Department of Labor Clarifies Scope of FFCRA

Patricia W. Goodson
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The Department of Labor (DOL) shared more insights into the Families First Coronavirus Response Act (FFCRA). These latest additions to the DOL's guidance include a few surprises, which we've highlighted here.

One of the biggest surprises was that the DOL provided two different definitions of the exact same words in the Act—Health Care Providers:

For purposes of determining who can advise an employee to self-quarantine, a "health care provider" is limited to a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification under the Family and Medical Leave Act (FMLA).

For purposes of determining who an employer can designate as exempt from paid leave and/or expanded FMLA under the FFCRA, the definition of "**health care provider**" is expansive. The definition generally includes the following: Anyone employed at any doctor's office, hospital, health care center, clinic, nursing facility, retirement facility, nursing home, home health care provider, lab, pharmacy and other similar types of facilities or employers.

This includes any type of facility (permanent or temporary) where medical services are provided.

This includes people employed by entities that contract with these types of employers to provide services or maintenance to them.

This includes any individual employed by any entity that provides medical services, produces medical products or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

For purposes of determining who an employer can designate as exempt from paid leave and/or expanded FMLA under the FFCRA, the definition of "**emergency responder"** is similarly expansive, and includes the following employees:

Any employee necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19;

The definition includes, but is not limited to, military or national guard, law enforcement officers, correctional institutional personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health officials, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, including individuals who work for such facilities.

One of the more pleasant surprises was that the DOL took a broad view of how a small employer (less than 50 employees) might show that it should be exempt from providing employees leave to care for children due to school or childcare closures. An employer can point to any of the following to show that providing this leave would jeopardize the viability of the business as a going concern:

Providing the paid leave would result in the business's expenses and financial obligations exceeding revenues and cause the business to cease operating at a minimal capacity;

The absence of employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because the employees have specialized skills, knowledge, or responsibilities; or

There are not sufficient other qualified employees to do the work of the employees requesting leave and that work is needed to operate at minimal capacity.

Other notable items in the latest guidance:

Son or Daughter: The DOL explained that son or daughter under the FFCRA also includes an adult son or daughter who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Return to Work Rights: The DOL noted that all types of leave under the FFCRA are job protected. However, employees are not protected from employment actions, like layoffs, that would have taken place regardless of whether or not the employee took leave.

Interaction with Regular FMLA —Emergency Paid Sick Leave Act (EPSLA): The DOL explained that eligible employees are entitled to paid sick leave under EPSLA regardless of how much leave the employee has taken under the Family and Medical Leave Act (FMLA). The paid leave under the EPSLA is in addition to any leave under the regular FMLA, even if the reason for taking the leave might also have qualified under the FMLA.
For example, if an employee's child gets COVID-19 and has complications, that employee's child likely has a serious health condition, and as a parent, the employee would be needed to care for the child.

This reason for leave seems to fall under the regular FMLA qualifying event—to care for a child with a serious health condition.

It also fits one of the reasons for taking leave under the EPSLA.

An employee could take job-protected paid leave under the EPSLA for two weeks and then still have up to an additional twelve weeks of job protected leave (although not paid) under the regular FMLA because the leave under the EPSLA is in addition to and does not run concurrently with regular FMLA leave.

In contrast, if the need for the leave is a qualifying reason under the new Emergency Family and Medical Leave Expansion Act (EFMLA), an employee could elect to take paid leave under the EPSLA for the first ten days.

Interaction with Regular FMLA—Emergency Family and Medical Leave Expansion Act (EFMLA): Because the EFMLA only added an additional reason for taking leave under the FMLA, any leave under the EFMLA is part of the total twelve weeks available under the FMLA. For example, if an employee had already taken four weeks of FMLA leave, and then took leave under the EFMLA, there would only be eight weeks of additional leave available to the employee.

Full-time Employees: The DOL clarified that "full time" under the EPSLA means employees who normally are scheduled to work 40 hours or more per week. All other employees are considered part time and entitled to something less than 80 hours of paid leave under the EPSLA.

Temporary Employees: The DOL stated that "joint employee" working on your site include workers employed temporarily, including those employed through a temp agency. The DOL didn't expressly state whether the temp agency or the contracting company must provide the leave payments, only that such employees are eligible. Unless additional guidance becomes available, we recommend reviewing the DOL's previous guidance about primary and secondary employers to determine who should pay the temporary employees under the FFCRA, linked below.

https://www.saggioaccounting.com/14815sagg/fact-sheet-35-seasonal-joint-emloyment-under-flsa.pdf

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28n.pdf