Third Round of Q&As from the DOL for the

Families First Coronavirus Response Act

Late Saturday night, the Department of Labor issued a ***third*** round of Q&As (FAQs #38-59) aimed at helping employers administer emergency paid sick leave (EPSL) and paid FMLA leave (FMLA+) as part of the Families First Coronavirus Response Act (FFCRA) (pdf), which as of April 1, 2020 will provide relief to American workers in the wake of the coronavirus pandemic.

In this latest round of FAQs, DOL gave critical guidance that employers need to know, including the following:

- Employers under 50 employees (which currently are not covered by the FMLA) are exempt from the FMLA+ and from one provision of EPSL, *but not all of the provisions* (FAQ # 58-59)
- Employees can take no more than 12 weeks of FMLA, which includes any leave taken under FMLA+ (FAQ # 44).
- ***BUT*** two Weeks of EPSL could be used in addition to the 12 weeks of FMLA+ (FAQ # 45).
- Health Care Providers and Emergency Responders (and pretty much anyone who works with them) are excluded from protection under the EPSL and FMLA+ (FAQ #56-57)
- Small Employers (24 or fewer Employees) Get Some Relief When it Comes to Restoration (FAQ #

Small Business Exemption Clarified—Employers with Fewer than 50 Employees May Be Exempt from FMLA+, and EPSL #5 (for School Closures/Childcare)—but NOT from other EPSL Reasons 1, 2, 3, 4 or 6 (FAQ #58-59)

For the first time, DOL gave smaller employers more clarity on how they would be exempt from the new law. As we noted in our Littler alert issued earlier today, DOL has clarified that small employers (those with fewer than 50 employees) – including religious or nonprofit organizations – may claim an exemption under FMLA+ and EPSL if the employer's authorized officer determines ***one of the following*** applies:

- Providing FMLA+ and EPSL reasons #5 leave (school closures and child care unavailability) would cause the business's expenses and financial obligations to exceeding its revenues and cause the business to cease operating at a minimal capacity;

- The employee's absence would entail a substantial risk to the business's financial health or operational capabilities because of specialized skills, knowledge of the business, or responsibilities, the employee possesses; or
- There are insufficient workers who are able, willing, and qualified to perform the labor or services provided by the employee(s) requesting child-care leave, and these labor or services are needed for the business to operate at a minimal capacity.

VERY IMPORTANT CAVEAT: DOL indicates that school closures/child care reasons for FFCRA leave (which is reason #5 for EPSL leave and the only reason FMLA+ is available) are the ***ONLY*** reasons for which this exemption is available (if one of the above criteria are met).

Naturally, this means that smaller employers with fewer than 50 employees – even those who can claim this exemption – are NOT exempt from providing EPSL for reasons #1, 2, 3, 4 and 6 (*i.e.*, the medical/family care related reasons for EPSL).

As if There was Any Doubt, an Employee Can Take No More Than 12 Weeks of FMLA (FAQ #44-45)

One of the remaining questions being tossed around since passage of FFCRA is whether the FMLA+ requires an ***additional*** 12 weeks on top of the 12 weeks already available under FMLA classic.

The DOL shut the door on any scuttlebutt that this new entitlement is anything more than 12 weeks MAX. In a comment directly intended for American workers, here's DOL's take:

. . . your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. *You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period.* If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave. (My emphasis)

For example, as the DOL points out, assume an employee took 2 weeks of FMLA classic leave in January 2020 to recover from a surgical procedure. Since

FMLA+ is a type of FMLA leave, the DOL confirms that the employee "would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks." And any leave taken under FMLA+ would count against the employee's entitlement to the entire bucket of FMLA leave.

Note: Although the DOL didn't specifically say it, we are working with the assumption that the 12-month FMLA period (aka the "FMLA year") is the same 12-month period the employer has previously chosen and regularly maintained (e.g., rolling year, look forward year, calendar year, fixed year).

But EPSL Could Be Used to Lengthen the Overall Entitlement to 14 Weeks (FAQ #45)

In not so many words, the DOL points out in its latest FAQs that the two weeks of EPSL could be used in addition to the 12 weeks of FMLA+. First, here's what the DOL says, and then I will explain:

. . . you are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave you have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But please note that if you take paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.

What the heck does this mean?

