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ACT NOW ADVISORY

# U.S. Department of Labor Issues Temporary Rule on the Families First Coronavirus Response Act

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On April 1, 2020, the day that the Families First Coronavirus Response Act ("FFCRA" or "Act") became effective, the Wage and Hour Division of the U.S. Department of Labor ("DOL") issued a temporary rule ("TR") concerning the Act's paid sick and family leave mandates related to the coronavirus ("COVID-19") pandemic. Since the passage of the FFCRA on March 18, 2020, the DOL has issued several rounds of Frequently Asked Questions ("FAQs") on its website to address a range of issues raised by the Act.[1] The TR codifies much of the guidance issued through the FAQs, although the DOL may continue to publish new FAQs as it receives inquiries about the Act's requirements.[2]

As we previously reported, the FFCRA contains two paid leave laws:

(i) The Emergency Paid Sick Leave Act ("EPSLA"), which entitles eligible employees to take up to two weeks of paid sick leave for certain COVID-19-related reasons; and

(ii) The Emergency Family and Medical Leave Expansion Act ("Expanded FMLA"), which amends the Family and Medical Leave Act ("FMLA") to permit eligible employees to take up to 12 weeks of family and medical leave, 10 of which are paid, for specified reasons related to COVID-19.

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[1] For more information on the FAQs, see here, here, and here.

[2] The DOL has extended its invitation to employers and employees to submit comments and questions about the FFCRA to April 10, 2020. Interested parties may do so at https://ffcra.ideascale.com/. Further, criticism of certain aspects of the DOL's interpretation of the FFCRA may prompt the agency to revise the TR or issue new FAQs, or the DOL may be required to make revisions pursuant to any new COVID-19 legislation that may be forthcoming from Congress.

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## I. Covered Private Employers [§ 826.40(a)]

With some important exemptions (discussed below), the Act applies to private employers with fewer than 500 employees in the United States. To determine whether an employer meets this threshold number of employees (or exceeds it and, therefore, is not covered by the FFCRA), the TR instructs employers to include the following workers when counting their workforce:

- all full-time and part-time employees employed within the United States (including the District of Columbia and U.S. territories) "*at the time the Employee would take leave*," regardless of how long the employees have been employed by the employer;

- any employees on leave of any kind; and

- all common employees of joint employers under the Fair Labor Standards Act ("FLSA") (including temporary workers of placement agencies) or of integrated employers under the FMLA.

Typically, a corporation (including its separate establishments or divisions) is considered a single employer and all of its employees must be counted together. However, where one corporation merely has an ownership interest in another corporation, the two corporations are separate employers unless they satisfy the joint-employer test noted above.

In counting employees, employers should *not* include:

- independent contractors, or
- workers who have been laid off or furloughed and have not subsequently been rehired.

The mandate that an employer determine its workforce as of the date an employee's leave would start is important, as it may require employers that are close to the "fewer than 500 employees" threshold to recount their employees each time an employee requests FFCRA leave. Consider this example: Company XYZ had 525 employees last week (and, thus, was not covered by the FFCRA), but yesterday, it implemented a reduction in force that reduced its employee count to 475 employees, and today, an employee requests an EPSLA leave, which is to start immediately. The company was not covered by the FFCRA last week but is now subject to the Act because it will have fewer than 500 employees when the employee will start the leave.

## II. Exemptions for Health Care Providers, Emergency Responders, and Small Businesses [§ 826.30(c), § 826.40(b)]

Employers of health care providers[3] or emergency responders[4] may elect to exclude otherwise qualified employees from eligibility for the paid sick leave and expanded family

[3] For purposes of the exclusion or exemption, the TR broadly defines "health care provider," e.g., "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity … [as well as] any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

[4] For the purposes of this exclusion/exemption, the TR defines an "emergency responder" as "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19, e.g., military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or

and medical leave provided under the Act. While admonishing employers to be "judicious" when using these definitions to exempt employees from the Act's coverage, the DOL has defined the terms broadly. For instance, the term "health care provider" is not limited to diagnosing medical professionals, but includes any individual capable of providing health care services necessary to combat the COVID-19 public health emergency. An employer's exercise of this option, however, does not impact an employee's earned or accrued sick, paid time off ("PTO"), or other employer-provided leave (or leave established by state or local law) and does not prevent the individuals from taking such leave in accordance with established policies.[5]

