisions.

Generally, full-time employees are entitled to up to 80 hours of paid sick leave and part-time employees are entitled to hours equal to the number of hours the employee worked on average over a two-week period. These specific sick leave hours cannot be carried over to another year as the FFCRA expires on December 31, 2020.

EPSL is calculated by multiplying the employee's regular rate of pay by the number of normally scheduled hours, and pay is subject to a daily cap and an aggregate amount. For leave taken as a result of reasons (1), (2) and (3), employees are capped at a maximum of $511 per day or $5,110 in aggregate. For leave taken as a result of reasons (4), (5) and (6), employee compensation is calculated at 2/3's their regular rate of pay multiplied by their normal scheduled hours and capped at $200 per day or $2,000 in aggregate. In applying these provisions, especially leave taken for reasons related to care (i.e., reasons (4) and (5) above), many employers have allowed employees to integrate existing leave banks so that employees would receive 100 percent of their salary.

These leaves are job protected and employers face potential penalties under the Fair Labor Standards Act for failure to comply with these provisions of the FFCRA.[6] Employees are not required to use already banked time before accessing EPSL.

Emergency Family and Medical Leave Expansion Act

The FFCRA also includes the Emergency Family and Medical Leave Expansion Act (EFMLEA), which expanded the Family and Medical Leave Act (FMLA) so that employees who have been employed with an employer for 30 days are eligible for these benefits. Under non-COVID-19 conditions, an employee is eligible to take FMLA if they work for a covered employer, have worked for that employer for the last 12 months, and have worked at least 1,250 hours for that employer during the 12 months preceding the leave.[7]

Under the EFMELA, eligible employees may take 12 weeks of protected leave if they are unable to work (or telework) due to the need to care for a child under 18 years of age if the child's school or childcare location has closed or if the care provider is unavailable due to a public health emergency.[8] Employers may exempt health care providers and emergency responders from these provisions as well.

If taken, the first ten days (or two weeks) of leave under EFMELA are not paid, and the remaining ten weeks are paid at 2/3's the employee's regular rate of pay multiplied by their normally scheduled hours up to a daily cap of $200 or an aggregate cap of $10,000. The first ten days (or two weeks) of unpaid EFMELA leave can be covered by EPSL or, as many employers are allowing, any already accrued paid time off. Many employers are also allowing employees to supplement the paid portion of EFMELA leave with accrued paid time off, so that employees can maintain 100 percent of their salary.

As mentioned, EFMELA leave is job protected in similar fashion to FMLA but provides some exceptions. The employee does not need to be restored to their job if the position no longer exists because of economic or other operational conditions. While this is not very different from an employer laying off an employee on FMLA leave for bona fide business reasons, reinstatement is more perilous now, when businesses are making difficult decisions about carrying on.

Key Issues for Implementing EPSL and EFMELA

Unsurprisingly, there are a number of issues that have arisen in the course of implementing EPSL and EFMELA leave of which employers should be aware.

Intermittent Usage

Generally, FMLA leave can be used intermittently for an employee's own serious health condition or to care for a family member with a serious health condition. However, with EPSL and EFMELA leave, this is not the rule. With EPSL, time off must be taken in full-day increments, and an employee must continue to take paid sick leave each day until the employee has used the full amount of paid sick leave or no longer has a qualifying reason to take paid sick leave.[9] The Department of Labor's (DOL) rationale is that for an employee who is sick with COVID-19 or caring for an individual who is sick with COVID-19, the purpose of the benefit is to provide such paid sick leave as necessary to keep the individual home and reduce the risk of spreading the virus to others.

There is an exception for employees who are teleworking, as well as employees taking EFMELA leave to care for a child due to school closure. In those cases, intermittent leave is allowable with the employer's permission.

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6 Pub. L. No. 116-127, § 5104-05, 134 Stat. 178, 196-97.

7 29 U.S.C. §§ 101(2)(A), (B), 102 (a)(1)(F).

8 Pub. L. No. 116-127, § 3102, 134 Stat. 178, 189.

9 Pub. L. No. 116-127, § 5102(c), 134 Stat. 178, 196.

Tax Credits for Providing Benefits

As mentioned above, all public agencies and most private employers with fewer than 500 employees must provide EPSL and EFMELA leave. Larger employers with 500 or more than 500 employees do not have to provide EPSL or EFMELA leave.

The private employers who are required to provide these benefits are eligible to claim payroll tax credits.[10] In contrast, public agency employers are not eligible for reimbursements or credits to offset the cost of providing EPSL or EFMELA benefits.[11]

This leaves public sector employers in a financially precarious position as they must fund these benefits on their own. Additionally, public agency employers generally have their own pension systems or are a part of a state pension system, for which they make significant financial contributions. Public agency employers also typically provide generous benefits for employees that include vacation, sick leave, holidays, compensatory time off, and other accrued time off, which are costly.

Public agencies in California are feeling the impacts of COVID-19 from many different angles. Not only are public agency employers expending funds to provide these enhanced benefits, without any federal reimbursement, but as shelter in place orders get extended and people stay home, that also means less sales tax revenues to pay for these expenditures. Thus EPSL and EFMLA will likely have a significant impact on public agency balance sheets.

Documentation Required for EPSL and EFMELA

In order to request EPSL or EFMELA leave, employees are required to provide employers with documentation supporting their leave and tying their leave to one of the six reasons set forth in the FFCRA. While the Centers for Disease Control (CDC) has indicated requesting leave notes from doctors at this point in time is overtaxing, employers are requesting copies of federal, state or local orders for EPSL reason (1) and documentation by a health care provider related to EPSL reasons (2), (3) and (6).

