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EMPLOYER NEWSLETTER

U.S. DOL ISSUES 2ND SET OF CLARIFICATIONS/FAQs ON FEDERAL PAID SICK AND FAMILY LEAVE OBLIGATIONS

March 27, 2020

The U.S. Department of Labor (“DOL”) released [additional FAQs](#) on March 26, 2020. The DOL issued the first set of FAQs on March 24, 2020, and they can be found on the same webpage.

Beginning on April 1, 2020 and extending through December 31, 2020, the recently enacted Families First Coronavirus Response Act (“FFCRA”) will require private employers with 499 or fewer employees to provide covered employees emergency paid sick leave (“EPSL”) and emergency paid family medical leave (“EFML”).

Below are some clarifications about the FFCRA and key takeaways from the FAQs:

Status of Small Employer Exception. The FFCRA allows the DOL to issue regulations to exclude small employers (i.e., 49 or fewer employees) from having to provide EFML and EPSL *if* to comply with the law would threaten the viability of the business. FAQ #4 says that the DOL is still developing those regulations.

Calculating the “Regular Rate” of Pay: EPSL and EFML benefits are to be paid using the eligible employee’s “regular rate” subject to caps on the daily amount and total amount paid to an employee. So, what is the “regular rate”? FAQ #8 explains that the “regular rate” includes all wages, commissions, tips, piece rates and/or similar production-based compensation earned by the employee. This is the definition of “regular rate” used by the Fair Labor Standards Act (“FLSA”).

Information and Documentation to Support Leave. FAQ #15 and #16 explain that employees must support leave requests with appropriate *information* and supporting *documentation*. The information an employee should provide is his/her name, the qualifying reason for leave, a statement that s/he is unable to work or telework for that reason, and applicable leave date(s). An employee’s supporting documentation could be a copy of a quarantine or isolation order or written *documentation* from a health care provider advising self-quarantine. For employees using leave to care for a child, supporting documentation could include a notice posted on a government, school, or day care website or published in a newspaper; or an email or note from an employee or official of the school, place of care, or child care provider.

The DOL recommends that employers retain this documentation to support their claims for applicable credits. The DOL refers employers to applicable Internal Revenue Service (“IRS”) forms and information to claim the tax credit.

What it means to be "Unable" to Work or Telework: FAQ #18 explains that being “unable” to work or telework means that an employer has work available, but one of the qualifying reasons for paid leave prevents the employee from being able to do so.

If an employer and employee agree that the employee can work the same number of hours but outside the normal schedule (*e.g.*, early morning or at night) then paid leave is not necessary – unless a COVID-19 related event makes that modified schedule not possible.

Intermittent and Incremental Use at Employer's Discretion: FAQ #20 and #21 provide that that employees and employers may agree to intermittent and incremental use of EPSL and EFML. But the FAQs take care to differentiate between two situations -- if the employee is **teleworking** or if the employee is **working onsite**.

For employees who are **teleworking**, the employer and employee can agree to intermittent leave for EPSL or EFML as long as a covered reason applies. However, if an employee **works onsite**, intermittent EPSL is permitted only if the employee is taking leave to care for a child whose school or childcare is unavailable for a COVID-19 related reason. If an employee takes EPSL for one of the other five reasons under the FFCRA, it must be taken in full-day increments. Telework is treated differently than onsite work because EPSL and EFML exist to prevent workplace transmission of COVID-19.

Worksite Closing Forecloses Leave Availability: Per FAQ #s23-27, if a worksite closes, employees do not receive, or continue to receive paid leave benefits. It does not matter whether: (a) the closure occurs before or after the law takes effect; (b) an employee is on leave when closure occurs; (c) an employer furloughs an employee; or (d) the worksite temporarily closes and the employer plans to reopen in the future. This is true whether the worksite closes for lack of business or per a federal, state, or local directive. If this occurs, an employee's only financial recourse is to seek unemployment benefits.

EPSL is probably not Available for Shelter-in-Place and Business Closure Orders: The current FAQ does not address how these types of orders will affect EPSL or EFML. However, it is the DOL's likely position that EPSL will not be available to employees affected by those types of sweeping emergency orders. FAQ #27 states: “If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. *This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive*” [emphasis added].

Similarly, FAQ #28 states: “If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work.”

Thus, we can infer that EPSL is not available to those covered by shelter-in-place and business closure orders at the state and local level (though employees whose child's school or childcare is unavailable would still be eligible for EFML because of the order).

Employees Can Use Leave Only for Scheduled Hours, even if those Scheduled Hours have been Reduced: FAQ #28 says that EPSL and EFML are available only for an employee's scheduled hours. If an employer reduces an employee's hours, the employee can use leave for remaining scheduled hours only.

Health Coverage Continues During Leave: Per FAQ #30, existing regular FMLA standards apply to EFML. Thus, employees can continue group health coverage on the same terms; if an employee has family coverage, an employer must maintain such coverage, and employees must generally continue to make regular contributions for their own portion of premiums.

For EPSL, the DOL says that, per the federal Health Insurance Portability and Accountability Act ("HIPAA"), employers cannot establish an eligibility rule, or set an individual's premium or contribution rate, based on whether the employee is actively at work, "unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work."

Paying Employees More Than the Law Requires. FAQ #34 says an employer may pay its employees more than the minimum amounts required by the FFCRA. However, the employer will not receive a tax credit for the extra amounts.

Conclusion

We will continue to monitor important legal developments related to the COVID-19 emergency. If we can provide advice or support, please contact us at 480-844-0039 or email: etc@clarkfirm.com or cassandra@clarkfirm.com.

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