The FFCRA also permits small businesses (including religious entities and nonprofits) with fewer than 50 employees to apply for a waiver on the grounds that compliance would jeopardize the employer's viability. The small business waiver is only applicable for leave due to school closings or child care unavailability (under both the EPSLA and the Expanded FMLA). The TR makes clear that such businesses may qualify for a waiver of the requirement to provide leave due to school closings or child care unavailability if "an authorized officer of the business has determined" that:

- the leave requested 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(s) requesting such 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

- the business lacks "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" currently being provided by the employee(s) requesting such leave, and these services are needed for the small business "to operate at a minimal capacity."

While employers should document this determination, the TR does *not* require employers to submit such documentation to the DOL. Rather, an employer should retain the records in its files. Accordingly, the DOL effectively allows small employers to implement such exemptions—without first applying for a waiver— if they can justify the decision to do so on any of the above criteria.

***Note: Regardless of whether a small employer exempts one or more employees, the employer is still required to post a notice of employees' rights under the FFCRA (discussed below).***

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training in operating specialized equipment or other skills needed to provide aid in a declared emergency…."

[5] The Act also provides that the Secretary of Labor has the authority to exclude by rulemaking "certain health care providers and emergency responders," but the Secretary of Labor has not exercised this authority in the TR. Rather, individual exclusion decisions are left to the discretion of employers.

## III. Covered Employees Under the FFCRA [§ 826.30(a), (b)]

Otherwise-qualified employees are eligible for EPSLA leave regardless of how long they have worked for their employer. However, to be eligible for Expanded FMLA leave, the employee:

- must have been employed by the employer for at least 30 calendar days prior to the day the employee's leave would begin, or

- was laid off or otherwise terminated on or after March 1, 2020, and rehired by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for at least 30 of the 60 calendar days prior to the layoff or termination date.

The TR reiterates that otherwise-qualified employees who meet either of these criteria are eligible for Expanded FMLA leave even if they do not satisfy any of the other requirements for a traditional FMLA leave of absence, such as having been employed for 12 months and having worked for at least 1,250 hours.

## IV. Uses for EPSLA Leave [§ 826.20(a)]

The FFCRA permits an employee of a covered employer to take paid sick leave between April 1, 2020, and December 31, 2020, for any of the following reasons:

1. **The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.**

    a. The TR clarifies that, for the purposes of the EPSLA, "a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them."

    b. The TR states that the employee must be able to work (including telework) "but for" being required to comply with a quarantine or isolation order. For example, if a police officer cannot work because she is quarantined on a cruise ship, the quarantine order is the "but for" cause of the police officer's inability to work, and the officer would be entitled to leave for this purpose.

    c. An employee is not able to work if the employer does not have work for the employee to perform, notwithstanding that the reason for the lack of work is

related to the COVID-19 crisis, such as a decline in business resulting from a locality-wide stay-at-home order (because, according to the TR, such an order is not personal to the employee). In other words, a furloughed employee is not eligible for EPSLA leave if the employer does not have work for the employee to perform.

2. **The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.**

    a. Under the TR, the health care provider must believe that the employee has or may have COVID-19, or that the employee is particularly vulnerable to COVID-19, and by following this advice to self-quarantine, the employee is unable to work, either at the workplace or via telework.

    b. For purposes of this provision, the term "health care provider" has the same meaning as in 29 C.F.R. § 825.102.

