

Department of Labor's New Regulations and Guidance on the Family First Coronavirus Relief Act ("FFCRA")

On April 6, 2020, the Department of Labor ("DOL") promulgated a temporary rule ("[Rule](#)") interpreting and giving further guidance on the Families First Coronavirus Relief Act ("FFCRA"). The FFCRA includes the Emergency Family Medical Leave Expansion Act ("EFMLA") and the Emergency Paid Sick Leave Act ("EPSL"). The Rule clarifies a number of important threshold questions in the wake of the FFCRA's enactment. This alert summarizes key requirements and considerations to aid employers' compliance with the FFCRA, the Rule, and other guidance through the date of this publication. New laws, regulations, and guidance are likely forthcoming, and Buchalter remains dedicated to staying informed on these issues.

1. WHICH EMPLOYERS MUST PROVIDE EMERGENCY PAID SICK LEAVE AND EXPANDED FAMILY MEDICAL LEAVE?

- Both expanded family leave under the EFMLA and paid sick leave under the EPSL are required of all employers with fewer than 500 employees "**at the time an employee's leave is to be taken.**"¹
- If at any point an employer has 500 or more employees, it no longer has an obligation to provide either type of leave so long as it maintains 500 or more employees.
- The Rule includes all full-time and part-time employees, employees on leave, employees who are jointly employed by an employment agency and the employer, and day laborers supplied by a temporary agency. The Rule excludes independent contractors, those who are laid off or furloughed – the DOL does not define any of these terms at this time.
- **Joint employers** must both count jointly-employed employees.
- **Integrated employers – generally**, two or more corporations/entities are considered separate employers, and must count their employees separately unless they meet the "integrated employer" test under the Family Medical Leave Act ("FMLA") (based on factors of "common management," "interrelation between operations," "centralized control of labor relations," and overlap of "ownership/financial control"). Integrated

¹ Note, some cities have issued or might issue orders requiring certain supplemental sick pay for certain Employers with 500 or more employees. Los Angeles, for example, requires employers who either employ 500 or more employees "within the city of Los Angeles," or employ 2,000 or more nationally, to provide sick leave and family leave under the EPSL and EFMLA. Additional requirements apply under Los Angeles' order. Consult counsel if you are unsure as to your obligations under a city ordinance.

employers each must count all employees employed by the “integrated employer” together to determine coverage under both EPSL and EFMLA.

- **Small employers with fewer than 50 employees can be exempt** from “providing paid sick leave and expanded medical leave to an employee” for child care purposes resulting from school or childcare facility closures when allowing such leave would “jeopardize the viability of the business as a going concern.”
 - Note, this exemption only applies to leave to care for the employee’s child whose school or place of care is closed, or whose child care provider is not available, and therefore small employers must still provide leave for the other types of permissible uses pursuant to the EPSL not involving child-care.
 - This exemption must be decided carefully by an “authorized officer” on a case-by-case basis for individual employees, and the impact on business must be thoroughly documented.²

2. **RIGHT TO PAID EMERGENCY FAMILY LEAVE UNDER THE EFMLA**

▪ **Which Employees Qualify for Leave under the EFMLA?**

- All employees who have been on the employer’s payroll for thirty (30) days or more.
- All employees regardless of whether they are part-time or full-time, or their length of employment.
- Employees can take leave under the EFMLA if they are “**unable to work** because the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, defined as an emergency with respect to COVID–19, declared by a Federal, State, or local authority.”
- Exception: Health care providers and emergency responders. The Rule provides definitions for “health care provider” and “emergency responder.”
 - The Rule defines “health care provider” as: “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational

² To use this small employer exemption, an “authorized officer” of the employer must determine and document that:

- i. The leave requested “would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity”;
- ii. “The absence of the employee or employees requesting leave [] would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or
- iii. There are no sufficient workers who are “able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.”

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.”

- The Rule defines “emergency responder” as: “an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. ”

▪ **How Much do Employees get Paid Under the EFMLA?**

- 2 weeks unpaid. If the employee also qualifies for the EPSL, the employees may be able to have the first two weeks paid and exhaust that benefit.
- 10 weeks paid. **Payments not less than 2/3 the employee’s regular rate of pay up to \$200 per day, and \$10,000 total.**
- Calculated based on the average number of hours employee worked per week for the 6 months prior to leave, or average over the entire duration of employment if employed less than 6 months.
- Traditional FMLA leave and EFMLA together provide for 12 weeks of leave total. Traditional FMLA leave taken for non-COVID-19 reasons during the applicable 12-month period can reduce entitlement to expanded leave under EFMLA.

