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CONSTANGY BROOKS, SMITH & PROPHETE LLP

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Weekend update: DOL answers more of our FFCRA questions

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On Friday and Saturday, **the U.S. Department of Labor added to its initial FAQs** about the expanded leave and paid leave provisions of the **Families First Coronavirus Response Act**.

The Emergency Family and Medical Leave Expansion Act allows most employees to take FMLA leave if they are needed to care for sons or daughters who are out of school or child care, or whose child care provider is unavailable, for a coronavirus-related reason. The Emergency Paid Sick Leave Act requires employees to be paid up to 80 hours for five coronavirus-related reasons plus a "substantially similar" reason if so designated by the federal government. Both provisions will take effect this Wednesday and will expire on December 31.

These laws do not apply to private sector employers with 500 or more employees.

We previously reported **here** and **here** about the initial set of FAQs. There are now 59 FAQs, and here are the highlights of the new ones:

Documentation (FAQs 15 and 16)

Employees requesting leave (either paid sick leave or expanded FMLA leave) are required to submit to the employer a form that will be issued by the Internal Revenue Service and other information to allow the employer to seek tax credits. Leave can be denied to any employee who fails to submit the required documentation and information.

To confirm the reason for the leave for a school/child care closing under the expanded FMLA or the Paid Sick Leave Act, the employer can accept a notice posted on a school or child care center website, media reports of a closing, or an email from an official of the school or child care facility, or provider. If the leave is for a coronavirus-related serious health condition within the meaning of the "old" FMLA, the employer can require a medical certification from the health care provider of the employee or the employee's spouse, parent, or child.

Flexible schedules, intermittent leave (FAQs 18, and 20-22)

Employees can take expanded FMLA or paid sick leave on an intermittent basis if they are teleworking, and if the employer agrees to allow them to

do so. The increments of "time off" and time worked can be anything agreed upon by the employer and the employee.

The rules are more complicated if the employee works onsite. If the employee is taking paid sick leave because of his or her own isolation or quarantine order from a government official or recommendation from a health care provider, because of symptoms of coronavirus, or because of the school/child care closing reason that also qualifies for expanded FMLA leave, then the employee can take the leave on an intermittent basis, provided that the employer agrees. If the employee working onsite takes paid sick leave for the other authorized reasons (care of an individual under an isolation or quarantine order, or under the "substantially similar" catchall provision), then the leave cannot be taken on an intermittent basis. Employees taking paid sick leave in this situation must take all of their paid leave continuously until (1) it is exhausted, or (2) they no longer qualify for paid leave. In the event of (2), any unused paid sick time can be used at a later date for a qualifying reason, provided that it is used by December 31, when the law expires.

Business closings (FAQs 23-28)

If a business closes -- whether the closure is for economic reasons or because of a government directive -- the employees are not entitled to expanded FMLA leave or paid sick leave. This applies whether the closure occurred before the effective date of the FFCRA or afterward. It also applies even if the employee was on expanded FMLA leave or paid sick leave at the time of the business closing. Similarly, employees who are out of work because of furloughs or other temporary closures, or whose hours are reduced because of lack of work, are not eligible for expanded FMLA leave or paid sick leave.

Continuation of health insurance benefits (FAQs 30 and 51)

If the employee is taking expanded FMLA leave, the employee's health insurance benefits should continue on the same basis as if he or she were still working. This is identical to the insurance continuation rule that applies under the "old" FMLA. The employer must also continue health insurance coverage for employees on paid sick leave. For new hires who take paid sick leave while subject to an insurance waiting period, the time on paid sick leave must be counted as part of the waiting period.

Supplementation of paid leave benefits (FAQs 31-34)

Employees are not allowed to "double-dip." In other words, they cannot use both their paid leave under the expanded FMLA and their paid sick leave at the same time. If the employer wishes, it can allow employees receiving only 2/3 pay to choose to supplement that with accrued paid time off. However, the employer cannot require employees to do so.

If the employer lets employees supplement their 2/3 leave pay with other paid leave, it is not entitled to a tax credit for the "supplement."