3. **The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis from a health care provider**.

    a. According to the TR, an employee may be eligible for paid sick leave under this provision if the employee is experiencing any of the following symptoms: (i) fever, (ii) dry cough, (iii) shortness of breath, or (iv) any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention ("CDC").[6]

    b. EPLSA leave taken for this reason is limited to the time the employee is unable to work because the employee is taking steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

    c. Note: The TR states that an employee is not eligible for leave while waiting for test results if the employee is able to telework, but it does not specifically address whether time spent waiting for results is covered when the employee is unable to telework due to symptoms but has not yet been advised not to work by a health care provider (e.g., where the employee took a diagnostic test at a drive-through testing facility) or because the employee must be physically present at the worksite to work, but cannot be present while waiting for results. In such situations, an employer may want to permit an employee awaiting test results to take sick leave. An employer also may want to allow an employee to take sick leave where the employee

[6] The CDC currently identifies emergency warning signs requiring immediate medical attention as (i) trouble breathing, (ii) persistent pain or pressure in the chest, (iii) new confusion or inability to arouse, and (iv) bluish lips or face. *See* "Symptoms of Coronavirus," CDC, *available at* https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last accessed Apr. 5, 2020).

normally teleworks, if the employee is symptomatic and awaiting test results.

4. **The employee is caring for an individual who is subject to a quarantine or isolation order or is seeking a medical diagnosis.**

    a. The TR defines "individual" as someone with whom the employee has a "personal relationship—specifically, (i) an immediate family member, (ii) a person who regularly resides in the employee's home (i.e., roommate), or (iii) "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."

    b. An employee may not take EPSLA leave unless, "but for a need to care for an individual," the employee would be able to work, either at the workplace or by telework. Again, though not addressed by the TR, an employer should not assume that an employee in this situation is able to telework because he or she normally works remotely.

    c. An employee caring for an individual is ineligible for EPLSA if his or her employer does not have work for the employee.

5. **The employee is caring for his or her son or daughter whose school or place of care has been temporarily closed, whether by order of a State or local authority or at the decision of the individual school or place of care, or the child's care provider is unavailable, for reasons related to COVID-19**.

    a. The TR clarifies that a "son or daughter" means both a child under 18 years of age and a child age 18 or older who is incapable of self-care because of a mental or physical disability.

    b. Under the TR, an employee is eligible for leave under this provisions only if:

        i. but for a need to care for the child, the employee would be able to work at the workplace or telework (here, too, an employer should make this determination on the specific facts of the situation, even if the employee normally teleworks);
        ii. the employee's employer has work for the employee to perform; and
        iii. "no other suitable person is available" to care for the child.

6. **The employee has a condition that is substantially similar to COVID-19, as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.**

    a. The TR provides no new guidance on leave for this reason.

## V. Use of Expanded FMLA Leave [§ 826.20(b)]

The FFCRA allows Expanded FMLA leave for eligible employees only when (i) an employee is unable to work because the employee must care for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to reasons related to COVID-19, and (ii) the employee cannot work onsite or through telework. The TR imposes the same restrictions on Expanded FMLA leave as described above with respect to EPSLA leave for child care reasons, e.g., no other suitable person is available to care for the child.

## VI. Telework [§ 826.10]

The TR explains than an employee is deemed able to telework when:

- the employer has work for the employee,
- the employer permits the employee to work from the employee's location, and
- there are no extenuating circumstances (such as a power outage or loss of internet service) that prevent the employee from performing that work.

Telework is work for which wages must be paid as required by applicable law, and it may not be compensated as paid leave under the EPSLA or the Expanded FMLA. Under the TR, the DOL's "continuous workday" guidance—i.e., that all time between performance of the first and last principal activities is compensable work time—will not be applied to telework under the FFCRA so as not to "undermine the very flexibility in teleworking arrangements that are critical to the FFCRA framework."

Accordingly, an employer allowing employees such telework flexibility during the COVID-19 pandemic is not required to count as hours worked all time between the first and last principal activity performed by an employee teleworking. Rather, employees who are teleworking for COVID-19-related reasons must be compensated for all hours actually worked and for hours that the employer knew or should have known the employee was working. Employees who are teleworking for COVID-19-related reasons must always record all hours actually worked, including overtime.

## VII. Amount of Paid Sick Leave [§ 826.21]

Under the FFCRA, a full-time employee is entitled to up to 80 hours of paid sick leave. An employee is considered to be a full-time employee if he or she is normally scheduled to work at least 40 hours each workweek.

The TR clarifies that an employee who does not have a normal weekly schedule is considered to be a full-time employee if the average number of hours per workweek that

the employee was scheduled to work, including hours for which the employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of:

- the six-month period ending on the date on which the employee takes EPSLA leave, or

- the entire period of the employee's employment.

