

MEMORANDUM

DATE: April 7, 2020

RE: Update for Employers regarding Coronavirus (COVID-19)

DOL Issues More Guidance on the FFCRA

The Department of Labor (DOL) has issued more FAQs regarding the Families First Coronavirus Response Act (FFCRA), including eagerly anticipated guidance regarding the small business exemption (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>). We encourage you to read all of the questions and answers carefully, but here is a brief summary of some of the highlights:

- The DOL has confirmed that employees can take no more than 12 weeks of FMLA, which includes any leave taken under the Emergency Family Leave Expansion Act (EFMLA) (FAQ #44). For example, if an employee already took four weeks of FMLA leave for a serious health condition, that employee would only be entitled to eight weeks of EFMLA leave.
- However, employees can use two weeks of paid leave under the Emergency Paid Sick Leave Act (EPSLA) regardless of how much FMLA/EFMLA leave the employee has taken (FAQ #45).
- Paid sick leave under the EPSLA is in addition to other leave provided under Federal, State or local law (e.g., Oregon Sick Leave) and your existing company policies (e.g., PTO, vacation) (FAQ #46).
- For purposes of the EPSLA, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week (FAQ # 48). A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week (FAQ #49). The EFMLA does not distinguish between full and part-time employees, but how much they work affects the amount of pay they're eligible to receive during EFMLA leave.
- If you have employees whose weekly wages and/or hours vary, the regulations set forth a detailed methodology for calculating average hours and average pay, which you then use to calculate the amount of pay due employees using FFCRA leave. Be careful -- if you make a mistake in that calculation, you will be vulnerable to a wage claim.

- Under the FFCRA, health care employers can exempt “health care providers” and “emergency responders” from receiving EPSLA and EFMLA paid leave. The DOL has defined those terms to include any employee employed by a wide range of health care-related businesses, including nursing homes, labs and pharmacies. It also includes third party businesses that contract with health care businesses to provide services or support; and employees of entities that provide medical services, produce medical products, or make COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. (FAQ ##56-57). Keep in mind that employees covered by the Oregon Family Leave Act (OFLA) and/or the Family and Medical Leave Act (FMLA) may still qualify for leave under those programs, but the leave would not be paid under the EPSLA or EFMLA.
- Employers with fewer than 50 employees may qualify for a hardship exemption related to EPSLA/EFMLA leave for parents absent from work because their kids are home if they can establish that the leave would affect the business’s financial health or operational capabilities. Examples include situations where business expenses exceed revenues, causing a hardship; where an employee’s absence would cause significant harm due to the employee’s specialized skills, knowledge and responsibilities; and where there are an insufficient number of employees available for the business to operate at minimal capacity. (FAQ ##58-59).
- Employees may not take paid sick leave under the EPSLA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms. (FAQ #62)
- Employees can only qualify for EPSLA if they are truly taking care of someone with whom they have a relationship that would create an expectation of the employee providing care. (FAQ ##63-65).
- The DOL has clarified when a parent can qualify for EPSLA/EFMLA while taking care of their children. For example, the definition of a child care provider has been expanded to include relatives who regularly babysit the child without charge. (FAQ ##66-72).

For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.