Department of Labor Publishes Final Rule Under Families First Coronavirus Response Act, Provides Employers With Much Needed Guidance

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On Monday the Department of Labor (the "DOL") published its Temporary Rule (the "Rule") regarding the Families First Coronavirus Response Act (the "FFCRA"), which became effective on April 1, 2020. The full text of the Rule, which provides clarifying guidance about many issues facing employers under the FFCRA, can be found here.

Below is a summary[1] of some key aspects of the Rule. Importantly, parts of the Rule appear to conflict with certain guidance previously issued by the DOL in its Questions and Answers ("Q & A's"). Because the DOL's Q & A's only serve as informal guidance, where there is a difference between the Q & A's and the Rule, the Rule should be followed.

The Rule addresses virtually every aspect of the FFCRA, which entitles an employee of a covered employer (which includes most private organizations with fewer than 500 employees) to take Emergency Paid Sick Leave ("EPSL") if the employee is unable to work (or telework) because he or she:

- 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 associated with COVID-19 and is seeking a medical diagnosis;
- Is caring for an individual subject to a federal, state or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine related to COVID-19;
- Is caring for a son or daughter whose school or place of care has closed or whose child care provider is unavailable due to COVID-19-related reasons; or
- Is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services[2].

Eligible employees (those who have been employed for at least 30 days) are also able to take up to 12 weeks of paid Emergency Family Medical Leave ("EFML") leave if the employee is unable to work (or telework) because of the need to care for a son or daughter whose school or place of care has closed or whose child care provider is unavailable due to COVID-19 related reasons.

Below is a summary of some important points regarding the Rule:

1.**Shelter-In-Place and Shutdown Orders**

The DOL's Rule answers a question that employers and legal practitioners have been asking since the FFCRA was first signed into law: Does a "quarantine or isolation order" (the first qualifying reason) include shelter-in-place or stay-at-home orders? The answer is yes. The Rule states that a quarantine or isolation order includes, "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state or local government authority," but with an important caveat. Such an 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." The Rules states that this includes when a federal, state, or local government orders or advises categories of citizens (e.g., those in certain age ranges or with certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work. The Rule emphasizes that EPSL is not available to employees who have, prior to being affected by such an order, already

stopped working (or teleworking) for other reasons.

Practical takeaway: If an employee notifies his/her employer of the need for EPSL due to a government-issued shelter-in-place or stay-at-home order/advice, the employer should determine whether: (1) the order/advice was issued on or after April 1, 2020; (2) the employee was working (or teleworking) prior to the order/advice; (3) the employee falls within a category of people to whom the order/advice was directed; and (4) the order/advice now renders the employee unable to perform the work (or telework) that he or she was previously able to do. Under the rule, those questions must all be answered in the affirmative for the employee to be eligible for EPSL.

2. **Caring for an individual who is subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine related to COVID-19**

The Rule defines – for the first time – the term "individual." The definition is narrower than what many legal practitioners anticipated. It states that "an individual" is an immediate family member, a person who regularly resides in the employee's home or a person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined.

Practical takeaway: In light of this new guidance, employers should confirm that an employee seeking EPSL leave to "care for an individual" has a relationship with the individual that meets the above definition (more on this below).

3. **Caring for a son or daughter whose school or place of care closes or child care provider is unavailable.**

The Rule provides guidance on two important issues: 1) the definition of "son or daughter"; and 2) the circumstances under which EPSL or EFML is available to an employee for school/child care reasons.

First, the Rule expands the definition of son or daughter set forth by prior FFCRA guidance. In addition to "a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing *in loco parentis*, who is under 18 years of age," the Rule includes a child, stepchild or legal ward who "is 18 years of age or older and incapable of self-care because of a mental or physical disability."

Second, the Rule states that EPSL and EFML is **only** available to an employee when no other suitable person is available to care for the son or daughter during the requested period of leave. The Rule also clarifies that the employee would not be entitled to leave if the employee is able to telework.

Practical takeaway: When an employee notifies his/her employer of the need to take leave due to the closure of a child's school or unavailability of a child care provider, the employer must verify that: (1) the child(ren) in question meet the Rule's definition; (2) the employee attests that no other suitable person is available to care for the son or daughter during the requested period of leave; and (3) the employee isn't able to telework and perform such work that the employer has available.

4. **Intermittent Leave**

The Rule makes clear that an employee may only take EPSL or EFML on an intermittent (as opposed to continuous) basis if both the employer and employee agree to such an arrangement. Intermittent EPSL or EFML may be taken in any increment of time agreed to by the employer and employee.

Practical takeaway: Employers should decide whether they are agreeable to intermittent EPSL or EFML leave and, if so, the smallest increment of intermittent leave that works. While the agreement need not be in writing so long as there is a clear and mutual understanding between the employer and employee, we recommend that employers memorialize the agreement in writing.

5. **Information Employees Must Provide To Employers**

The Rule departs from the guidance previously provided in the DOL's Q&A's regarding the support an employee must provide when taking EPSL or EFML. Under the Rule, the employee only has to provide the employer with information – not the documentation referenced in the Q & A.

The Rule states that an employer can require an employee to certify (in writing) that he/she is unable to work (or telework) because of a qualifying reason and provide the following information: the employee's name, date(s) for which leave is requested, and the qualifying reason for the leave.

Depending upon the qualifying reason, the Rule requires an employee taking EPSL to also provide the employer with:

- The name of the government entity that issued the COVID-19-related quarantine or isolation order that applies to the employee; or
- The name of the health care provider who advised the employee to self-quarantine due to COVID-19-related concerns; or
- The name of the government entity that issued the quarantine or isolation order for the person being cared for and the name of the person who is being cared for and the relationship to the employee; or
- The name of the healthcare provider who advised the individual being cared for to self-quarantine (if taking EPSL to care of another person) and the name of the person who is being cared for and the relationship to the employee.

The Rule states that the employee must provide the name of the son or daughter being cared for, the son or daughter's age, and the name of the son or daughter's school, place of care or child care provider that is closed or unavailable due to coronavirus-related reasons. This is narrower than the DOL's Q & A No. 16, which placed obligations on the employee to produce supporting documentation such as notices posted to the school or daycare's website regarding its closure.

Practical takeaway: An employer cannot grant EPSL or EFML unless qualifying circumstance exist AND it has supporting information. Employers will likely not qualify for the tax credits established by the FFCRA to cover/offset the cost of paid leaves unless it can establish qualifying reasons for the paid leave.

The revised EPSL and EFMLA forms to conform to the Rule are attached .

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[1] DISCLAIMER: *Please note that this article is not intended to, and does not, serve as legal advice to the reader. This is general information that neither constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Also, regulations and guidance related to COVID-19-based legislation is being published frequently, which may affect the information provided here.*

[2] The Department of Health and Human Services has not specified any other substantially similar condition as of yet.