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DOL Clarifies Certification for Covered Reasons to Take FFCRA Leave:

Part Two in a Five-Part Series

In the first installment of this five-part series exploring the US Department of Labor (DOL) regulations (29 CFR Part 826) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible to take, and which employers are required to provide, emergency paid sick leave or emergency paid family leave under the FFCRA. In this second installment, we take a closer look at the reasons why an employee might take job-protected leave under the FFCRA and what proof an employer may request to determine employee eligibility.

Qualifying Reasons for Leave

As we covered previously, under the Emergency Paid Sick Leave (EPSL) provisions of the FFCRA, eligible employees may take up to 80 hours of paid sick leave between April 1 and December 31, 2020, for one of six covered reasons related to coronavirus disease 2019 (COVID-19), and up to 12 weeks (10 of which are paid) of extended paid FMLA leave for reason number 5 below. Although the qualifying reasons for paid leave are unchanged from the original FFCRA language, the DOL has provided additional guidance on how to interpret these provisions, shown below.

1. Quarantine or Isolation Orders

Under the FFCRA, a covered employer shall provide its eligible employees EPSL to the extent that the employee is unable to work or telework because he or she "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." 29 C.F.R. § 826.20(a)(1)(i).

- The Executive Summary the DOL issued with the regulations (which provides context for the regulations, but that does not separately have the force of law) explains that "[q]uarantine or isolation 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."
- Many employees are currently impacted by such orders; however, the regulations make clear that an employee qualifies for leave under this first reason only if "but for being subject to the [quarantine or isolation] order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework." 29 C.F.R. § 826.20(a)(2). In other words, even if an employee is affected by a shelter-in-place or non-essential business closing order because the place of business where the employee works is closed temporarily, he or she may not be entitled to paid time off under this provision because "[a]n Employee Subject to a Quarantine or Isolation Order may not take [EPSL] where the Employer does not have work for the Employee as a result of the order or other circumstances." This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.
- The Executive Summary accompanying the regulations provides an example of a coffee shop that closes indefinitely due to a downturn in business related to COVID-19. As a result, it no longer has any work for its employees. A cashier who worked at the coffee shop and is subject to a shelter-in-place order would be unable to work even if he were not required to stay at home, and, therefore, does not qualify for EPSL under the first reason. The Executive Summary goes on to explain that the same result would apply if the coffee shop closed because of the quarantine or isolation order itself; even if the coffee shop closed because it is deemed non-essential or because its customers must adhere to the stay-at-home order, the cashier's inability to work would be because those customers were subject to the order and/or because the store was required to close, not because **the cashier** was subject to the order. A subtle difference, but one that may result in disqualification from EPSL leave under the first FFCRA reason.
- The Executive Summary contains a further example of a law firm that permits its lawyers to work from home during a quarantine or isolation order. Because the lawyer is not prevented from working by the order because of the availability of teleworking, she would not be entitled to EPSL under the first qualifying reason. However, if she were unable to telework due to a power outage or similar extenuating circumstance and could not access the office due to a stay-at-home order, then she may be entitled to EPSL.

2. Recommendation to Self-Quarantine

Another reason why an employee may take EPSL under the FFCRA is that the employee is unable to work or telework because he or she "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19." 29 C.F.R. § 826.20(a)(1)(ii).

