LABOR AND EMPLOYMENT

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COVID-19: The Department of Labor Issues FFCRA Regulations

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On April 1, 2020, the day the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family Medical Leave Expansion Act ("EFMLEA") portions of the Families First Coronavirus Response Act ("FFCRA") took effect, the U.S. Department of Labor issued lengthy regulations interpreting the EPSLA and EFMLEA[1].

Since the FFCRA was signed into law by President Trump on March 18, 2020, the Department has sought to provide ongoing guidance about how it would interpret and enforce the FFCRA as employers and employees have besieged the Department with questions. The Department first issued a limited "Q&A" on March 24, 2020[2], followed by a more detailed "Q&A" on March 28, 2020[3]. The 124 pages of the new April 1 regulations should now be considered operative and employers with fewer than 500 employees should be familiar with them.

The regulations provide both broad interpretations of the EPSLA and EFMLEA, such as the standards for exemptions for small employers and harmonizing the flexibility of teleworking with the obligation to pay employees for all time worked, and also provide technical guidance in numerous areas, including the definition of a "son or daughter" and how to calculate the amount of paid time off due to full- and part-time employees. This Alert highlights specific portions of the regulations of interest to employers as they seek to comply with the FFCRA.

What are the EPSLA and EFMLEA basics?

As a reminder, employers with fewer than 500 employees must provide paid sick leave under the EPSLA to employees who are unable to work because they are subject to a federal, state, or local quarantine or isolation order related to COVID-19; have been advised by a health-care provider to self-quarantine due to concerns related to COVID-19; are experiencing symptoms of COVID-19 and are seeking a medical diagnosis; are caring for individuals who are subject to a quarantine order or who have been advised to self-isolate; are caring for sons or daughters whose schools or places of care have been closed or whose child-care providers are unavailable due to COVID-19 related reasons; or are experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services in consultation with the U.S. Secretary of the Treasury and the U.S. Secretary of Labor.

The EFMLEA requires employers with fewer than 500 employees to provide expanded partially paid family and medical leave to eligible employees who are unable to work because they are caring for sons or

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1 Federal Register, Paid Leave Under the Families First Coronavirus Response Act, https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

2 *See,* Schnader's Client Alert, "U.S. DOL Releases Initial Guidance for Employers on Families First Coronavirus Response Act," http://www.schnader.com/wp-content/uploads/2020/03/U.S.-DOL-RELEASES-INITIAL-GUIDANCE-FOR-EMPLOYERS-ON-FAMILIES-FIRST-CORONAVIRUS-RESPONSE-ACT-3_27_2020.pdf.

3 U.S. DOL, Families First Coronavirus Response Act: Questions and Answers, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

daughters whose schools or places of care are closed or whose child-care providers are unavailable due to a public health emergency with respect to COVID-19 as declared by a federal, state, or local authority.

Under both EPSLA and EFMLEA, employers with fewer than 50 employees may be exempt from these requirements.

Who is a "covered employer"?

The regulations make an important change in the Department of Labor's approach to determining whether related business entities are considered separately or on a consolidated basis in assessing "covered employer" status; that is, whether they employ 500 or fewer employees. It appeared based on initial guidance from the Department that related business entities would apply two different tests to determine whether they should combine the number of employees in related entities to measure the 500-employee cap. The initial guidance referred to the "joint employer" standards under the Fair Labor Standards Act ("FLSA") as the correct test to determine coverage under the EPSLA and the "integrated entity" test under the Family and Medical Leave Act of 1993 ("FMLA") as the test to determine employer coverage under the EFMLEA.

The new April 1 regulations do not separate the EPSLA and EFMLEA in dictating how to determine whether employees of related entities are to be counted toward the 500-employee cap. Rather, for application of both EPSLA and EFMLEA, the regulations infer and the guidance preceding the regulations state that related entities are considered separate employers, unless they are *either* joint employers or integrated entities. In other words, related entities that meet either the joint employer standards or the integrated entity test must count all employees of all related entities toward the 500-employee cap for both EPSLA and EFMLEA compliance. This approach should simplify administration of the two laws by employers by providing a single standard for both laws.

