

Updates on FMLA and the ADA in the COVID-19 Environment

James R. Macy, Esq.

jmacy@vonbriesen.com

Jonathon R. Eiden, Esq.

jeiden@vonbriesen.com

von Briesen & Roper, s.c.

Integrated Disability Management

1. FMLA & FMLEA
2. Emergency Paid Sick Leave Act (EPSLA)
3. ADA
4. Workers' Comp.
5. STD/LTD
6. LOA/Medical Leave /Sick Leave
7. Other?

Not a policy by policy approach -
need to look at all possible obligations!

Families First Coronavirus Response Act

- Generally applies to employers with less than 500 employees.
- Generally effective for employment/labor purposes as of April 1, 2020
- Three Key Parts:
 - 1) Expansion of FMLA rights
 - 2) Emergency Paid Sick Leave
 - 3) Unemployment Eligibility

*Also COVID-19 testing coverage under Group Health Plan
- DOL Notices Have Been Published/Regulations Modified

Emergency FMLA Expansion Act

- Expands FMLA coverage to cover all government employers and private sector companies with less than 500 employees for child care during the public health emergency only.
- Employee must have been employed for 30 days to be eligible.
- Emergency FMLA benefit applies to employees who would typically not meet the standard 1250 hours/12 months eligibility required for typical Federal FMLA leave.
- EFMLA coverage is job protected leave to provide *needed* care for a son or daughter under 18 because a school or a place of care (daycare) has been closed or the child care provider is not available.

FMLA - Paid or Unpaid

- First 10 workdays of leave - unpaid (except for substitution of paid leave by employee).
- Remainder of FMLA for emergency child care available at 2/3 of the regular hourly rate of pay of the employee for normally scheduled work hours.
- Wages are capped at \$200 per day (\$10,000 total) (per employee).

Verification of Need

- Certification requirements for FMLA remain as under current law. Key information includes:
 - 1) Names and ages of the children to be cared for.
 - 2) Name of the school or daycare that is unavailable.
 - 3) Representation that no other suitable caretaker is available (i.e. employee is *needed* to care for child).
 - 4) Identify special circumstances, if needed, to care for child over the age of 14.

Steps to Follow When an EPSL or EFML Request to Care for a Child Arises

- Assess whether employee is exempt from the FFCRA due to emergency responder or health care provider status.
- Assess whether the employee meets the FFCRA's threshold eligibility criteria.
- Assess whether the requirements of the EPSL/EFML are met, including:
 - The child's school or place of care is closed.
 - The child is under 18 years of age.
 - The employee needs to stay home to care for the child.
 - The employee cannot work or telework while simultaneously caring for the child, even if only on an intermittent basis.

Under the EPSL or EFMLEA, When is a School “Closed”?

- DOL Question #70 of FFCRA Q&A’s:
 - **Question:** My child’s school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it “closed”?
 - **Answer:** Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

Under the EPSL or EFMLEA, When is a School “Closed”?

- DOL’s guidance indicates that even partial online instruction or distance learning, even with an in-person learning component, constitutes a “closure” under the FFCRA.
- The phrasing of DOL’s Question 70 suggests that, if the parents have the option of regular in-person instruction but choose to enroll their child in part-time or full-time virtual instruction, then school has not closed for purposes of the FFCRA on days in which regular in-person instruction is available.

Under the EPSL or EFMLEA, When is a School “Closed”?

- Thus, the crux issue is whether parents are actively prohibiting their child from being at school on days when regular in-person instruction is available.

Hybrid Re-opening Plan

- **Grades K-5**
 - In-person five days/week
 - Virtual alternative available
- **Grades 6-12**
 - Blended (2 days in person, 3 days virtual)
 - A group: in person Monday/Thursday
 - B group: in person Tuesday/Friday
 - All students virtual on Wednesday

FFCRA School Checklist regarding School Closures

- Is there an in-person option?
- What days is in-person unavailable?
 - If hybrid, confirm whether student is in A or B group.
 - Can students from the same household be in the same group?
- Develop work schedule based on anticipated school schedule.
- Verify any changes to the district model.
- Verify any changes based on classroom exposure.