Under at least ***two*** scenarios, an employee might be able to use 14 weeks of FFCRA leave:

1. First, an employee can use 80 hours (or the proportionate equivalent) of EPSL for non-child-care purposes (as allowed under EPSL). Assuming the employee has not used any FMLA leave ("classic" or "plus") during the applicable FMLA 12-month period, the employee can then take up to 12 weeks of FMLA+ child-care leave.
2. Second, during the initial unpaid 10-day period of FMLA+ leave (*i.e.*, 2 weeks), the employee can use pre-existing non-FFCRA employer-provided benefits instead of EPST benefits (*i.e.*, 2 weeks). The employee gets up to another 10 weeks of FMLA+ paid child-care leave (2 weeks + 10 weeks = 12 weeks). After that, assuming no EPST was used to date, the employee could use EPST child-care leave for an additional two weeks (2 weeks + 10 weeks + 2 weeks = 14 weeks). [H/T to my colleague Sebastian Chilco for clarifying this little nugget for me.]

EPSL and FMLA+ is in Addition to Any State or Local Leave the Employee Has Earned (FAQ #46)

We kinda knew this already, but DOL thought it worth mentioning – any leave under EPSL and FMLA+ is *in addition to* any other forms of sick/personal leave the employee has earned under the increasing number of state and local paid leave laws and ordinances. The new federal paid leave law does not touch or otherwise preempt these other leave entitlements, which means the employee's actual leave entitlement could outstrip the 12 (or 14 weeks) allowed under EPSL and FMLA+.

Full-time and Part-Time Employees Now are Defined, which will Affect How Much You Pay Them (FAQ #48-49)

In its FAQs, the DOL clearly defined who is a full-time and who is a part-time employee under the EPSL. Why is this important? Keep in mind that the EPSL states that full-time employees receive no more than 80 hours of pay for EPSL, and part-time employees receive the number of hours they normally work during a two-week period.

In its latest guidance, the DOL makes clear that an employee is "full" time if their employer normally schedules them to work 40 or more hours per week. An employee who is not "full" time is "part" time, and that employee receives a number of EPSL hours equivalent to the number of hours the employee works on average over a 2-week period.

DOL reminds employers that under FFCRA, FMLA+ "does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive."

Health Care Providers/Emergency Responders are Excluded from Protection (FAQ #56-57)

In a nod to those who employ health care providers and emergency responders, the DOL made clear that employers can elect to exclude from coverage—which 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, 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." (emphasis added).

The definition also includes “any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions 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.”

To help minimize the spread of COVID-19, DOL encourages employers to be judicious when applying its new definitions for those who qualify as a “health care provider” or “emergency responder” for whom they are electing not to provide leave.

Small Employers (24 or fewer Employees) Get Some Relief When it Comes to Restoration (FAQ #43)

Taking the lead from the statute itself, DOL offers small employers (24 or fewer employees) a lifeline: these employers can ***deny*** the employee’s return to the job so long as all four of the following hardship conditions exist:

- 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 FMLA+ leave;
- the employer can show it made reasonable efforts to restore the employee to the same or an equivalent position;
- the employer makes reasonable efforts to contact this same employee if an equivalent position becomes available; and
- the employer continues to make reasonable efforts to contact the employee for <u>one</u> year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after FMLA+ leave began, whichever is earlier.

Note: These employers also can deny restoration to an FMLA “key” employee (salaried employee who is among the highest paid 10% of all the employer’s employees within 75 miles of the employee’s worksite).

Dispute Resolution (FAQ #41-42)

To the agency’s credit, the DOL strongly encourages any employee who believes that the employer is improperly withholding paid sick or FMLA leave benefits to them to work out the differences first with their employer. This is not a tactic often

recommended by a federal agency, which typically resorts to “come to us, and we’ll go hammer them for you . . .” [*Well, not really, but kinda.*]

Nevertheless, kudos to the DOL for attempting to bring some sensibility and calm to an otherwise frenetic time in which we live.

DOL Walks Back its Previous Guidance regarding Documentation of Qualifying Need for Leave

Finally, the DOL also took a red pen to some of its previous guidance.

Notably, the DOL eliminated much of its previous discussion regarding the specific types of documentation to support a leave request under EPSL and FMLA+, pointing employers instead to applicable IRS forms and information. However, the IRS has yet to publish guidance for employers on this issue.

For school closures and childcare-related need for leave, the DOL indicates that additional documentation may be required beyond what “conventional” FMLA allows—such as a notification of such school closure, etc. But all indications seem to suggest that for medically necessary reasons for COVID-19 (EPSL reasons #1, 2, 3, 4, and 6), employers may still request appropriate supporting documentation, although given current realities, employers may find they need to, as a practical matter, relax traditional documentation standards they might impose under normal circumstances. Additionally, the DOL now says employers need not provide leave if employees do not provide materials sufficient to support a tax credit.

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