Must EPSLA paid leave be provided if the business is shuttered due to a governmental order or lack of business?

When the FFCRA was enacted, employers expressed concern with the apparent obligation in the law to provide paid leave even if a business was closed due to lack of business or a governmental shutdown order. The April 1 regulations clarify that employers need not provide paid time off for periods when employees are precluded from working because there is no work to perform or when a business is closed, regardless of the reason. The Department explained that since an employer has no work for employees to perform during a shutdown or when the business is closed, employees are not entitled to EPSLA or EFMLEA paid leave.

Are employees required to work an uninterrupted schedule while teleworking under FLSA?

The April 1 regulations expressly acknowledge and agree with the FFCRA's goal that employers develop and implement flexible telework policies to compensate for the restrictions caused by COVID-19. In doing so, the regulations specifically allow employers and employees to agree to interrupted work schedules throughout a day or week to effectuate the flexible mandates of the FFCRA, as long as the employees are paid for all time worked. The regulations specify that such interrupted work schedules will not violate other Department regulations, namely 29 C.F.R. 790.60, regarding the continuous work day.

How are full-time and part-time employees defined?

The EPSLA provides employers with formulas to calculate an employee's status as a part-time employee or full-time employee for EPSLA purposes and also provides specific guidance on calculating paid time off for part-time employees. The April 1 regulations define full-time employees as those working at least 40 hours per week or 80 hours in a two-week period. Part-time employees, according to the regulations, are employees working any amount of time less than 40 hours per week. Employers should note this distinction as many businesses maintain policies that refer to full-time employees as those working more than 30 or 35 hours per week. Additionally, in making the determination of who is full-time and who is part-time, employers must

include any leave time taken, not only hours worked or scheduled. As employers develop policies to comply with the EPSLA, they may wish to include language that defines part-time and full-time status for EPSLA purposes and, if inconsistent with the definitions in other business policies, clarify that the EPSLA policy is limited in application.

What is the correct rate of pay to apply to time off?

The April 1 regulations also instruct employers to pay employees EPSLA and EFMLEA time off based on the regular rate as defined by the FLSA. Given this direction, employers may wish to review the FLSA regulations as to how to calculate the regular rate of pay, including, for example, the inclusion of ascertainable, non-discretionary bonus amounts so that the correct rate of pay is applied to the paid time off under the FFCRA.

What is the relationship between the EPSLA and EFMLEA leaves and the company PTO?

Employers have questioned how to handle requests for time off under the EPSLA and EFMLEA when the statutory benefits are less generous than the employers' leave policies because of the daily caps on the statutory benefits. The April 1 regulations make clear that employers cannot require employees to exhaust employer-provided paid leave prior to using EPSLA time off. However, employers may agree to allow employees to use an existing employer benefit to supplement EPSLA time off so that employees receive one hundred percent of their wages during the two-week EPSLA leave period. In contrast, the EFMLEA allows employers to require employees to use paid leave concurrently with the partially paid time allowed pursuant to the EFMLEA, and the regulations confirm this approach for EFMLEA leave.

Are employees entitled to intermittent leave under EPSLA or EFMLEA?

The April 1 regulations allow intermittent leave under EPSLA and EFMLEA by employees who are teleworking, upon agreement between the employer and the employees, regardless of the underlying basis for the leave. Significantly, the regulations also provide that, for employees who are reporting to a worksite, intermittent leave under the EPSLA and EFMLEA may be taken only to care for a child whose school or child-care facility is closed due to COVID-19. The Department of Labor specifically explained that intermittent leave under EPSLA and EFMLEA for such employees is appropriate only for child care because every other EPSLA leave involves actual or presumed direct contact with COVID-19 by the workers and to allow them into the workplace intermittently after contact with COVID-19 would undermine one of the purposes of the FFCRA to slow the spread of COVID-19.

