SQUIRE PATTON BOGGS

Job Restoration and Non-discrimination Obligations Under the FFCRA

Part Five in a Five-Part Series

In parts one through four 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 for leave under the FFCRA; the reasons why an eligible employee may take job-protected emergency paid sick leave (EPSL) or paid public health emergency FMLA leave (EFMLA) for coronavirus-related reasons; the unique rules regarding how EPSL and EFMLA may be used; and how employers calculate the "regular rate of pay" in order to pay employees exercising EPSL and EFMLA leave rights.

In this final alert in the series, we discuss employees' rights regarding job restoration and protection against discrimination and retaliation for exercising FFCRA rights.

Job Restoration Under the EPSL Provisions of the FFCRA

Although the EPSL provisions of the FFCRA modify the Fair Labor Standards Act, which does not address job restoration (because it is not a leave statute, but rather one providing for payment of a minimum wage and overtime compensation), the DOL nonetheless reads into the EPSL provisions of the FFCRA an obligation to restore employees to their position at the conclusion of their EPSL leave. According to 29 C.F.R. § 826.130(a), "[o]n return from [EPSL] . . ., an Employee has a right to be restored to the same or an equivalent position[.]"

According to existing FMLA regulations incorporated by the DOL by reference, an "equivalent position" is one that is "virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites and status," and one that involves "the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). "Equivalent terms and conditions of employment" requires reinstatement to the same or geographically proximate worksite, schedule, opportunity for bonus payments, and profit-sharing and other discretionary and non-discretionary payments. 29 C.F.R. § 825.215(e). "Equivalent pay" includes any unconditional pay increases that occurred during the EFMLA leave period, such as cost-of-living increases, and restoration to a position with the same or equivalent pay premiums, such as pay differentials, bonus eligibility and equivalent benefits. 29 C.F.R. §§ 825.215(c)(1), (c)(2), (d). An employee ordinarily is entitled to such reinstatement even if he or she "has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 C.F.R. § 825.214.

However, this job restoration expectation is subject to one exception in the context of EPSL leaves. If an employer would have implemented employment actions, such as layoffs, that would have affected the employee whether or not he took EPSL leave, the employee is not guaranteed job restoration. However, to deny job restoration in such circumstances, the employer "must be able to show that an Employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 C.F.R. § 826.130(b)(1). It is, therefore, critical that employers carefully document selection criteria when terminating employees who are on, or recently have taken, EPSL leave. It is also important to document the dates when leave is taken – job restoration rights only apply to leaves taken on or after April 1 and before December 31, 2020, and do not have retroactive effect to leaves employees were permitted to take prior to the effective date.

Job Restoration Under the EFMLA Provisions of the FFCRA

The EFMLA expands on the existing Family and Medical Leave Act (FMLA) and, therefore, the general principles of job restoration in the FMLA apply equally with respect to EFMLA leave. The general rule, therefore, is that, upon return from EFMLA leave, an employee has a right to be restored to the same or equivalent position as they held prior to EFMLA leave. 29 C.F.R § 826.130(a). However, several exceptions exist:

- An employer may deny job restoration to "key employees," if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 826.130(b)(2); 29 C.F.R. § 825.217.
  - A "key employee" is a salaried-exempt, FMLA-eligible employee who is among the highest paid 10% of all the employees (both salaried and non-salaried, FMLA-eligible and FMLA-ineligible) employed by the employer within 75 miles of the employee's worksite.
  - In determining which employees are among the highest paid 10%, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses, but exclude incentives whose value is determined at some future date, such as stock options.
  - The key employee determination must be made at the time the employee gives notice of the need for leave. This notice allows the employee the opportunity to make an informed decision whether to take FMLA leave (or, in this context, EFMLA leave), aware of the risk the employee may not be restored to their prior position at the conclusion of the leave period.
- In addition, according to 29 C.F.R. § 826.130(b)(3), an employer who employs fewer than 25 eligible employees may deny job restoration to an eligible employee who has taken EFMLA if all four of the following conditions are satisfied:
  - The eligible employee took leave to care for a son or daughter whose school or place of care was closed, or whose childcare provider was unavailable for COVID-19 related reasons.