Emergency Paid Sick Leave Act

- Full-time employees - 80 hours.
- Part-time employees - number of hours such employee normally works over a two (2) week period. If variable hours, average over last 6 months.
- Employee chooses what to use first - not the employer - no ordering requirement in taking Paid Sick Leave.
- Allows employer opt-out for health care workers and emergency responders.
- Provides DOL ability to issue regulations exempting small businesses (50 or less) if compliance would “jeopardize the viability of the business as a going concern.”

What Can I Take Paid Sick Leave For?

- 1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19: **PAID at 100%.**
- 2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19: **PAID at 100%.**
- 3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis: **PAID at 100%.**
- 4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2): **PAID at 2/3 of regular rate of pay.**

What Can I Take Paid Sick Leave For?

(cont.)

- 5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions: **PAID at 2/3 of regular rate of pay.**
 - 6) The employee 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: **PAID at 2/3 of regular rate of pay.**
- * Wages capped at **\$511 per day (\$5,110 total)** for 1,2, and 3 above; capped at **\$200 per day (\$2,000 total)** for 4, 5 and 6 above.

Updated DOL Temporary Rule

Publish Date: 09/16/2020

- US District Court - Southern Dist. NY (04/14/2020)
 - 4 Areas of Prior Temporary Rule held invalid
 - Requirement that leaves available only if employee has work from which to take leave from.
 - Requirement that employee may take leave intermittently only with employer approval.
 - Challenge to definition of health care provider.
 - Challenge to employee required notice to employer provision.

Requirement that leaves is available only if employee has work from which to take leave from

- DOL - Maintains its prior rule - In order to be eligible for either of the leaves under FFCRA (EFMLEA or EPSLA), the employee must be in a work available status and not on layoff.

Requirement that employee may takes leave intermittently only with employer approval

- DOL - Maintains its position that intermittent leave available only upon employer's approval.
- DOL Clarifies that Hybrid School closures are not intermittent situations, but a new leave every day of school closure.

Challenge to definition of health care provider

- DOL - Revises the definition of “health care provider” to mean employees who are health care providers under 29 CFR 825.102 and 825.125, and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.

Challenge to Employee Required Notice to Employer Provision

- DOL - Revises its rule to clarify and correct inconsistency regarding when an employee may be required to give notice of expanded FMLA to the employer. The modified rules now follows FMLA when notice may not necessarily be required before the leave, but “as soon as practical.”

The FMLA Compliance Process must also consider Workplace Accommodation Obligations Under:

- Federal and State FMLA
- Workers' Compensation Laws
- Americans with Disabilities Act, as amended (ADA)
- State Disability Law

Also need to consider the Genetic Information Nondisclosure Act (GINA)

Accommodation Generally

- Employers are legally obligated to accommodate qualified individuals with disabilities, unless doing so creates an undue hardship.
- Interactive Process
 - Includes meeting with the employee, discussing restrictions, abilities and ideas for accommodation.
 - May include meeting with employee's supervisor to discuss accommodation.
 - Document efforts.
 - Breakdown in interactive process.
- Impact of failure to respond quickly to employee request for accommodation.

Accommodation Obligations

- Accommodations for Absence - Employee
 - Full-time Leave
 - Intermittent Leave
 - Reduced Leave Schedule
- Work at home?
- What leave applies?

Interactive Process

- Interactive Process
 - Includes meeting with the employee, discussing restrictions, abilities and ideas for accommodation.
 - May include meeting with employee's supervisor to discuss accommodation.
 - Request of medical information.
 - Document efforts.

Other COVID-19 Leave Issues

- I am uncomfortable coming to work.
- I am in a vulnerable health/age group and would prefer to work at home.
- I tested positive.
- My spouse is in a vulnerable health/age group and I would prefer to work at home.

Other COVID-19 Leave Issues

- I have been in contact with someone who tested positive.
- I heard a co-worker tested positive and want to know who and if I am safe.
- Can you lay me off so I can make more money staying home?

QUESTIONS?

Jonathon R. Eiden, Esq.

jeiden@vonbriesen.com

(920) 233-6793

James R. Macy, Esq.

jmacy@vonbriesen.com

(920) 232-4841