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DOL Guidance Clarifies Nuances on How FFCRA Leave May Be Used

Part Three 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 the second installment, we reviewed the six reasons why an eligible employee may take job-protected paid sick leave or paid family leave for coronavirus disease 2019 (COVID-19)-related reasons. In this third installment, we look at the unique rules regarding how emergency paid sick leave (EPSL) and paid public health emergency FMLA leave (EFMLA) may be used – whether continuously or intermittently, and how both leave provisions work in conjunction with existing employer leave policies.

General Principles

The EPSL provisions of the FFCRA allow eligible full-time employees to take up to 80 hours of paid sick leave between April 1 and December 31, 2020, for one of the six enumerated reasons set forth in the Act, which we discussed in depth here. Part-time employees are entitled to a prorated amount of time off. EPSL is paid at the employee's regular rate of pay, up to US$511/day maximum or US$5,110 in the aggregate, for certain EPSL-qualifying reasons (i.e., when the employee is subject to a quarantine or isolation order; when the employee has been directed to self-quarantine by a health care provider; or when the employee is symptomatic and awaiting a COVID-19 diagnosis). EPSL is paid at two-thirds the employee's regular rate of pay, up to US$200/day maximum, for all other EPSL-qualifying reasons (i.e., when the employee is caring for an individual subject to a quarantine or isolation order, caring for a child whose school or daycare has closed, or for other reasons as may later be determined by the Secretary of Health and Human Services).

The EFMLA provisions of the FFCRA allow an eligible employee to take up to 12 weeks of job-protected FMLA leave when they have a need to care for a child whose school or place of care has closed or childcare provider is unavailable. The first two weeks of EFMLA leave may be unpaid, but the remainder of the EFMLA leave is paid at two-thirds the employee's regular rate of pay, up to US$200/day maximum or US$10,000 in the aggregate. This seems simple enough in theory, but as we will discuss in part four of the series, even these pay obligations can be quite vexing. For today, though, we look first on whether and when employers can require that employees use accrued paid time off with, or in place of, the paid leave available under the FFCRA.

Coordination With Paid Time Off Policies

1. Employers may, but are not required to, allow use of accrued paid time off to supplement EPSL wages.

We know from the FFCRA that the maximum number of EPSL hours to which an eligible employee is entitled is 80 hours [FFCRA § 5102(b)]. The regulations now make clear that that is 80 hours total between April 1 and December 31, 2020, regardless of how many employers an employee works for, meaning the 80-hour maximum is per person, not per job. 29 C.F.R. § 826.160(f). We also know that any unused EPSL hours do not carry over at year end [FFCRA § 5102(b)(2)(3)], and that EPSL provided to an employee shall cease beginning with the employee's next scheduled work shift immediately following the termination of the need for EPSL [FFCRA § 5102(c)]. We also know that an employer may not require, as a condition of providing EPSL, that the employee search for or find a replacement employee to cover the hours during which the employee is using EPSL [FFCRA § 5102(d)]. Further, we know that EPSL is "available for immediate use by the employee" for qualifying reasons, "regardless of how long the employee has been employed by an employer" [FFCRA § 5102(d)], and that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses EPSL [FFCRA § 5102(e)(2)(B)]. The regulations confirm this, and the executive summary published by the DOL with the regulations explain that, "[p]aid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before . . . April 1, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave." What the FFCRA left unclear was whether employers could permit, or even require, employees to use other paid leave to supplement wages payable under the FFCRA.

The DOL regulations now clarify that use of other available paid sick leave to supplement wages is permissible, but not required. Section 5107 of the FFCRA makes clear that the FFCRA is not to be construed in a manner to diminish rights or benefits an employee is entitled to under any federal, state, or local law; collective bargaining agreement; or existing employer policy. Therefore, leave available to employees under federal, state, or local law, such as paid sick leave statutes adopted by many states and municipalities, or leave available under discretionary employer policies, continue in full force and effect notwithstanding the adoption of the FFCRA. Therefore, if an employee has paid time off available, such as in a discretionary employer-provided bank, the employer may not require the use of such time prior to, or in lieu of, providing the employee with the daily pay required under the EPSL provisions of the FFCRA, but may permit the employee to use such accrued time off to supplement their wages so as to be paid their regular rate of pay until leave is exhausted. It is also clear that an employer may refuse to allow an employee to do so, as, according to 29 C.F.R. § 826.22(c)(1)-(2), "[i]n no event shall an Employer be required to pay more than US$511 per day" or "US$200 per day" for applicable qualifying reasons, as set forth above. That discretion may be particularly useful if employers are facing cash flow issues in the current economic crisis.

