

Highlights of DOL Temporary Rule on Expanded FMLA and Paid Sick Leave

Article By:

Jessica E. Chang

Faith C. Whittaker

On April 1, 2020, the U.S. Department of Labor (“DOL”) issued a temporary rule regarding the implementation of the emergency paid sick leave and Expanded Family and Medical Leave (“EFMLA”) requirements established by the recently enacted Families First Coronavirus Response Act (“FFCRA”). The DOL temporary rule covers significant ground in terms of delineating workers’ and employers’ rights and responsibilities under the FFCRA. This alert provides some highlights from the temporary rule.

Clarifications on Paid Sick Leave Eligibility:

The DOL temporary rule provides clarifications on when an employee is eligible for emergency paid sick leave under the FFCRA, clarifications that have become all the more important as more states issue stay-at-home or similar orders and the coronavirus continues to spread. The temporary rule clarifies that the phrase “quarantine or isolation orders” can include a broad range of governmental orders, including shelter-in-place, stay-at-home, or quarantine orders. An employee may take paid sick leave if they are subject to one of these orders, but the test is whether the employee would be able to work or telework “*but for*” being required to comply with one of the aforementioned orders.

Further, the employee can only take sick leave when the employer has work for the employee to do. The temporary rule provides the following examples:

- If a coffee shop closes (temporarily or permanently) due to a downturn in business related to COVID-19, or a government stay-at-home order, it would no longer have any work for its employees. Employees of this coffee shop are not eligible for emergency paid sick leave under the FFCRA because the employees’ inability to work is not due to their need to comply with the stay-at-home order, but rather due to the closure of the place of employment.
- An attorney who has tested positive for COVID-19, but whose symptoms are such that he/she is still able to perform services by teleworking, then he/she would not be eligible for emergency sick leave under the FFCRA.

Clarifications of Definitions under FFCRA:

“Advised by a Health Care Provider to Self-Quarantine”

The temporary rule explains that the advice to self-quarantine must be based on a health care provider’s belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19 and, self-quarantining must prevent the employee from working. This does not include any self-quarantine for preventive issues.

“Experiencing Symptoms and Seeking Diagnosis”

The temporary rule explains symptoms that could trigger this are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. As such, an employee who is unable to telework may take paid sick leave while awaiting a COVID-19 test result. Any employee who exhibits COVID-19 symptoms and seeks medical advice but is told he or she does not meet the criteria for testing and is advised to self-quarantine is eligible for paid sick leave. However, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.

“Time Off to Care for an Individual”

The temporary rule clarifies that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. The rule further explains that the employee must have a genuine need to care for the individual. An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee’s child needs. Thus, employees who do not want to come to work because they live with an immunocompromised or high-risk individual, or employees who are not acting in a caregiver capacity, are excluded from taking time off under the FFCRA.

Requiring Concurrent Use of Paid Leave Benefits and EFMLA:

The temporary rules provide that an employer may require an employee use leave available under the employer’s policies to care for a child, such as vacation or personal leave or paid time off, concurrently [during the first two unpaid weeks of leave]. If EFMLA is used concurrently with another source of paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer’s preexisting paid-leave policy for the period of leave taken, even if that amount is greater than \$200 per day or \$10,000 aggregate. However, the employer’s eligibility for tax credits is still limited to the cap of \$200 per day or \$10,000 in the aggregate.

Use of Total FMLA Leave Entitlement when Utilizing EFMLA:

The temporary rules further clarify that any time taken by an eligible employee as expanded family and medical leave counts toward the 12 workweeks of FMLA leave to which the employee is entitled. If an employee has exhausted his or her 12 workweeks of FMLA or EFMLA leave, he or she may still take paid sick leave under the FFCRA for a COVID-19 qualifying reason.

Notice Requirements for EFMLA Leave:

The temporary rules provide that if the need for EFMLA is foreseeable, employees (or their spokesperson if the employee is unable to do so personally) shall provide employers with notice of the leave as soon as practicable. The rule further states that it is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances

Recordkeeping requirements under FFCRA:

The temporary rules state that an employer is required to retain all documentation provided for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for paid sick leave or EFMLA, the employer is required to document and retain such information for four years.

Intermittent Leave:

The temporary rules state that employers do not have to permit intermittent use of paid sick or EFMLA leave but may agree to allow increments of intermittent leave in any amount. Intermittent leave cannot be used when the employee is working at their usual worksite (as opposed to teleworking) and is taking the emergency sick leave because of a quarantine or isolation order because they are experiencing symptoms and are seeking a diagnosis, or if they are caring for another individual. In those circumstances, the employee must continue to take paid sick leave until the allotment of leave is exhausted or the reason for the leave is no longer in effect.

Small Business Exemption:

The temporary rule clarifies employers with under 50 employees may seek an exemption when:

- Providing such leave would cause the business expenses and financial obligations to exceed available business revenue and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- The small business cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers may deny paid emergency leave only to employees whose absence would cause one of these three scenarios, meaning leave may sometimes be denied non-uniformly. In this situation, employers are strongly urged to consult with counsel before making leave decisions so as not to accidentally implicate non-discrimination laws.

The DOL temporary rule provides much-needed guidance on the FFCRA, but it does not resolve all open questions or concerns. As the COVID-19 crisis continues, situations will continue to arise that

require careful analysis of the laws and existing employer obligations.

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National Law Review, Volume X, Number 97

Source URL: <https://natlawreview.com/article/highlights-dol-temporary-rule-expanded-fmla-and-paid-sick-leave>