- Section 826.20(a)(3) of the FFCRA regulations explains that the advice to self-quarantine must be based on an approved healthcare provider's belief that the employee has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19.
- In addition, the self-quarantine must prevent the employee from working. If an employee is self-quarantining based on a healthcare provider's advice but is able to telework, he or she does not qualify for EPSL under this second FFCRA reason. An employee who is self-quarantining is able to telework and, therefore, may not take EPSL for this reason if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.
- The advice to self-quarantine required to fall within this qualifying reason must come from a "health care provider" as defined in 29 C.F.R. § 825.102. This is not the expansive definition of healthcare providers who may be exempted from coverage under the FFCRA in employers' discretion as we discussed in Part 1 of this series, but rather is limited to those providers who are able to certify FMLA leaves in the ordinary course, and includes "[a] doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or [a]ny other person determined by the Secretary [of Labor] to be capable of providing health care services." This latter category includes only: podiatrists, dentists, clinical psychologists, optometrists and chiropractors; nurse practitioners, nurse-midwives, clinical social workers and physician assistants; Christian Science Practitioners; any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and healthcare providers who practice in a country other than the US who are authorized to practice in accordance with the law of that country and who are performing within the scope of his or her practice as defined under such law.
- Therefore, employees may not make their own determination that they are vulnerable to COVID-19; they must be **instructed** by one of the narrow list of enumerated healthcare providers above that they should self-quarantine for a *bona fide* reason and, by virtue of that self-quarantine, they must be unable to work or telework despite the availability of work otherwise in order to qualify for EPSL under this reason.

3. Seeking Medical Diagnosis After COVID-19 Symptoms

The third qualifying reason why an employee may take EPSL if he or she "is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider." 29 C.F.R. § 826.20(a)(1)(iii).

- Section 826.20 clarifies that to qualify for EPSL under this qualifying reason, an employee must be experiencing symptoms identified by the US Centers for Disease Control and Prevention as being consistent with COVID-19, such as fever, dry cough or shortness of breath, and be unable to work because the employee is taking affirmative steps to obtain a medical diagnosis to confirm whether or not the employee is COVID-19-positive, "such as making, waiting for, or attending an appointment for a test for COVID-19."
- Therefore, being symptomatic alone is insufficient. To qualify for EPSL under this reason, an employee must be both symptomatic **and** taking affirmative steps to obtain a diagnosis, and the covered time off is limited to the time the employee is unable to work because of taking those affirmative steps. Self-quarantine without seeking a medical diagnosis is not sufficient to qualify for EPSL under this reason. And, similar to the scenarios set forth above, employees who are able to telework while waiting for their appointment or test results would not be eligible for EPSL for this reason.
- An employee may continue to take EPSL while experiencing COVID-19 symptoms and awaiting test results under this reason, and may continue to do so until EPSL is exhausted after testing positive for COVID-19 if the employee's healthcare provider advises the employee to self-quarantine, but then the EPSL would be covered under reason number 2.

4. Caring for an Individual Who Is Quarantining or Isolating

The FFCRA allows an eligible employee to take EPSL to care for an individual who is subject to a "Federal, State, or local quarantine or isolation order related to COVID-19" or has been directed to self-quarantine by a health care provider due to concerns related to COVID-19." 29 C.F.R. § 826.20(a)(1)(iv).

- The regulations clarify this qualifying 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. Accordingly, an employee caring for an individual may not take paid sick leave if the employer does not have work for him or her.

- Although the statute is written broadly to suggest that leave may be taken to care for any "individual," the regulations narrow this and state that leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, a person who regularly resides in the employee's home, such as a 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. Furthermore, the individual being cared for must (a) be subject to a federal, state or local quarantine or isolation order, or (b) have been advised by a healthcare provider to self-quarantine based on a belief that he or she (i) has COVID-19, (ii) may have COVID-19 or (iii) is particularly vulnerable to COVID-19.
- For purposes of certification, an employee requesting EPSL under this reason must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject, or (2) the name of the healthcare provider who advised the individual to self-quarantine, depending on the precise reason for the request.

5. Child Care Paid Sick Leave

The FFCRA also permits an eligible employee to take EPSL to care for the employee's son or daughter "whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID-19." 29 C.F.R. § 826.20(a)(1)(v). The FFCRA further permits eligible employees to take emergency paid FMLA leave for up to 12 weeks total for emergency child care leave due to school and daycare closures and daycare provider unavailability.

