HR Tracker, ¶46,829, Temporary rule fleshes out FFCRA leave requirement — FEDERAL REGULATIONS, (Apr. 3, 2020)

On April 1, the Department of Labor's Wage and Hour Division released a temporary rule implementing the newly available public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and the similarly new emergency paid sick leave available to assist working families facing public health emergencies arising out of the COVID-19 global pandemic. Created under the Families First Coronavirus Response Act (FFCRA), the leave is established by a time-limited statutory authority set to expire on December 31, 2020.

Slated for publication in the *Federal Register* on April 6, the temporary rule is effective from April 2, 2020, through December 31, 2020; it became operational on April 1, 2020. The temporary rule provides further insight into various aspects of the FFCRA, including the qualifying reasons for leave and how intermittent leave may be taken.

Notably, the FFCRA and the temporary rule do not affect the FMLA *after* December 31, 2020.

Public emergency leave. President Trump signed the FFCRA into law on March 18, 2020, creating two new emergency paid leave requirements in response to the COVID-19 global pandemic.

- Division E of the FFCRA, "The Emergency Paid Sick Leave Act" (EPSLA), entitles certain employees to take up to two weeks of paid sick leave.
- Division C of the FFCRA, "The Emergency Family and Medical Leave Expansion Act" (EFMLEA), which amends Title I of the FMLA, permits certain employees to take up to 12 weeks of expanded family and medical leave, 10 of which are paid, for specified reasons related to COVID-19.

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which amends certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

Paid sick leave. Generally, the FFCRA requires covered employers to provide eligible employees up to two weeks of paid sick leave at *full pay* (up to a specified cap) when the employee is unable to work because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing COVID-19 symptoms and seeking a medical diagnosis.

The FFCRA also provides up to two weeks of paid sick leave at *partial* pay (up to a specified cap) when an employee is unable to work because:

- Of a need to care for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons; or
- The employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services.

Expanded FMLA leave. In addition, the FFCRA also requires covered employers to provide up to 12 weeks of expanded family and medical leave, up to 10 weeks of which must be paid at *partial* pay (up to a specified cap) when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.

Covered employers. The FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with fewer than 50 employees may qualify for an *exemption* from the requirement

to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would *jeopardize the viability of their business as a going concern.*

Refundable tax credits. Covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA (up to per diem and aggregate caps) and for allocable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA.

CARES Act. The CARES Act amended the FFCRA by providing certain technical corrections and by:

- Clarifying the caps for payment of leave;
- Expanding family and medical leave to certain employees who were laid off or terminated after March 1, 2020, but are reemployed by the same employer prior to December 31, 2020; and
- Providing authority to the Director of the Office of Management and Budget to exclude certain federal employees from paid sick leave and expanded family and medical leave.

New C.F.R. Part. The paid leave requirements in the EPSLA and the EFMLEA are described and interpreted by the Secretary of Labor in regulations to appear in new Part 826 of Title 29 of the Code of Federal Regulations.

Reasons for paid sick leave. Under the EPSLA, covered employers must provide paid sick leave to employees when the employee:

(1) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
(2) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
(3) Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
(4) Is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);
(5) Is caring for a son or daughter whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19 related reasons; or
(6) Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Caring for son or daughter. The EFMLEA defines "qualifying need related to a public health emergency" as a need for leave "to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." The DOL noted that this definition could be read to narrow the FMLA definition of "son or daughter" for purposes of expanded family and medical leave because the FMLA expressly includes children 18 years of age or older and incapable of self-care because of a mental or physical disability. The EPSLA also adopts the FMLA definition of "son or daughter."

The DOL believes that it would create needless confusion and complication to have different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons. Accordingly, the DOL is treating the definitions as the same, to include *children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability.*

About telework. The DOL also clarifies that "telework" is no less work than if it were performed at an employer's worksite. Thus, employees who are teleworking for COVID-19 related reasons must always record and be compensated for *all hours actually worked*, including overtime, in accordance with the FLSA. Notably, employers are *not required* to compensate employees for *unreported* hours worked while teleworking for COVID-19 related reasons, *unless* the employer knew or should have known about such telework. (Note that employers permitting teleworking flexibility during the COVID-19 pandemic are *not required* to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons.)

Quarantine and isolation orders. The temporary regulation explains that the paid sick leave based on an employee's inability to work because he or she is subject to a federal, state, or local COVID-19 quarantine or

isolation order includes a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.

An employee may take paid sick leave only if being subject to one of these orders *prevents the employee from working or teleworking.* The question is whether the employee would be able to work or telework *"but for"* being required to comply with a quarantine or isolation order.

Does the employer have available work? An employee subject to one of these orders *may not* take paid sick leave where the employer *does not have work* for the employee. This is because the employee would be *unable to work* even if he or she were not required to comply with the quarantine or isolation order. That said, the employee may be eligible for state unemployment insurance.

Able to telework. Further, an employee subject to a quarantine or isolation order *is able to telework*, and therefore may not take paid sick leave where:

- The employer has work for the employee to perform;
- The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and
- There are no extenuating circumstances that prevent the employee from performing that work.

