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## EMPLOYER NEWSLETTER

### UPDATE TO THE DEPARTMENT OF LABOR FAQs

April 1, 2020

On March 28, 2020, the U.S. Department of Labor (“DOL”) released its third set of [Q&As \(#38-59\)](#) concerning the Families First Coronavirus Response Act (“FFCRA”). Effective April 1, 2020, the FFCRA requires employers with 499 or fewer employees to provide eligible employees with Emergency Paid Sick Leave (“EPSL”) and paid Emergency Family & Medical Leave (“EFML”).

#### **Who is a “Covered Employer”?**

A “Covered Employer” under the FFCRA is any private employer with fewer than 500 aggregate employees “at the time [the] employee’s leave is to be taken.” Thus, when the employee requests to take leave is when the total number of employees is counted.

The following types of employees are counted: all full-time and part-time employees, employees on leave, temporary employees who are jointly employed, and day laborers supplied by a temporary agency.

#### **Who qualifies for the “small business exemption”?**

The FAQs provide much-anticipated guidance on the small business exemption to EPSL and EFML benefits. To qualify for the small business exemption, an employer must have fewer than 50 employees **and** to comply would jeopardize “the viability of the employer’s business as a going concern.”

Per the DOL, three circumstances satisfy this hardship requirement:

- Providing paid sick leave or emergency FMLA leave would result in expenses and financial obligations exceeding available business revenues, and would cause the business to cease operating at a minimal capacity;
- The absence of an employee or employees on leave would entail a substantial risk of a similar effect of expenses and financial obligations exceeding revenues; or
- Providing leave would result in insufficient available workers to keep the business operating at a minimal capacity.

The DOL allows a small business to claim the exemption if an authorized officer concludes that the business meets the above requirements. The DOL says it will not contest the good-faith business judgment of a small business in reaching this conclusion.

However, the DOL threw an unexpected curveball regarding the scope of the small business exemption: school closures/child care reasons for FFCRA leave (which is reason #5 for EPSL leave and the only reason EFML is available) are the **only reasons** for which this exemption is available (assuming the if on above criteria is met). **This means that smaller employers with fewer than 50 employees who satisfy the hardship test are NOT exempt from providing EPSL for reasons #1, 2, 3, 4 and 6 (i.e., the medical/family care related reasons for EPSL).**

### **Which employees are eligible for leave?**

To be eligible for EPSL, it does not matter how long the employee has worked for the employer. For EFML, an employee must have been employed for at least 30 calendar days.

Under both the EPSL and EFML, employees of “healthcare providers” and “emergency responders” may be excluded from coverage. These definitions are discussed below.

### **Who are “healthcare providers” who can be excluded from EPSL and EFML?**

The DOL broadly defines a “healthcare provider” as:

- Anyone employed at a doctor’s office, hospital, healthcare center, clinic, nursing facility, retirement facility, or home healthcare provider;
- Anyone employed at a college/university providing healthcare instruction, or at a medical school;
- Anyone employed by a facility that performs lab or medical testing;
- Anyone employed by a pharmacy;
- Anyone employed by a contractor that provides services to any of the foregoing entities;
- Anyone employed by an entity that is involved in making COVID-19 related medical equipment, tests or other diagnostic tools, drugs, vaccines, or treatments; and
- Anyone that a state governor determines is a “healthcare provider.”

However, the DOL encourages health care employers to balance the need for providers to combat COVID-19 against the risk of infected providers spreading it.

### **Who are “emergency providers” who can be excluded from EPSL and EFML?**

The DOL has similarly defined an “emergency responder” as any employee necessary to provide transport, care, healthcare, comfort and nutrition to COVID-19 patients, or whose services “are otherwise needed to limit the spread of COVID-19.” The following are included:

- Doctors and nurses;
- EMTs and paramedics;
- Emergency management personnel, public health personnel, and 911 operators;
- Public works personnel and other needed to assist with a declared emergency;

- Military and the national guard; and
- Law enforcement officers and firefighters.

### **What protections do employees have while on leave?**

Employees have a right to return from FFCRA leave to the same (or a nearly equivalent) job – unless s/he is a “key employee” or works for an employer with fewer than 25 employees.

A key employee under the FMLA is “a salaried, FMLA-eligible employee who is among the highest-paid 10 percent of all of the employer’s employees within 75 miles.”

If an employer has fewer than 25 employees, it may refuse to return an employee to the same position following if all four of the following hardship conditions exist: (1) the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period the leave; (2) the employer made reasonable efforts to restore the employee to the same or an equivalent position; (3) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and (4) the employer continues to make reasonable efforts to contact the key employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is earlier.

Employees are also protected from being fired, disciplined, or otherwise being discriminated against because they exercised their rights to take EPSL or EFML or they filed a complaint under the FFCRA. An employer is not prohibited, however, from taking employment actions that would have occurred regardless of the leave or complaint (such as lay off, termination, furlough, etc.).

### **How an employee’s previous use of “traditional” FMLA affect EPSL and EFML?**

Traditional FMLA leave provided before April 1, 2020, even for COVID-19 reasons, does not reduce the employer’s EPSL benefits. However, traditional FMLA leave already taken in the 12-month period used by the employer for calculating FMLA leave does reduce the amount of leave available under the EFML. For example, if an employee has taken five weeks of traditional FMLA leave during the relevant 12-month period, s/he would be eligible to take seven weeks of EFML. Thus, if an employee has already taken twelve weeks of traditional FMLA, s/he may not take additional EFML.

EPSL does not count against the twelve weeks cap for traditional FMLA leave – unless the employee takes the first two weeks (or 80 hours) of EPSL concurrently with the first two weeks of EFML. In that event, the two weeks of EPSL do count towards the 12-week maximum amount.

### **Conclusion**

We will continue to monitor important legal developments related to the COVID-19 emergency. If we can provide you with advice, support or EFML/EPSL policies and forms, please contact us at 480-844-0039 or email: [etc@clarkfirm.com](mailto:etc@clarkfirm.com) or [cassandra@clarkfirm.com](mailto:cassandra@clarkfirm.com).

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