An employee who does not satisfy the requirements of "full-time" as set forth above is deemed a part-time employee. A part-time employee with a normal weekly schedule is entitled to up to the number of hours of paid sick leave equal to the number of hours that the employee is normally scheduled to work over two workweeks.

If the part-time employee lacks a normal weekly schedule, the number of hours of paid sick leave to which the employee is entitled is calculated as follows:

- **If employed for at least six months:** the part-time employee is entitled to up to the number of hours of paid sick leave equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes the leave, including any hours for which the employee took leave of any type. An employer may also use twice the number of hours that an employee was scheduled to work per workweek.

- **If employed for fewer than six months:** the part-time employee is entitled to up to the number of hours of paid sick leave equal to 14 times the number of hours the employee and the employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled to up to the number of hours of paid sick leave equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

## VIII. Amount of Pay for Paid Sick Leave [§ 826.22]

The TR reiterates that for each hour of paid EPSLA leave taken for reasons (1) – (3) (discussed above), an employee must be paid the higher of:

- the employee's average regular rate (as computed under the TR's guidelines), or

- the federal, state, or local minimum wage to which the employee is entitled.

For leave taken pursuant to reasons (4) – (6), employees must receive two-thirds of the amount described above.

The TR also confirms the caps on EPSLA leave pay, i.e., $511 per day and $5,110 in the aggregate per employee when leave is taken for reasons (1) – (3), and $200 per day and $2,000 in the aggregate per employee when leave is taken for reasons (4) – (6).

## IX. Amount of Expanded Family and Medical Leave [§ 826.23]

The TR reiterates that an employee is entitled to a total of 12 weeks of FMLA leave. Thus, as discussed more fully below, any leave taken as Expanded FMLA leave counts towards the 12-week maximum.

## X. Amount of Pay for Expanded Family and Medical Leave [§ 826.24]

After an employee's initial two weeks of Expanded FMLA leave, the employer must pay the employee two-thirds of the employee's average regular rate times the employee's "scheduled number of hours" for each day such leave is taken. The cap on payment for this leave is $200 per day and $10,000 in the aggregate per eligible employee when the employee takes the leave for up to 10 weeks after the initial, unpaid two-week period.

The "scheduled number of hours" is determined as follows:

- **If the employee has a normal work schedule:** the number of hours the employee is normally scheduled to work on that workday;

- **If the employee has a work schedule that varies to such an extent that an employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken and has been employed for at least six months:** the average number of hours the employee was scheduled to work each workday, over the six-month period ending on the date on which the employee first takes Expanded FMLA leave, including hours for which the employee took leave of any type; or

- **If the employee has a work schedule that varies to such an extent that the employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken and the employee has been employed for fewer than six months:** the average number of hours the employee and the employer agreed at the time of hiring that the employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

The TR also provides an alternative calculation of pay, allowing employers to compute the amount of pay in hourly increments instead of a full day. Accordingly, for each hour of Expanded FMLA leave taken after the first two weeks, the employer would pay the employee two-thirds of the employee's average regular rate (calculated pursuant to the methods set forth in § 826.25 of the TR).

## XI. Intermittent Leave [§ 826.50]

The TR permits an employee to take EPSLA or Expanded FMLA leave intermittently, but only for the following reasons (and only if the employer agrees):

- To care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19. The employer and employee must agree, either orally or in writing, to the arrangement, including the increments of time for which leave will be taken.

    - An employee may not take EPSLA leave if the leave is taken for reasons (1) – (4) and (6) (discussed above). Once the employee begins taking leave for one of these reasons, the employee must use the permitted days of leave consecutively.

- Teleworking: If an employer directs or allows an employee to telework, or the employee normally works from home, the employer and employee "may agree that the Employee may take… [EPSLA or Expanded FMLA leave] for any qualifying reason intermittently, and in any agreed increment of time (but only when the Employee is unavailable to Telework because of a COVID-19 related reason)."

To avoid future disputes, employers are encouraged to require written agreements to any intermittent leave arrangement.