Most health care providers are seeing patients by phone or video and can email documentation at this time and, in instances where they cannot, providing the name of the health care provider (for contact at a future date) is acceptable. If an employee requires additional time for their own serious health condition, the employee may qualify for FMLA and, in those instances, the employee is required to provide the medical documentation routinely required under the FMLA. For EFMELA, the employees must provide the name of the child, the name of the school or childcare center that is closed, and represent that there is no other suitable person to care for the child.[12] A notice of closure of a school issued or posted by the local government is sufficient.

If the employer intends to claim a tax credit under the FFCRA for either EPSL or EFMELA leave, employers must retain the appropriate documentation. Not surprisingly, there is a slight discrepancy by the DOL guidance and what is required by the IRS. The documentation requirements stated above is what is prescribed by the DOL. IRS guidance indicates that in cases of leave requested under EFMELA, the employer must have documentation from the employee that includes what is prescribed by the DOL, but also with "respect to the employees' inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care."[13] The DOL regulations allow for employers to request from an employee any additional documentation in support of their application for tax credits, and an employer is allowed to deny leave if there is insufficient documentation to support the tax credit.[14]

Temporary Non-Enforcement by the DOL

The DOL has also indicated that it will observe a temporary period of non-enforcement of the FFCRA from March 18 through April 17, 2020. During this time, the DOL will not bring any enforcement actions provided that the employer engaged in a good faith, reasonable

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[10] Employers are generally required to withhold federal income taxes and the employees' share of Social Security and Medicare taxes from employee paychecks. These taxes as well as Social Security contributions are filed with quarterly payroll tax returns with the IRS. Eligible employers who provide EPSL or EFMLA will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.

[11] Pub. L. No. 116-127, §§ 7001(e)(4), 7003(e)(4), 134 Stat. 178, 211, 216.

[12] 29 C.F.R § 826.100.

[13] IRS, *COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs*, FAQ No. 44, *available at* https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.

[14] 29 C.F.R § 826.100 (Apr. 6, 2020).

efforts to comply with the FFCRA. Good faith, reasonable efforts include an employer remedying any violations as soon as practicable, not engaging in any willful violations, and a written statement that the employer will comply with the Act in the future.[15]

Layoffs and Furloughs

Interestingly, EPSL and EFMELA leave are not available to those who have been laid off or furloughed as a result of business slowdown or closures related to stay at home orders even if the employer has closed as a result of such orders. Here, if an employer shutters operations as a result of a stay at home order (reason (1) above), the DOL explained that EPSL does not apply because the employee would be unable to work even if they were not required to comply with the stay at home order.[16]

The DOL used an example of a coffee shop to illustrate its point that even if the coffee shop closed due to a stay at home order, the reason for the employee being unable to work would be because the coffee shop was subject to the order, not because the employee himself was subject to the order.[17] However, employees in this circumstance may be eligible for unemployment benefits. In California, there are enhanced unemployment benefits for employees impacted by COVID-19.[18]

This situation also creates questions for public agency employers. Unlike private employers, public agencies must remain open to provide public services, so while there might be a slowdown resulting in layoffs or furloughs, public agencies will never close. There are some public programs such as recreational programs that will close as a result of stay at home orders so that is more akin to the coffee shop illustration, but a public agency, generally, will still have work whether it is forced to close or whether a stay at home order has kept citizens from its services. In these instances, public agency employers may be better off applying EPSL to work slowdowns before needing to furlough employees.

FMLA and EFMELA Abuse

Employees are not eligible for multiple FMLA leaves as a result of the FFCRA. If an employee is already on FMLA when the FFCRA went into effect, the employee cannot add to their existing FMLA or change the characterization of their leave so that the employee receives EFMELA payments. For example, if an employee on (regular) FMLA due to childbirth has a return to work date of May 4, 2020, and uses the full 12 weeks of FMLA leave, the employee cannot request an additional 12 weeks of EFMELA to care for a child.

Similarly, if an employee is on an approved FMLA leave due to childbirth with a return to work date of May 4, 2020, and as of April 1, 2020, has used eight of the 12 weeks of FMLA leave, the employee cannot convert the last four weeks of unpaid FMLA leave to paid EFMELA leave, unless the reason for the leave changes.

Employers should keep track of documentation in support of EPSL and EFMELA leave to prevent abuse of these leaves.

Conclusion

Employer responses to the ongoing COVID-19 pandemic will continue to change as the federal, state and local governments and agencies release additional information. The federal government - especially the DOL and IRS – have provided useful FAQs that should be reviewed and revisited as these sites are frequently updated.

Tim, Charles and Genevieve are partners at Sloan Sakai Yeung and Wong where Sherry is an associate. The last month has been spent providing legal advice related to COVID-19 to their public sector and non-profit clients.

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[15] Wage & Hour Division Field Assistance Bulletin No. 2020-1 (Mar. 24, 2020), *available at* https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1.

[16] Wage & Hour Division, *Families First Coronavirus Response Act: Questions and Answers*, FAQs Nos. 26-29, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

[17] 29 C.F.R § 826.20 (Apr 6, 2020).

[18] In California, the maximum weekly benefit under Unemployment Insurance (UI) is $450 for up to 26 weeks. The FFCRA and the Coronavirus Aid, Relief and Economic Security Act (CARES Act), S 3548, 116th Cong. (2020), provides an additional $600 per week for an extra 13 weeks. This means for Californians, the maximum benefit is $1050 for up to 39 weeks. The waiting period for UI benefits has been waived so people can begin receiving benefits immediately.