2. Employers may, but are not required to, allow use of accrued paid time off to supplement EFMLA wages.

We know from the FFCRA that the first 10 days for which an employee takes EFMLA leave "may consist of unpaid leave," but that an employee may elect to substitute any accrued vacation leave, personal leave or medical or sick leave for unpaid leave during the 10-day period. [FFCRA § 3102(b)(1)]. We also know that an employer "shall provide paid leave for each day of [EFMLA] leave . . . that an employee takes after taking leave . . . for 10 days," up to a total of 12 weeks of leave in total, but "[i]n no event shall such paid leave exceed US$200 per day and US$10,000 in the aggregate." [FFCRA §§ 3102(b)(2)(A); 3102(b)(2)(B)(ii)]

The DOL regulations now make clear that, although "[i]n no event shall an Employer be required to pay more than US$200 per day and US$10,000 in the aggregate per Eligible Employee when an Eligible Employee takes Expanded Family and Medical Leave for up to ten weeks after the initial two-week period of unpaid Expanded Family and Medical Leave," 29 C.F.R. § 826.24(a), an eligible employee may elect to use vacation, personal leave, or other paid time off to make up the difference between (a) the lesser of (i) two-thirds the employee's regular daily pay, and (ii) US$200; and (b) the employee's regular daily wage. 29 C.F.R. § 826.24(d). Likewise, if an employer requires eligible employees to use vacation, personal leave, or other paid time off concurrently with FMLA leave, the employer may require the eligible employee to supplement their EFMLA wages with accrued time off so as to be paid "a full day's pay for that day." However, the employer may only take a maximum of US$200/day, or US$10,000 in the aggregate, in tax credits per employee for wages paid as EFMLA. *Id*.

According to an executive summary issued by the DOL with the regulations, the DOL believes this effectuates the purposes of the FFRA "by allowing employees to receive full pay during the period for which they have preexisting accrued vacation or personal leave or paid time off, and allowing employers to require employees to take such leave and minimize employee absences."

Coordination of EPSL and EFMLA for Childcare Purposes

Both the EPSL and EFMLA provisions of the FFCRA provide leave to care for a child due to a school or place of care closure or child care unavailability; up to 80 hours of EPSL are available, and up to 12 weeks of EFMLA are available, the first two weeks of which may be unpaid. The regulations clarify that EPSL and EFMLA for childcare reasons may "run concurrently." 29 C.F.R. § 826.60(a). In such case, the first two weeks of EFMLA leave (up to 80 hours) may be paid under the EPSL provisions of the FFCRA, whereas the subsequent weeks will be paid under the EFMLA provisions of the FFCRA. 29 C.F.R. § 826.60(a)(1)-(2).

However, if an employee has already used or exhausted EPSL for any other qualifying reason, that will impact the amount of EPSL that remains available to the employee. For example, if an employee first uses 60 hours of EPSL because he or she is symptomatic and awaiting a COVID-19 diagnosis, and then after being confirmed negative for the virus, wishes to take time off due to his or her child's daycare closure, the first 20 hours of childcare leave will be paid under the EPSL provisions; the balance of the first two weeks of childcare leave may be unpaid; and then the subsequent leave – up to a maximum of 10 weeks – will be paid under the EFMLA provisions of the Act. 29 C.F.R. §§ 826.60(a)(3)-(4), (b).