*Calculation of Leave Taken Intermittently*

If an employee takes EPSLA or Expanded FMLA leave intermittently, only the amount of leave actually taken may be counted toward the employee's leave entitlements. The TR provides the following example: An employee who normally works 40 hours in a workweek and only takes three hours of leave each work day (for a weekly total of 15 hours) has taken only 15 hours of the employee's EPSLA leave or 37.5 percent of a workweek of Expanded FMLA leave.

## XII. Intersection of EPSLA, Expanded FMLA Leave, and Traditional FMLA When Leave Is Taken for Child Care [§ 826.60(a), § 826.70]

An eligible employee who needs leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19-related reasons may be eligible to take leave under both the EPSLA and the Expanded FMLA. If so, the benefits provided by the EPSLA run concurrently with those provided under the Expanded FMLA.

The first two weeks of such leave (up to 80 hours) may be paid under the EPSLA; the subsequent 10 weeks are paid under the Expanded FMLA, to the extent that the employee has not previously used his or her allotted leave time under either law or under the traditional FMLA. For example, an employee who has exhausted his or her traditional

FMLA 12-workweek entitlement in the prior 12 months is not entitled to Expanded FMLA leave but is not precluded from taking EPSLA leave.

The TR also clarifies that an employee can take a maximum of 12 workweeks of Expanded FMLA leave during the period in which the leave may be taken (April 2, 2020, to December 31, 2020), *even if that period spans two FMLA leave 12-month periods*. The TR provides this example: If an employer's 12-month period begins on July 1, and the employee took seven weeks of Expanded FMLA in May and June 2020, the employee could only take up to five additional weeks of Expanded FMLA leave between July 1 and December 31, 2020, even though the first seven weeks of Expanded FMLA leave fell in the prior 12-month period.

## XIII. Sequencing of EPSLA and Expanded FMLA Leave [§ 826.60(b)]

With respect to EPSLA leave, an employee may first use EPSLA before taking any other leave to which he or she is entitled under federal, state, or local law; a collective bargaining agreement ("CBA"); or an employer policy that existed prior to April 1, 2020. An employer may not require an employee to use EPSLA leave prior to using such other paid sick leave benefit, but the employee, at his or her sole discretion, may choose to do so.

During the initial two-week *unpaid* portion of the Expanded FMLA leave, an employee may elect to use, **or an employer may require that the employee use**, PTO benefits available to the employee under the employer's policies, concurrently with Expanded FMLA. However, if the employee elects, or the employer requires, concurrent leave, the employer must pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken. As discussed below, during the paid portion of the Expanded FMLA, employers may not require the substitution of existing paid leave.

Except as limited by the Expanded FMLA (discussed above), an employer may not deny or postpone an eligible employee's right to take EPSLA or Expanded FMLA leave because of the employee's use of any type of leave prior to April 1, 2020, for reasons related to COVID-19 or otherwise. However, no employer is required to provide, and no employee has a right to receive, any retroactive reimbursement or financial compensation through the EPSLA or Expanded FMLA law for any unpaid or partially paid leave taken prior to April 1, 2020, even if such leave was taken for COVID-19-reated reasons.

In addition, the TR clarifies that, if an employee has taken EPSLA leave for a reason other than reason (5) (closure of school or closure/unavailability of day care), and then takes Expanded FMLA, the employee is still entitled to 12 weeks of Expanded FMLA for reason (5), but the first two weeks are unpaid, unless the employee chooses to use other employer-provided paid leave during those two weeks.

## XIV. Intersection of EPSLA, Expanded FMLA, and Employer-Provided Leave [§ 826.70(f)]

For the first "two weeks" of Expanded FMLA leave, which is unpaid under the Act, the employee may use any available EPSLA leave or he or she can elect to use employer-provided paid leave. However, as discussed above, if the employee chooses to use the employer's PTO, the employer can require that this two weeks of paid leave run concurrently with the employee's Expanded FMLA entitlement.

For the remaining 10 weeks of Expanded FMLA leave, neither the employer nor the employee may insist that PTO be used to supplement the amount of paid leave provided for under the Act (i.e., two-thirds of the employee's pay to a cap of $200 per day / $10,000 in aggregate). However, the TR states that the employer and employee may agree to have PTO supplement the Expanded FMLA payment so that the employee receives the full amount of his or her normal pay.