An employer cannot "offset" an employee's paid leave entitlement with its own paid time off. The paid leave entitlement under both the expanded FMLA and the Paid Sick Leave Act is in addition to whatever paid leave the employer already offers.

"Son or daughter" (FAQ 40)

The FAQ clarifies that "son or daughter" includes adult children if they (1) have mental or physical disabilities and (2) are incapable of self-care because of their disabilities. This tracks the "old" FMLA regulations.

Restoration requirement, retaliation (FAQ 43)

Upon completion of expanded FMLA or paid sick leave, the employee must be restored to his or her job, or to an equivalent one. The DOL clarifies that an employer will be liable for retaliation if it takes action against an employee *because* the employee took leave under the laws or engaged in protected activity under the laws.

If an employer conducts a layoff or other action that affects an employee on expanded FMLA leave or paid sick leave, it can include that employee in the layoff. The employer would have to show that it would have taken the same action even if the employee had not been on leave. This standard also applies to neutral job-related actions taken that adversely affect an employee on leave under the "old" FMLA.

There is a limited exception to the restoration requirement when the individual on leave is a "highly compensated key employee" or when the employer has fewer than 25 employees. In these circumstances, the employer may be excused from the restoration requirement if

- the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of leave;
- the employer made reasonable efforts to restore the employee to the same or an equivalent position;
- the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
- the employer continues to make reasonable efforts to contact the for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

(Quoted from DOL page with minor edits.) This limited exception applies only in the case of FMLA leave related to the closing of a school or child care, or unavailability of the child care provider, for a coronavirus-related reason.

"Old" FMLA versus "new" FMLA (FAQs 44-45)

If the employer was covered by the FMLA before April 1, 2020, then employees are entitled to a total of 12 weeks' leave in a 12-month period, using the same "leave year" that the employer uses for other FMLA purposes. Of course, paid sick leave is available whether the employee has FMLA leave available or not.

Health care providers, emergency responders (FAQs 52, and 56-57)

For purposes of documenting the need for COVID-19 leave for medical reasons, the old FMLA's definition of "health care provider" applies. In other words, a "health care provider" could be a physician, osteopath, nurse

practitioner, or other provider defined in the FMLA regulations.

However, for purposes of the exempting "health care providers" from being "eligible employees," the definition is much more broad:

> [A] health care provider is 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
>
> This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities . . . to provide services or to maintain 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

An "emergency responder" is "an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19." This could include members of the military or National Guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical service personnel, 911 operators, and public works personnel. It also includes "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." Finally, it includes the individual determined by the highest official of the state, territory, or the District of Columbia to be the emergency responder necessary for the jurisdiction's response to COVID-19.

The exemption of health care providers and emergency responders is also available to employers that are public agencies.

Small business exception (FAQs 58-59)

The small business exception to the expanded FMLA and paid sick leave laws applies if the employer has fewer than 50 employees, but only if the leave is because the employee is needed to care for a son or daughter who is home because of a school or child care closing, or because a child care provider is not available, for a reason related to coronavirus. In the case of expanded FMLA leave, the employer would also have to demonstrate that providing expanded FMLA leave "would jeopardize the visibility of the small business as a growing concern."

The DOL says that the exemption will apply if an authorized officer of the business determines one of the following:

- The provision of paid sick leave or expanded family and medical leave 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 or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

(Quoted from DOL page with minor edits.) In other words, a small business will qualify for the "small business exemption" if (1) it has fewer than 50 employees, (2) the leave would be taken for the school-related reason, and (3) an authorized official of the company has determined that one of the three conditions listed above is satisfied.

Words of wisdom from the DOL

The FAQs contain words of wisdom, and employers who follow them are likely to be more successful in the event of a complaint or other investigation. First, the DOL says that employers and employees should cooperate as much as possible in determining the type of documentation that is required for leave, and whether employees should be allowed to take intermittent leave or supplement their leave pay with PTO. Second, the DOL says that employers should be "judicious" when exempting health care providers and emergency responders from the FFCRA to prevent the spread of coronavirus. Third, the DOL says that small businesses should "collaborate to reach the best solution for maintaining the business and ensuring employee safety."

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