- The position held by the eligible 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 the COVID-19 public health emergency during the period of the employee's leave.
- The employer makes reasonable efforts to restore the eligible employee to a position equivalent to the position the employee held when the leave began, with equivalent employment benefits, pay and other terms and conditions of employment.
- Where reasonable efforts 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. This one-year period begins on the earlier of (i) the date the EFMLA leave ends or (ii) the date 12 weeks after the employee's leave began.

- For covered employers of all sizes, even those with more than 25 employees, an employee is not entitled to job restoration if the employer can show that an employee would not otherwise have been employed at the time reinstatement is requested, such as due to layoffs that would have included the employee irrespective of their taking EFMLA leave. 29 C.F.R. § 826.130(b)(1).
- Finally, any employee who fraudulently obtains EFMLA leave is not protected by the job restoration requirements otherwise applicable under the FMLA. 29 C.F.R. § 825.216(d).

Prohibition Against Discrimination and Retaliation; Causes of Action

The FFCRA does more than simply provide employees with paid time off from work for certain COVID-19 related issues. It also creates causes of action for employees whose rights were disregarded or against whom employers retaliate for exercising those rights.

EPSL Remedies

Section 5104 of the FFCRA provides that it "shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes [EPSL] leave …, and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to [use of EPSL] (including a proceeding that seeks enforcement of [the EPSL provisions of the FFCRA]), or has testified or is about to testify in any such proceeding." The regulations reinforce this. See 29 C.F.R. § 826.150(a). If an employer violates the EPSL provisions of the FFCRA, an aggrieved employee may recover the wages that should have been paid to them under the EPSL provisions and an equal amount as liquidated damages. If the employee brings a private civil action to recover actual and liquidated damages and prevails, they also may recover attorneys' fees and costs of litigation. See 29 C.F.R. § 826.150(b).

The DOL may also pursue relief on behalf of victims denied EPSL rights in which it seeks damages and liquidated damages and other legal or equitable relief to which the employees may be entitled, and seek civil money penalties for the violation. In addition, any employer who willfully violates the EPSL provisions of the FFCRA could be subject to criminal penalties, including a fine and, if a repeat offender, imprisonment. If the DOL concludes that an employer has unlawfully terminated the employment of an employee who pursued rights under the EPSL provisions of the FFCRA, it may seek victim-specific relief, including lost wages, liquidated damages and reinstatement.

EFMLA Remedies

Enforcement rights under the EFMLA provisions of the FFCRA differ. The prohibitions against interference with the exercise of rights, discrimination and interference with proceedings or inquiries described in the FMLA also apply in the EFMLA context. 29 C.F.R. § 826.151(a). Even though an employer who violates the non-discrimination or non-interference provisions of the FMLA is subject to oversight by the DOL, an eligible employee may only file a private action against the employer if the employer is otherwise subject to the FMLA in the absence of the EFMLA expansion. 29 C.F.R. § 826.151(b). In other words, an employee may not bring a private action against an employer under the EFMLA if the employer, although now subject to the paid leave requirements of the EFMLA, is not otherwise subject to the FMLA, meaning that to bring a private action, the employee's employer must have had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The DOL can investigate written complaints lodged with the Wage and Hour Division, including through its subpoena power, 29 C.F.R. §§ 826.151, 826.152(b), but otherwise employees of businesses with fewer than 50 employees lack the ability to file a private cause of action under the EFMLA expansion.

Although this concludes our five-part in-depth look at the DOL's FFCRA regulations, we assume that this area will continue to evolve as the pandemic continues and employers face difficult decisions regarding workforce structuring. We will continue to share guidance as the situation evolves, both through alerts and through our blog, to which we suggest employers subscribe for the most current information regarding regulatory developments: www.employmentlawworldview.com.

Contacts

Laura Lawless
Partner, Phoenix
T +1 602 528 4137
E laura.lawless@squirepb.com

Daniel B. Pasternak
Partner, Phoenix
T +1 602 528 4187
E daniel.pasternak@squirepb.com

37909/04/20