## XV. Employer Notice of Employees' Rights [§ 826.80]

Every employer covered by FFCRA's paid leave provisions (even those that invoke exemptions) is required to post and keep posted on its premises in conspicuous places the notice titled "Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)." The TR states that an employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. The notice does not need to be provided in languages other than English (although a version in Spanish is available on the DOL's website).

## XVI. Employee Notice of Need for Leave [§ 826.90, § 826.100]

The TR instructs that employees provide their employer with notice of their need for leave "as soon as practicable" if the EPSLA or Expanded FMLA leave is to care for a child whose school or place of care is closed or child care provider is unavailable. Employees taking leave for other reasons only need to provide "reasonable" notice after the first workday (or portion thereof) for which an employee takes leave.

Generally, the employer can require employees to comply with the company's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. However, the TR cautions employers to provide employees with the opportunity to remedy an omission or mistake concerning the employer's notice procedures prior to denying a request for leave.

Encouraging a more lenient approach to notice requirements, the TR states that employees may provide oral notice, but must also supply "sufficient information" for the employer to determine whether the requested leave is covered by the EPSLA or the Expanded FMLA. Specifically, the TR requires an employee to provide the following relatively minimal information:

- employee's name,

- date(s) for which leave is requested,

- qualifying reason for the leave, and

- oral or written statement that the employee is unable to work because of the qualified reason for leave.

Additionally if the employee takes leave:

- **pursuant to a quarantine or isolation order affecting the employee or an individual the employee is caring for**, the employee must provide the name of the government entity that issued the order;

- **pursuant to the advice of a health care provider advising the employee or an individual the employee is caring for**, the employee must provide the provider's name; or

- **to care for a child whose school or care facility is closed or whose care provider is unavailable**, the employee must provide the child's name, and the name of the school or place of care that is closed or child care provider who is unavailable, along with a representation that no other suitable person is available to care for the child.

An employer may also request an employee to provide such additional material as needed for the employer to support a request for tax credits afforded by the FFCRA. The TR emphasizes that an employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

## XVII. Health Care Coverage [§ 826.110]

While an employee is on EPSLA or Expanded FMLA leave, all employers covered under those laws must maintain the employee's coverage under any "group health plan" (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.

If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is taking EPSLA or Expanded FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave.

An employee remains responsible for paying his or her portion of group health plan premiums that had been paid by the employee prior to taking the leave. If leave is unpaid,

or the employee's pay during leave is insufficient to cover his or her share of the premiums, the employer may obtain payment from the employee, as set forth in the TR.

If an employee chooses not to retain group health plan coverage while on leave, the employee, upon returning from leave, is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

Except as required by COBRA, an employer's obligation to maintain health benefits while an employee is taking EPSLA or Expanded FMLA leave ceases if and when the employment relationship would have terminated if the employee had not taken such leave (e.g., if the employee fails to return from leave, or if the entitlement to leave ceases because the employer closes its business).

## XVIII. Multiemployer Plans [§ 826.120]

The FFCRA provides that, in accordance with an employer's existing collective bargaining obligations, an employer signatory to a multiemployer CBA may satisfy its obligations to provide EPSLA and Expanded FMLA leave by making contributions to a multiemployer fund, plan, or other program. Such contributions must be based on the hours of EPSLA and Expanded FMLA leave to which each employee is entitled under those laws, according to each employee's work under the multiemployer CBA.

The TR also sets forth an alternative means of compliance. An employer signatory to a multiemployer CBA may satisfy its obligations to provide EPSLA and Expanded FMLA leave by means other than those set forth above, "provided such means are consistent with its existing bargaining obligations and any applicable collective bargaining agreement."

## XIX. Return to Work [§ 826.130]

*General Rule*

On return from EPSLA or Expanded FMLA leave, an employee has a right to be restored to the same or an equivalent position he or she held prior to taking leave.

*Restoration Limitations*

The TR reiterates the following limits to the general restoration rule:

- An employee is not protected from employment actions, such as layoffs or furloughs, that would have affected the employee regardless of whether he or she took leave. In order to deny restoration to employment, an employer must be able to show that the employee would not otherwise have been employed at the time the employee requested reinstatement.

