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COVID-19 HR LEGAL UPDATE: IMPORTANT CHANGES AND CLARIFICATIONS FROM THE DEPARTMENT OF LABOR REGULATIONS ON FEDERAL LEAVE UNDER THE FFCRA

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The U.S. Department of Labor ("DOL") has issued its regulations that tell employers how the DOL will be interpreting and enforcing the two types of federal leave created under the Families First Coronavirus Response Act ("FFCRA"). That leave includes Emergency Paid Sick Leave and expanded Family and Medical Leave ("EPSL" and "EFMLA leave" for purposes of this article). Below we have highlighted several important changes and clarifications that employers need to know about as they deal with these types of leave, which went into effect on April 1.

As you review these items, please keep in mind that many of them will need to be treated on a case by case basis. Additionally, we recommend that any decisions related to discipline, denial of leave, furloughs and layoffs, or termination of employment should be run past labor and employment counsel before such decisions are finalized.

- **Parents cannot "double dip" on leave that is available where a child's school or place of care is closed or whose child care provider is unavailable due to COVID-19 related reasons.** This addresses the concern that parents could abuse the new leave by taking it together at the same time. The regulations provide that an employee generally does not need to take leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs. However, it remains possible that two parents could telework from home and split child care responsibilities, if their employers have approved both telework and intermittent use of the leave.

- **The definition of "child care provider" for purposes of leave due to child care issues is no longer limited to only paid and state approved / licensed care providers. It also includes unpaid and unlicensed providers that are family members or friends, such as a neighbor, who regularly care for an employee's child.** This broadens the employees potentially eligible for leave because of child care issues. Under the FFCRA, the term "child care provider" originally was limited to a provider who receives compensation for providing child care services on a regular basis and satisfies state licensing and related requirements.

- **The definition of a son or daughter now also includes children over 18 who are not capable of self care.** This is a straightforward change that also broadens the employees potentially eligible for leave because of child care issues.

- **An employee cannot volunteer to care for just anybody and be eligible for EPSL. EPSL may not be taken to care for someone with whom the employee has no personal relationship.** Instead, "the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined. Additionally, the individual being cared for must: (a) be subject to a Federal, State, or local quarantine or isolation order ***; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19."

- **A government shelter in place or stay at home order does qualify as a quarantine or isolation order for purposes of EPSL and may, in specific circumstances, make an employee eligible for EPSL. <u>However, this does not mean that every employee in every state that has issued such an order now qualifies for EPSL.</u>** Instead, the order must cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. Two examples come to mind. One is from the DOL and involves an order that advises categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them. Another example may be a state which has an order that requires essential businesses to designate which employees are essential and which are not. There could be an argument made that employees deemed non-essential and told to stay home in such a state may qualify for EPSL, if they have not been furloughed or laid off. Employers in states with orders that require determinations like this should consult legal counsel to determine whether any specific employees may be eligible for EPSL; they should not by any means assume that they are eligible.

- **It is still clear as mud what it means for an employee to be unable to telework.** According to the regulations, an employee is able to telework, and therefore may not take paid sick leave, if (1) the employer has work for the employee to perform; (2) the employer permits the employee to perform that work remotely; and (3) there are no extenuating circumstances that prevent the employee from performing that work. It is unclear what constitutes "extenuating circumstances," and the only examples given include a power outage that prevents an employee from using necessary technology (such as the employee's computer) and serious COVID-19 related symptoms that prevent the employee from being able to work. Whether working from home with children may ever constitute "extenuating circumstances" is unclear, but it seems that more probably will be required beyond just having children at home. Even so, employers should be prepared that employees will argue that they can't work at home and deal with their children at the same time. That may or may not be true depending on the circumstances (such as age and number of children). An employer's best response may be to relax certain deadlines and some work demands and provide the employee the flexibility to work weekends as well as evenings after the children are in bed. In the end, the one to win this argument is likely to be the one that has been the most reasonable. The issue of "extenuating circumstances" is something that employers will need to consider on a case by case basis, and they should consult labor and employment counsel before finalizing any decisions.

