

## ED CLIPS!

### **New Temporary Paid Leave Options under the Families First Coronavirus Response Act** **Jill Williams**

On April 1, 2020 the U.S. Department of Labor (Department) announced new action regarding how American workers and employers will benefit from the protections and relief offered by the Families First Coronavirus Response Act (FFCRA).

The Department promulgated regulations to implement public health and emergency leave under Title I of the Family and Medical Leave Act (FMLA) and emergency paid sick leave to assist working families facing public health emergencies arising out of the COVID-19 global pandemic. The law enables employers to keep their workers on their payrolls, while at the same time ensuring that workers are not forced to choose between their paychecks and the public health measures needed to combat the virus. The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements.

The temporary rule was operational on April 1, 2020 and is effective from April 2, 2020 through December 31, 2020.

#### ***Emergency Paid Leave***

The FFCRA provides employees with paid sick leave through two brand new laws: The Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both the EPSLA and EFMLEA apply to public agencies, including school districts.<sup>1</sup> Districts are required to provide their employees with sick paid leave or expanded family and medical leave for specified reasons related to COVID-19. These two provisions of the FFCRA provide up to two weeks (80 hours) of paid sick leave plus an additional 12 weeks (10 of those weeks paid) of expanded family and medical leave for reasons related to COVID-19.

#### ***Emergency Paid Sick Leave Act***

The EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons having to do with COVID-19 where the employee (1) is subject to a Federal,

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<sup>1</sup> 29 CFR §826.10(a), U.S. Dept. of Labor, Wage and Hour Div., Families First Coronavirus Response Act: Questions and Answer, Question 52-52.

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.<sup>2</sup> While this statutory text provides covered employers with general direction, it also leaves open many questions as to the exact parameters of these qualifying reasons. The DOL regulations now answer many of those questions and, in fact, may substantially limit the use of ESL in certain circumstances.

### ***Reason #1: Quarantine or Isolation Order***

The DOL has clarified that an employee “subject to a quarantine or isolation order” may only use emergency paid sick leave if work (or telework) is available to the employee that the employee cannot perform due to the governmental order.

### ***Reason #2: Advised by Health Care Provider to Self-Quarantine***

The term “health care provider,” means a licensed Doctor of Medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the Family and Medical Leave Act (FMLA).<sup>3</sup>

### ***Reason #3: Seeking Medical Diagnosis***

For an employee to use emergency paid sick leave when an employee believes he or she may have COVID-19, the employee must take “affirmative steps” to get a medical diagnosis “such as making, waiting for, or attending an appointment.” An employee will not qualify under Reason #3 if the employee simply believes that he or she may have COVID-19 but does not take affirmative steps, nor will the employee qualify simply because he or she has been asked to remain home by the employer, even when related to COVID-19 concerns.

### ***Reason #4: Caring for an Individual***

The DOL has clarified that an individual includes an employee’s immediate family member, a person who regularly resides in the employee’s home, 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 were quarantined or self-quarantined.” So, while the term does not include just any individual, the DOL has also left open what type of relationship “creates an expectation” of

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<sup>2</sup> 29 CFR §826.20.

<sup>3</sup> 29 CFR §825.102.

care. Employers will be left to navigate this in good faith and likely without further guidance from the DOL.

### ***Reason #5: Caring for a Child***

Even before the issuance of the DOL regulations, the need for an employee to be home to care for a child due to school closure or the unavailability of childcare appeared to be one of the simpler reasons to manage. While the DOL did not upend the general understanding of this reason for leave, it did clarify that such leave is only available where there is “no other suitable person” to care for the child. This clarifying language is particularly meaningful in communities where schools and/or day cares have been closed for weeks in advance of the effective date of the FFCRA.

While employers should not unreasonably deny this leave, they are free to ask the employee how he or she managed childcare post-school or day closure but prior to April 1, 2020, in order to identify if another “suitable person” is available. Moreover, recent guidance from the IRS clarified that an employer may ask an employee to certify that his or her child over the age of 14 needs care during daylight hours.<sup>4</sup> An employee requesting leave to care for a child over the age of 14 for a school/place of care closure must certify that “special circumstances” exist requiring care of the child. This is not perfect, but it does allow additional questioning of employees who are applying for EFMLA or EPSL to care for high school aged children.

### ***Reason #6: Substantially Similar Condition***

The FFCRA also included a catch-all opportunity for the DOL to define any “substantially similar condition.” However, the U.S. Department of Health and Human Services (HHS) has not yet identified any “substantially similar condition” that would allow an employee to take paid sick leave. If HHS does identify any such condition, the Department of Labor will issue guidance explaining when an employee may take paid sick leave based on a “substantially similar condition.” As a result, we currently believe that no employee should seek or be granted leave under Reason #6 at this time.

The EPSLA entitles full-time employees to up to 80 hours of paid sick leave, and generally entitles part-time employees to up to the number of hours that they work on average over a two-week period, although special rules may apply to part-time employees with varying schedules. For an employee who takes paid sick leave because he or she is subject to a quarantine or isolation order, has been advised to self-quarantine by a health care provider, or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the EPSLA provides for paid sick leave at the greater of the employee's regular rate of pay, or the applicable minimum wage (federal, state, or local), up to \$511 per day and \$5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason under the EPSLA is entitled to be paid two-thirds of that amount, up

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<sup>4</sup> <https://www.irs.gov/newsroom/covid-19-related-paid-leave>, FAQs.

to \$200 per day and \$2,000 in the aggregate. An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave, nor may an employer require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using paid sick leave.