- For leave taken under the Expanded FMLA, an employer may deny job restoration to *key* employees (as defined under the FMLA), if such denial is necessary to prevent "substantial and grievous economic injury" to the employer's operations.

- An employer that employs fewer than 25 eligible employees may deny job restoration to an employee who has taken Expanded FMLA leave if all four of the following conditions exist:

    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, for COVID-19-related reasons;

    2. The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave;

    3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and

    4. Where the reasonable efforts of the employer to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period, if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave related to a public health emergency concludes or the date 12 weeks after the employee's leave began.

## XX. Expiration of Leave Entitlement [§ 826.160(d),(e),(f)]

An employer has no obligation to provide—and an employee or former employee has no right to receive—financial compensation or other reimbursement for unused EPSLA or Expanded FMLA leave upon the employee's voluntary or involuntary separation from employment. Similarly, an employee has no right to any such benefits after the expiration of the FFCRA on December 31, 2020.

An employee who has taken all leave available under the FFCRA and then changes employers is not entitled to additional EPSLA leave from his or her new employer. An employee who has taken some, but fewer than 80 hours of EPSLA leave, and then changes employers is entitled only to the remaining portion of such leave from his or her new employer and only if his or her new employer is covered by the EPSLA. Such an employee's EPSLA leave would expire upon reaching 80 hours, regardless of the employer providing it, or when the employee reaches the number of hours of EPSLA leave to which he or she is entitled based on a part-time schedule with the new employer.

## XXI. Recordkeeping [§ 826.140]

Employers must maintain the following records for four years:

- Documentation of an employee's oral statements in support of his or her request for EPSLA or Expanded FMLA leave, and

- Documentation concerning the granting or denial of an employee's request for leave, including a determination by an authorized officer that the employer was eligible for an exemption as to that employee.

To claim tax credits from the Internal Revenue Service ("IRS"), the TR advises employers to maintain the following records for four years:

- Documentation showing how the employer determined the amount of EPSLA and Expanded FMLA leave pay it paid to employees that is eligible for the credit, including records of work and telework;

- Documentation detailing how the employer determined the amount of qualified health plan expenses that it 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.[7]

## XXII. Prohibited Acts and Enforcement [§ 826.150, § 826.151]

The TR reiterates the EPSLA's ban on discrimination or retaliation against an eligible employee for exercising his or her rights under the law. Failure to provide EPSLA leave is considered a failure to pay the minimum wage as required by the FLSA. An employer that violates the ban on discrimination and retaliation is considered to have violated the nondiscrimination provisions of the FLSA.

Although not contained in the FFCRA, the TR instructs that improper interference with an employee's exercise of his or her rights to Expanded FMLA leave is subject to the enforcement provisions set forth in the FMLA, except that an eligible employee may file

[7] For more information on the FFCRA tax credit, see here.

a private action to enforce the Expanded FMLA only if the employer is otherwise subject to the FMLA in the absence of the Expanded FMLA.

**What Employers Should Do Now**

- As the leave entitlements under the FFCRA began on April 1, 2020, make sure that you immediately determine whether you are covered by the Act—i.e., whether you employ fewer than 500 employees.

- Notwithstanding the latitude given to small employers to exempt employees from paid leave for child care, if you are a covered employer, take care to ensure that such exemption is clearly justified. If you intend to exempt health care providers and/or emergency responders, determine the parameters by which you intend to exclude such employees and document the reasons for doing so.

- Post the required notice of FFCRA benefits and inform employees of their rights to benefits under the law. If employees are not present in the workplace, consider posting the notice to an intranet site or emailing it to employees. You may need to post the notice in several ways to ensure that all employees receive the mandated notice.

- Be prepared to receive requests from employees seeking to take leave under the FFCRA.

- Properly document leave requests by employees, and those leave requests should include the required supporting information and documents. Consider creating leave request forms for this purpose. Additionally, if you agree to intermittent leave arrangements, document the specifics of such arrangements in writing.

- During the onboarding process, provide notice to the new hires of their rights under the FFCRA, and inquire whether the new hires have taken any EPSLA leave with a prior employer.

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