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Client Alert Applies To: Self-Funded, Fully-Funded, Small Group, and Large Group

March 31th, 2020

DOL Issues Additional Guidance on Employee Leave Under the Families First Coronavirus Relief Act

The Department of Labor's (DOL) guidance on the Families First Coronavirus Relief Act's (FFCRA) Emergency Paid Sick Leave and COVID-19 Family Leave is coming at a fast pace. Late Thursday night, the DOL released additional FAQs (# 15-37), addressing some more substantive questions related to the leave and corresponding employer tax credit. In particular, the guidance addresses briefly the type of documentation employers should require when employees request leave to obtain the tax credit. The guidance can be accessed here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Employers covered by FFCRA should read the entire set of FAQs, but here is a summary of the guidance:

- In order to claim a tax credit for the leave, employers must require employees to submit documentation in support of a request for leave, and employers do not have to provide leave if appropriate documentation is not provided. The DOL indicates that the IRS will be specifying the exact documentation required to claim the tax credit, and employers should follow IRS requirements. The FAQs do indicate that if the employee is seeking either EPSL leave or COVID-19 Family Leave to care for a child out of school or childcare due to COVID-19, employers may require documentation in support of the leave such as a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider (FAQ # 15-16).
- If an employee is teleworking and can telework the required number of hours, but employer and employee have agreed the employee can work differing hours than usual (i.e., early in the morning or late at night), leave is not available (FAQ #18).
- If an employee is teleworking, EPSL and COVID-19 Leave may be used intermittently but only with employer consent (FAQs #20).
- If an employee is working at the employer's worksite (as opposed to teleworking), EPSL and COVID-19 Family Leave taken for any purpose other than the need to care for a child must be taken in full-day increments (FAQ # 21). As the DOL notes, this is because the point of providing leave for the other reasons listed in FFCRA (quarantine orders or recommendations; obtaining testing for COVID-19; caring for a family member under quarantine) is to keep the employee out of the workplace altogether to avoid spreading COVID-19. If an employee is working at the employer's worksite and seeks EPSL or COVID-19 leave to care for a child, leave may be taken intermittently subject to the employer's consent (FAQ # 22).

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- If an employer shuts down its operations in whole or part and employees are laid off or furloughed while on EPSL or COVID-19 Leave, the employee is entitled to be paid for leave used prior to the termination or furlough, but thereafter is not (FAQ ## 23-27). (Although employees may be eligible for unemployment benefits.) Paid leave benefits end on the date of termination.
- An employee is not entitled to EPSL or COVID 19 Leave if an employer closes its worksite and shuts down for any reason, including pursuant to a Federal, State or local directive (FAQ #27). While the terms “shelter in place” or “stay at home” order are not used, this FAQ appears to confirm that employees unable to work due to such orders are not entitled to EPSL or COVID-19 Family leave.
- As with regular FMLA, employees taking COVID-19 Leave are entitled to continue their group health coverage during the leave. The employee must continue to pay his/her share of the premium (FAQ # 30).
- Employees may not supplement EPSL or COVID-19 paid leave with existing paid leave entitlements (i.e., PTO or sick leave) to get to full pay unless the employer agrees (FAQ #31). Similarly, employers cannot require employees to supplement their FFCRA payments with accrued time off to get to full pay; the employee must agree. (FAQs #32-33).

The Following Items Were Updated on March 30th, 2020:

Without fanfare or announcement, sometime this weekend the Department of Labor (DOL) updated its Families First Coronavirus Relief Act FAQ to provide a broad exemption to health care employers and to outline the Small Business Exemption. See a summary below:

[Healthcare Provider/Emergency Responder Exemption](#)

FAQ #56 provides that for purposes of who is a health care provider that may be exempted from the FFCRA's emergency paid sick leave (EPSL) and expanded family leave (COVID-19 Family Leave) requirements, health care provider means:

[a]nyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's, territory's, or the District of Columbia's response to COVID-19.

The DOL notes that to minimize the spread of COVID-19, healthcare employers should be judicious in utilizing the exemption. The term emergency responder is similarly defined broadly. See FAQ #57.

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Small Business Exemption

FAQ #58 provides that a small business (under 50 employees) may claim the exemption only from the FFCRA's EPSL requirements to the extent leave is sought for child care needs (and not due to the need to quarantine or care for a family member quarantines), and that to claim the exemption from EPSL (sought for child care needs) and extended COVID-19 Family Leave, an authorized office of the business must determine:

1. The provision of the paid leave would cause business expenses and obligations to exceed available revenue such that it caused the business to cease operating; or
2. The absence of the employee seeking leave would entail a substantial risk to the financial or operational health of a business because of the employee's specialized skill or knowledge; or
3. The employer doesn't have sufficient workers who are willing, able and qualified to fill in for the employee seeking leave.

See FAQ #58-59.

Please visit www.moreton.com/news-events/ for more information and to view other client alerts. This Client Alert was written by Carolyn Cox, Moreton & Company's in-house corporate counsel who provides our clients with compliance services. For additional questions, please contact Carolyn at 801-715-7110 or ccox@moreton.com.

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