Seeking medical diagnosis. The temporary rule also makes clarifications related to the paid sick leave that applies when an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. The symptoms that could trigger this are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the CDC.

Notably, the paid sick leave taken for this reason must be *limited* to the time the employee is unable to work because he or she is *taking affirmative steps to obtain a medical diagnosis.* This means that an employee experiencing COVID-19 symptoms may take paid sick leave for time spent making, waiting for, or attending an appointment for a test for COVID-19.

Self-quarantine requires medical diagnosis. The employee may not take paid sick leave to self-quarantine *without seeking a medical diagnosis.*

Waiting for results. An employee who is waiting for the results of a test *is able to telework*, and accordingly *may not* take paid sick leave, if:

- The employee's employer has work for the employee to perform;
- The employer permits the employee to perform that work from the location where the employee is waiting; and
- There are no extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work.

An employee who is *unable to telework* may continue to take paid sick leave while awaiting a test result, regardless of the severity of the COVID-19 symptoms that he or she might be experiencing.

Symptomatic or tested positive. An employee may continue to take leave while experiencing any of the specified COVID-19 symptoms, however, or may continue to take leave after testing positive for COVID-19, *regardless* of symptoms experienced, *provided* that the health care provider advises the employee to self-quarantine.

Testing refused. If an employee exhibits COVID-19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the self-quarantine reason, provided he or she meets all of the requirements for that qualifying reason.

Caring for others in isolation or self-quarantine. The temporary rule provides additional insight into when paid sick leave applies because an employee is unable to work due to the need to care for an individual who is either subject to a federal, state, or local quarantine or isolation order or has been advised by a health care provider

to self-quarantine due to concerns related to COVID-19. This qualifying reason *only* applies if, *but for a need to care for an individual*, the employee would be able to perform work for the employer.

This means that an employee caring for an individual may not take paid sick leave *if the employer does not have work* for the employee. The employee also must have a *genuine need* to care for the individual; paid sick leave may not be taken to care for someone with whom the employee *has no personal relationship.*

Caring for who? To qualify for leave, 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. In addition, the individual being cared for must:

- Be subject to a federal, state, or local quarantine or isolation order as described above; or
- 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.

School closings and unavailable child care. The temporary rule also fleshes out the paid sick leave that is available when the employee is unable to work because the employee needs to care for a son or daughter when the child's school or place of care has closed or the child care provider is unavailable, due to COVID-19 related reasons. Here again, the paid sick leave is not available if the employer does not have work for the employee.

Further, the employee may take paid sick leave to care for his or her child *only* when the employee needs to, and *actually is*, caring for the child. Generally, an employee does not need to take this leave if another suitable individual (e.g., a co-parent, co-guardian, or the usual child care provider) is available to provide the care that the child needs.

Substantially similar condition. Notably, the temporary rule does not shed any additional light on paid sick leave that is available when an employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Intermittent leave. The regulation does, however, make some clarifications related to intermittent leave. The employee and the employer *must agree* that the employee may take paid sick leave or expanded family and medical leave intermittently. Absent agreement, no leave under the FFCRA may be taken intermittently.

Writing not required. The agreement is not required to be in writing or similarly memorialized. But in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both. The employee and the employer also must agree on the increments of time in which leave may be taken.

Minimal risk at worksite. Employees who continue to report to the worksite may *only* take paid sick leave or expanded family and medical leave intermittently and in any increment in circumstances when there is a minimal risk that the employee will spread COVID-19 to others at the worksite.

Therefore, an employer and employee who reports to the worksite may agree that the employee may take paid sick leave or expanded family and medical leave intermittently *solely* to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19. The absence of confirmed or suspected COVID-19 in the employee's household reduces the risk that the employee will spread COVID-19 by reporting to the employer's worksite while taking intermittent paid leave. *This is not true, however, when the employee takes paid sick leave for other qualifying reasons.*

Intermittent leave barred. Employees who report to the worksite are prohibited from taking paid sick leave intermittently, notwithstanding any agreement between the employer and employee to the contrary, *if* the leave is taken because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;

- Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing any other substantially similar condition specified by the HHS Secretary.

When paid leave is taken for these reasons, "the employee is, may be, or is reasonably likely to become, sick with COVID-19, or is exposed to someone who is, may be, or is reasonably likely to become, sick with COVID-19," according to the temporary rule. The employee *may not* take intermittent leave under these circumstances due to the unacceptably high risk that the employee might spread COVID-19 to other employees when reporting to the worksite.

Stop the spread. Once the employee begins taking paid sick leave for one or more of these qualifying reasons, the employee *must continue to take paid sick leave each day* until the employee either uses the full amount of paid sick leave or no longer has a qualifying reason for taking paid sick leave. This requirement furthers Congress' objective to slow the spread of COVID-19.

Other regulatory provisions. The temporary regulations cover much more territory than one article could reasonable address. Other topics include in these regs include employer and employee notice; documentation requirements; health care coverage; multiemployer plans; return to work; recordkeeping; effect of other laws and collective bargaining agreements; and enforcement.

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