The regulations also clarify that, once EPSL has been exhausted, the employee may choose to substitute earned or accrued paid leave provided by the employer during the two-week unpaid portion of EFMLA leave, which substitute pay will run concurrently with the EFMLA leave. 29 C.F.R. § 826.60(b)(2). If the employee does not elect to substitute paid leave for unpaid EFMLA leave during the balance of the first two weeks of childcare leave, the eligible employee will remain entitled to any paid leave he or she has earned or accrued. 29 C.F.R. § 826.60(b)(3).

Once the employer and employee are past the two-week unpaid period and into the 10-week paid FMLA portion of childcare leave, neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where Federal or state law permits, to have accrued paid leave supplement the two-third pay so that the employee receives the full amount of their normal pay."

What about those employees who already have exhausted all annual FMLA leave, such as for birth or baby bonding or due to an unrelated serious health condition? The EFMLA enactment does not add to the 12-week FMLA limit; therefore, if an employee has already exhausted all available FMLA leave but requires time off for childcare purposes, he or she may use up to 80 hours of EPSL for childcare leave, but then has no FMLA time remaining thereafter. 29 C.F.R. §§ 826.60(a)(4), (b); § 826.70(b). In addition, even if the employer utilizes a 12-month period other than a rolling 12-month period for determining FMLA eligibility, the regulations clarify that employees may take no more than 12 weeks of EFMLA leave between April 1 and December 31, 2020. 29 C.F.R. § 826.70(e). For example, if the employer defines the FMLA eligibility year as July 1 – June 30 each year, the employee nonetheless may take no more than 12 workweeks of paid EFMLA leave between April 1 and December 31, 2020, even though the leave spans two FMLA leave 12-month periods under established employer policies. *Id.*

Intermittent Leave – A Matter of Employer Discretion

Employers already know that FMLA leave may be used intermittently, but what about EPSL and EFMLA? The regulations clarify that intermittent use is possible, but that intermittent EPSL and EFMLA leave is entirely at employer discretion.

As a general premise, the DOL supports "providing maximum flexibility to employers and employees during the public health emergency." For that reason, as explained in the DOL's executive summary, an employee's use of intermittent leave combined with EPSL or EMLA "should not be construed as undermining the employee's salary basis." [Executive Summary, p. 20.] That said, intermittent leave is not required under either EPSL or EFMLA, as, according to the executive summary, "one basic condition applies to all employees who seek to take their [EPSL] or [EMLA] intermittently – they and their employer must agree." [*Id.*, p. 43] "Absent agreement, no leave under the FFCRA may be taken intermittently." Although a written agreement is not necessary, there must be "a clear and mutual understanding between the parties that the employee may take intermittent [EPSL] or [EFMLA] or both" and as to "the increments of time in which leave may be taken." 29 C.F.R. 826.50(a).

According to the regulations, and assuming the employer and employee agree:

- If an employee is reporting to the employer's worksite, and if the employer and employee agree:
  - The employee may take EPSL and EFMLA intermittently for child-care-related reasons due to school or daycare closures, and in any increment of time agreed to by the employer and employee.
  - The employee may not take EPSL for any reason other than childcare intermittently, but instead "must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take EPSL."
- If the employee is teleworking, the employee and employer may agree to allow the employee to use EPSL or EFMLA intermittently for any reason and in any agreed increment of time, but only when the employee is unavailable to telework because of a COVID-19 related reason.

Only the amount of time actually taken may be counted toward the employee's leave entitlement, so if an employee normally works 40 hours per week but takes three hours of leave each workday for child care reasons, for a total of fifteen hours per workweek, then the employee has only used 15 hours of EPSL (out of 80), or 37.5% of the workweek if in EFMLA leave.

According to the executive summary published by the DOL, these regulations are intended to afford "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." Further, "as teleworking employees present no risk of spreading COVID-19 to work colleagues, intermittent leave for any qualifying reason furthers the statute's objective to contain the virus." By contrast, employees reporting to the worksite may only take leave in full-day increments when using time off for potential infection or when exposed to possibly infected individuals because of the "unacceptably high risk that the employee might spread COVID-19 to other employees when reporting to the employer's worksite."

Now that we have clarity (or close to clarity!) on when and how EPSL and EFMLA may be used, we address next in our series how to pay for such leave, which is less intuitive than it seems on the surface.

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