Under what circumstances is an employer with fewer than 50 employees entitled to an exemption from the FFCRA?

An employer with fewer than 50 employees may be granted an exemption from providing EPSLA and EFMLEA time off for an employee to care for a child whose school or child-care facility is closed. In order to qualify for this exemption, an authorized officer of the business must determine one of the following three bases for exemption as delineated in the April 1 regulations:

- The leave requested would result in the expenses and financial obligations of the business exceeding available business revenues and cause the business to cease operating at a minimal capacity; or
- The absence of the employee or employees requesting leave under either the EPSLA or EFMLEA 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
- There are not 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 provided by the employee or employees requesting leave, and these labor or services are needed for the business to operate at a minimal capacity.

Employers are advised to keep records of the support for their entitlement to an exemption, but not to

provide the information to the Department at this time.

What are the exemptions for health care providers from the EPSLA or EFMLEA?

The April 1 regulations clarify that many employers that are health care providers may be exempt from EPSLA or EFMLEA. These employers have the option to exclude workers from being qualified for the paid leaves outlined above. "Health care provider" includes 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, pharmacy, any facility that performs laboratory or medical testing, or any similar institution. Included within this definition are employees of entities that contract with such businesses to provide services or to maintain the operation of the facility if the employees support the operation of the health care facility. Also included is 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.

Emergency responders, defined as any employee necessary for the provision of transport, care, health care, comfort and nutrition of patients, or others needed for the response to COVID-19 may also be excluded from coverage at the discretion of their employers. This definition encompasses military or national guard, law enforcement officers, correctional institution personnel, firefighters, 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 training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

The regulations also provide discretion to the U.S. Secretary of Health, as well as the secretaries of health in states and territories, to name additional classes of workers who need to be exempted from the leave requirements based on the state's or territory's response to COVID-19.

What records do employers need to keep, regarding requests for leave and determinations about whether to grant leave under the FFCRA?

Employers must keep documents regarding a request for time off under the EPSLA or EFMLEA for four years from the date the leave is requested, regardless of whether the paid time off is granted or denied. Since employers can provide time off pursuant to a verbal request, employers should consider whether they want to use specific forms for these leaves of absence or whether they will continue using existing forms to document such requests. Notably, employers that deny a request for time off because of a belief that the business is exempt from the law must document that an authorized officer has made the required determination regarding exemption. This provision applies to all businesses that deny a request for time off because they have concluded that they are not a "covered employer." Employers making such a determination may consider proactively documenting the basis for the conclusion and maintaining documentation with other records relating to EPSLA and EFMLEA compliance.

In addition, the regulations require employers to retain documents for four years regarding tax credits taken for EPSLA and EFMLEA leaves. These include documents regarding how an employee's leave allowance was calculated; how much of the employer's group health expenses were allocated to wages; IRS form 7200 regarding tax credit advances the employer received for providing paid time off; quarterly tax returns; and other documents. Employers are directed to the IRS website[4] to

[4] IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.

determine what documents the IRS considers to be relevant.

How should a business handle leave issues when it employs both parents of a child?

The April 1 regulations provide that leave to care for a child whose school or child-care facility is closed due to COVID-19 is only available to an employee when there is no other suitable individual to take care of the child. How this rule will operate in practice is uncertain because currently there is no rule explaining how employers should address parents of the same child working for the same company. It appears from the regulations that each employee of the same business may be entitled to two weeks of EPSLA and separate entitlements of EFMLEA time off. By way of contrast, the FMLA caps certain leaves when parents of the same child work for the same employer.

Takeaways from the April 1 regulations

Employers must deal with a range of complicated factors in determining whether their employees are eligible for EPSLA and EFMLEA leaves of absence. In the event a business determines it is not a covered employer, the basis for the decision should be documented. The April 1 regulations may help covered employers to more fully develop and communicate policies and forms in a timely manner to address and process leaves of absence and to subsequently support the tax credits related to these leaves.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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