- **The regulations set forth the documentation an employee must provide to support a request for EPSL or EFMLA leave.** From a practical standpoint, it is likely that an employee will make a

very basic request for leave, and the employer will end up needing to ask for or inform the employee what information is required. According to the regulations, however, an employee must provide a signed statement that includes the employee's name; date(s) for which leave is requested; the qualifying reason for the leave; and an oral or written statement that the employee is unable to work because of the qualified reason for leave. Depending on the qualifying reason for the leave, the employee also will need to provide one of the following: the name of the government entity that issued the quarantine or isolation order; the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19; either the name of the government entity that issued the quarantine or isolation order to which the individual being care for is subject, or the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19; or the name of the son or daughter being cared for, the name of the school, place of care, or child care provider that has closed or become unavailable, and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or EFMLA leave.

- **The regulations set forth the additional documentation an employer may request to support a request for EPSL or EFMLA leave.** In addition to the documentation an employee must provide, the employer may also request an employee to provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. The regulations also direct employers to the IRS for more information on documentation required of employers applying for tax credits under the FFCRA. The IRS has indicated that employers must also document the age of the children and if a child is over 14 years old, the special circumstances that exist that require the employee to provide care for that child during daylight hours. For EPSL leave that is medical in nature, the regulations do not make clear whether employers either (1) must accept employee statements and cannot ask for additional documentation, such as a doctor's notes, or (2) can ask for that type of additional supporting medical documentation to support the employee's statements. At this point, we recommend that employers do ask for additional documentation to substantiate the leave, such as a doctor's note, as long as the employer does not delay in providing the leave and the information requested does not go beyond what employers previously were able to request in order to certify other types of FMLA leave. Where an employer already knows that an employee falls into a category that would make them eligible for EPSL leave, it probably is not necessary to ask for additional supporting documentation beyond what the regulations require the employee to provide.

- **Employees do not get a free refill on EPSL leave by changing jobs, but they may use EPSL that they still have available.** The regulations provide that the absolute upper limit of 80 hours of EPSL to which one employee could potentially be eligible is per person and not per job. If an employee changes jobs during the period of time in which EPSL is in effect, the employee is not entitled to a new round of EPSL. However, if an employee changes jobs before taking 80 hours of EPSL, then the new employer (if covered by FFCRA) must provide the remaining amount of EPSL available until the employee has used a total of 80 hours. EPSL does not start over for an individual with each new employer.

- **There is a significant change regarding using EFMLA leave and employer-provided leave concurrently. An employee can still run EPSL and EFMLA leave concurrently, if the employee has both available, to cover the initial unpaid period of EFMLA leave. Now, however, an employee also can choose to – and an employer can even require the employee to – take other employer provided leave (PTO, vacation, etc.) concurrently with the remaining 10 weeks of EFMLA leave.** Practically speaking,

this may help deter potential EFMLA abuse by employees considering whether to take the additional 10 weeks of leave. The prospect of being forced to use up other types of leave while on EFMLA leave may not be attractive to employees who really can make alternate child care arrangements and keep working. Those employees who can keep working and don't take the EFMLA leave may prefer to preserve their employer provided leave for vacations and other personal uses later down the road.

- **It will be hard for most businesses with fewer than 50 employees to qualify for the small business exemption from EPSL and EFMLA leave.** The standard that the DOL is applying is specific and likely difficult to meet for most businesses. Additionally, the DOL has officially narrowed the scope of the exemption to apply only to EPSL and EFMLA leave related to child care issues. This means that even exempt small businesses still must provide EPSL for the five other categories set forth under the FFCRA. Businesses that believe they meet the exemption must document it and save that documentation for at least four years. They will remain subject to investigation by the DOL during that time; however, employers should not send any documentation to the DOL at this time. They should maintain it in their own files.

A small employer is exempt when: (1) child care related leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting child care related leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting child care leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

- **Many of the regulations are devoted to calculating EPSL and EFMLA payments to employees who work something other than a 9:00-5:00 Monday-Friday schedule.** That includes, but is not limited to, part-time employees. We will not go through all the scenarios here. But know that the regulations likely will contain examples that fully address or provide considerable guidance on how to pay any employee who takes either type of leave, regardless of the schedule they work.

- **Employers must keep leave related documentation for four years.** This includes documentation regarding employee requests as well as employer decisions granting or denying the leave. Employers also must find a way to document oral statements from employees that were used to support requests for leave. The regulations contain lists of specific documents that employers must maintain and can be found here at pages 119-120.