3. **RIGHT TO PAID SICK LEAVE UNDER THE EPSL**

▪ **Which Employees Receive Paid Sick Leave through the EPSL?**

- All employees – regardless of whether they are part-time or full-time, or their length of employment.
- Employees can take leave under the EPLSA if they are unable to work or telework due to one of **6 qualifying reasons**, including where 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 his or her son or daughter whose school or place of care has been closed or whose child care 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.
- Exception: health care providers and emergency responders.
- Exception: the small business exception for employers with under 50 employees applies only to employees who need to care for children “whose school or place of care has been closed and whose child care provider is unavailable due to COVID-19 related reasons.” (No. 5 above).
- Stay at home orders and “shelter-in-place” orders do constitute qualifying “quarantine or isolation order” referenced in the FFCRA.
- **Employees must be unable to work or telework due to the qualifying leave under each law.** “An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee.”
- For employees whose employing business has closed as a result of a state or local shutdown order, they will not be eligible for emergency paid sick leave.
- For childcare, “no other suitable person” (other parent, co-guardians, childcare provider) can be available.
- Intermittent leave under both EPSL and EFMLA is allowed for teleworkers, but both employer and employee must agree to use intermittent leave. For employees on the worksite, employees may only use intermittent sick leave under the EPSL if they are caring for a child whose school has been closed.
- **How Much Do Employees get Paid under the EPSL?**
 - For full-time employees, pay their usual salary if exempt or 80 hours if hourly.
 - For part-time employees, pay “an amount equal to the average number of hours such employee works over a 2-week period for part-time employees.”
 - **The amount of employee pay is dependent on the reason for taking sick leave.**
 - Employees taking leave for qualifying **reasons (1) - (3) above** (pertaining to orders and symptoms applicable to the employee) allow employees to receive their **full regular rate of pay up to \$511 per day, and \$5,110 in total.**
 - Employees taking leave for **qualifying reasons (4) - (6) above** (for employee caring for another) allow employees to receive **2/3 their regular rate of pay up to \$200 per day, and an aggregate cap of \$2,000**
 - Unused leave under either law does not carry over. Leave is only available through 2020.
 - The Rule explains that an employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer’s group health plan on the same terms as if the employee did not take leave.

4. RESTORATION TO POSITION

- “On return from Paid Sick Leave or Expanded Family and Medical Leave, an employee has a right to be restored to the same or an equivalent position.”
- However, an employee “is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took leave.”
- “In order to deny restoration to employment, an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.”
- Two additional exceptions apply to the EFMLA (but not sick pay under EPSL).
 - Employers with fewer than 25 employees may not be required to restore a particular employee after EFMLA leave if all 4 of the following conditions are met:
 - (a) The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;
 - (b) The employee’s position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID–19 related reasons) during the period of the employee’s leave;
 - (c) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and
 - (d) If the employer’s reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available.
 - The Rule also notes that certain “key” employees under the FMLA may not be entitled to restoration after taking EFMLA if denial is necessary to prevent “substantial and grievous” economic injury.

5. WHAT DOCUMENTATION MUST EMPLOYERS KEEP?

- Employers must retain documents for 4 years to substantiate decisions regarding EFMLA and EPSL leave, regardless of whether they grant or deny leave, including:
 - Documents showing how much EPSL or EFMLA leave was paid to employees, and how that was determined, “including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave”;
 - Documents showing the amount of qualified health plan expenses were allocated to wages;
 - Copies of IRS Forms 7200 (Advance of Employer Credits due to COVID-19), and 941 (Employer’s Quarterly Federal Tax Return);

- Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.
 - The Rule refers employers to further guidance at <https://www.irs.gov/newsroom/covid-19-related-tax-creditsfor-required-paid-leave-provided-bysmall-and-midsize-businesses-faqs>.
- The Rule does not specify what information specifically is required to support tax credits, but it does identify what information employers may require employees to provide to support various types of leave.
 - Employees are required to provide a signed statement containing the following information: “(1) The employee’s name; (2) the date(s) for which leave is requested; (3) the COVID–19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID–19 qualifying reason.”
 - Employees also must provide additional documentation for leave taken for certain reasons, including the “name of government entity that issued the [quarantine or isolation] order,” “name of the health care provider who advised the employee to self quarantine,” “name of child” being cared for, and name of school or childcare provider.
 - Employees unable to work due to child care must make a representation that “no other suitable person will be caring for the child during the period.”
- Employers may reject leave for employees who do not provide sufficient information so support the tax credits. However, employers the employer “should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.”
- Employers should also keep documentation to support decisions to deny medical leave, and to support the small business exceptions discussed above.

6. **WHAT NOTICE MUST EMPLOYERS POST?**

- The Rule provides that employers may use the DOL’s model notice WHD 1422.
- The WHD 1422 notice can be found at: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Employers must post in conspicuous places, email or direct mail to employees, or post on internal or external website.

7. **SAFE-HARBOR PERIOD UNTIL APRIL 17, 2020**

- The DOL “will observe a temporary period of non-enforcement of the FFCRA” through April 17, 2020 for employers who make “reasonable, good faith efforts to comply with” the FFCRA.
- However, the DOL reserves its authority to enforcement if the employer “either (i) violates the Act willfully, (ii) fails to provide a written commitment to future compliance with the Act, or (iii) fails to remedy the violation upon notification by Department, the employee seeking payment, or a representative of that employee, including by making all affected employees whole as soon as practicable.”

Buchalter is committed to helping clients navigate through these challenging and rapidly changing times. We have attorneys experienced in adapting and navigating clients through these trying environments and are here to help however you need. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.



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