Nothing in the EPSLA diminishes the rights or benefits that an employee is entitled to under any other Federal, State, or local law; or existing District board policy. Moreover, the EPSLA does not require financial or other reimbursement by an employer to an employee for unused paid sick leave upon the employee's separation from employment.

### ***Emergency Family and Medical Leave Expansion Act***

The FFCRA amends the 1993 Family and Medical Leave Act (FMLA) by adding an additional reason for leave through the EFMLEA, which, as stated above, applies to all public agencies including school districts. The FMLA provides 12 weeks of protected leave, but it's unpaid. Under the EFMLEA, the first two weeks remain unpaid, but for the next 10 weeks, eligible employees (those who have been employed with the employer for at least 30 calendar days) will receive two-thirds pay while on leave. If an employee has any paid personal, sick, medical or sick days, they can use those paid leave days during the 14 days of unpaid leave under the EFMLEA.

The only qualifying reason for EFMLEA is employee leave to care for his or her child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. To qualify, there must be no other suitable person available to care for the child.<sup>5</sup> The EFMLEA requires employers to provide expanded paid family and medical leave to eligible employees who 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. The EFMLEA requires employers to grant up to an additional 12 weeks of expanded family and medical leave. The first two weeks (of 12) under EFMLEA may be unpaid, but the employee can use other paid leave if available including EPSLA leave. To be eligible for EFMLEA the employee must be covered under Title I of FMLA and have worked for the employer for at least 30 calendar days. This leave includes job protection as provide by the FMLA.<sup>6</sup> An eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off. The total EFMLEA payment per employee for this ten-week period is

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<sup>5</sup> 29 CFR §§826.20 (b), 23, U.S. Dep't of Labor, Wage and Hour Div., Families First Coronavirus Response Act, Questions and Answers, Question 7, 68-70, 71.

<sup>6</sup> An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. 29 CFR §826.10, U.S. Dep't of Labor, Wage and Hour Div., Families First Coronavirus Response Act: Questions and Answers.

capped at \$200 per day and \$10,000 in the aggregate, for a total of no more than \$12,000 when combined with two weeks of paid leave taken under the EPSLA.

Further, the EFMLEA provides that if the need for expanded family and medical leave is foreseeable, employees shall provide employers with notice of the leave as soon as practicable. The FMLA's general prohibitions on interference with rights and discrimination, as well as the FMLA's enforcement provisions, apply for purposes of the EFMLEA, except that an employee's right to file a lawsuit directly against an employer does not extend to employers who were not previously covered by the FMLA.<sup>7</sup>

### ***Required Documentation Under EPSLA and EFMLEA***

An employee is required to provide the employer documentation containing the following information prior to taking paid sick leave under the EPSLA or expanded family and medical leave under the EFMLEA: Employee's name;

1. Date(s) for which leave is requested;
2. Qualifying reason for the leave; and
3. Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

In order to take paid sick leave for a qualifying COVID-19 related circumstance in which the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, an employee must additionally provide the employer with the name of the government entity that issued the quarantine or isolation order.

In order to take paid sick leave for a qualifying COVID-19 related circumstance in which the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, an employee must additionally provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19. In order to take paid sick leave for a qualifying COVID-19 related circumstance in which the employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine related to COVID-19, an employee must additionally provide the employer with either:

1. The name of the government entity that issued the quarantine or isolation order to which the individual being care for is subject; or
2. The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.

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<sup>7</sup> See, 29 USC 2611(a)(1), and 29 USC§ 2617.

In order to take paid sick leave for a qualifying COVID-19 related circumstance in which the employee is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons, or Expanded Family and Medical Leave, an employee must additionally provide:

1. The name of the son or daughter being cared for;
2. The name of the school, place of care, or childcare provider that has closed or become unavailable; and
3. A representation that no other suitable person will be caring for the child during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

If an employee were to take unpaid leave under the FMLA, the FMLA's documentation requirements are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

### ***Employer's Must Post Notice***

To comply with the FFCRA, districts must post notice of FFCRA requirements in a conspicuous place on the district's premises. EPSLA requires employers to post a notice of employees' rights under the EPSLA. To satisfy the requirement, the district may email or direct mail notice to employees or post notice on an employee's internal or external website. The worksite poster developed by the Department of Labor is available in English and Spanish. Posting of the English version is required.<sup>8</sup>

### ***Watch for Updates and Further Guidance***

This information is intended to serve as an overview of the new temporary rule, nevertheless, there are many open questions that require further guidance as to the specifics of how these provisions will be implemented. As relief from the COVID-19 pandemic at the federal level continues to evolve, our attorneys at Powell, Youngblood and Taylor, LLP are committed to staying on top of the rapid changes to help you navigate and understand your obligations under the statutory requirements. Please give us a call any time at (512) 494-1177.

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<sup>8</sup> 29 CFR 826.80 (A0-(d)). U.S. Dep't of Labor, Hour and Wage Div., Families First Coronavirus Response Act. Notice-Question and Answers.