- Although the FFCRA specifically limited leave for this reason to children under 18 years of age, the DOL expanded the definition to be consistent with the definition of "child" as used in the existing provisions of the FMLA to include children over the age of 18 who are incapable of self-care because of a mental or physical disability.
- To qualify for EPSL under this provision, the employee must be able to perform work for his or her employer but for the need to care for the child, which means that the employee may not qualify for EPSL under this reason if the employer does not have work for him or her to do.
- Moreover, an employee may take EPSL to care for a child only when the employee needs to, and actually is, caring for his or her child. According to the DOL's Executive Summary, generally, an employee does not need to take EPSL for child care reasons "if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide the care the child needs."
- Although the DOL regulations do not address this, please note that the IRS issued guidance regarding employer applications for tax credit relief to offset the cost of EPSL and emergency paid FMLA leave suggesting that employees who used paid time off under the FFCRA for child care for a child over the age of 14 would need to demonstrate extenuating circumstances for why the child could not be left unattended. In an abundance of caution, employers may wish to obtain the specific age and circumstances requiring child care leave when employees exercise FFCRA rights to care for older, non-disabled teens.

6. Other "Substantially Similar Condition"

The FFCRA includes a catch-all provision whereby an employee may use EPSL if he or she "has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor." Although these "substantially similar conditions" have not yet been defined, the regulations make clear that they "may be defined at any point during the Effective Period, April 1, 2020 to December 31, 2020." 29 C.F.R. § 826.20(a)(1)(vi). If they are updated, we will provide further guidance.

Employee Notice Requirements

Despite the state of alarm that we all find ourselves in, employees still must take affirmative steps to alert their employers to their request for FFCRA-qualifying leave. Section 826.90 of the FFCRA regulations addresses an employee's notice obligation.

- Employers may require employees to follow reasonable notice procedures **after the first workday or portion thereof** for which an employee takes EPSL for any reason, other than for child care reasons. Notice may not be required in advance, and may only be required after the first workday or portion thereof when the employee uses paid leave. However, after the first workday, it will be reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case. Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case.
- Because leave for school/daycare closures are generally more foreseeable, in any case, where an employee requests leave to care for a son or daughter whose school or daycare closed, if that leave was foreseeable, an employee shall provide the employer with notice of the need for leave "as soon as practicable." Even then, if an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.
- Generally, it will be reasonable for the employer to require the employee to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Furthermore, it will generally be deemed reasonable for notice to be given by the Employee's spokesperson (spouse, adult family member, or other responsible party) if the Employee is unable to do so personally.

- The DOL presumes that it is reasonable for an employer to require oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA. An employer may not require notice to include documentation beyond the certification items listed below.
- The DOL encourages, but does not require, employees to notify employers about their request for paid leave as soon as practicable, and, if an employee fails to give proper notice, the employer is required to give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

Employee Documentation/Certification Requirements

- All employees requesting EPSL or paid FMLA leave must provide their employer a signed statement containing the following information:
  - Employee 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 or telework because of the qualified reason(s) for the leave

In addition:

- Employees seeking to take EPSL for qualifying reason number 1 "must additionally provide the employer with the name of the government entity that issued the quarantine or isolation order."
- Employees seeking to take EPSL for qualifying reason number 2 must provide the employer "with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19."
- Employees seeking to take EPSL to care for an individual subject to a quarantine or isolation order must provide the employer with "the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject," or "the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19."
- Employees seeking to take paid sick leave for child care reasons must additionally provide:
  - The name of the son or daughter being cared for
  - The name of the school, place of care or child care provider that has closed or become unavailable, and
  - A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or expanded paid FMLA leave
- Employers may also request an employee to provide such additional material as is needed for the employer to support a request for tax credits pursuant to the FFCRA. This information will be laid out in anticipated IRS guidelines, but for now, employers can review informal IRS guidance here.
- Employers must retain all documentation provided as part of the certification process for four years, regardless of whether leave was granted or denied. If the employee provides oral statement to support a request for EPSL or paid FMLA, the employer must document and retain such information for four years.

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