New DOL Rules Are Impacting Paid Leave Especially In Medical Practices

Alan Gassman Contributor
Retirement
I write about tax, estate and legal strategies and opportunities.

On March 18, 2020, the "Families First Coronavirus Response Act" ("FFCRA") was enacted. This means that the Government will pay Employers to provide paid time off for certain virus related situations. As discussed in my blog post dated March 20, 2020, two separate provisions were established to provide paid leave for employees absent from work for "qualifying reasons" related to COVID-19.

It is now crucial that Employers understand these new rules and document facts and circumstances that require paid time off for Employees and allow for reimbursement or tax credits to the Employer for complying.

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Established under Division E of the FFCRA is "The Emergency Paid Sick Leave Act" ("EPSLA"), which entitles certain employees of "covered employers" (which are private-sector employers with fewer than 500 employees, and public sector employers with 1 or more employee) to take up to two weeks of paid sick leave if the employee is unable to work (or telework) for any one of the following "qualifying reasons" related to COVID-19:

- *The employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19.*

- *The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.*
- *The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.*
- *The employee is caring for another individual who is either subject to a Federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.*
- *The employee is caring for their son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID-19 related reasons.*
- *The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services (HHS).*

Established under Division C of the FFCRA is "The Expanded Family and Medical Leave Expansion Act" ("EFMLEA"), which amends Title I of the Family and Medical Leave Act ("FMLA"), and permits certain employees of covered employers to take up to 12 weeks of expanded family and medical leave, ten of which are paid, if the employee is unable to work (or telework) due to a need for leave to care for the son or daughter of such employee, if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 related reasons.

On September 11, 2020, the Department of Labor ("DOL") issued revisions to the Temporary Rule effective September 16, 2020, that revises and provides clarifications to the DOL's April 1st Temporary Rule.

The revisions and clarifications made by the September 11, 2020, revisions to the Temporary Rule are the following:

1. The employee must have had work he or she would have done

The DOL reaffirmed that paid sick leave and expanded family and medical leave may be taken for appropriate reasons "only if the employee has work from which to take leave." Therefore, if an individual does not have work he or she can perform because of "the employer closing the work-site (temporarily or permanently)" or other reasons then such leave will not be covered by the FFCRA.

2. Approval is needed by the Employer to take intermittent leave

The DOL reaffirms that, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently under 29 CFR § 825.50. The revisions to the Temporary Rule provides additional explanation.

This regulation states that "the ability of an employee to take paid sick leave or expanded family and medical leave intermittently while reporting to an employer's worksite depends upon the reason for the leave."

This regulation also goes on to state that "if the employer and employee agree, an employee may take up to the entire portion of paid sick leave or expanded family and medical leave intermittently to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, because of reasons related to COVID-19. Under such circumstances, intermittent Paid Sick Leave or paid Expanded Family and Medical Leave may be taken in any increment of time agreed to by the Employer and Employee."

Further, this regulation states that "if an employee takes paid sick leave or expanded family and medical leave intermittently as the employee and employer have agreed, only the amount of leave actually taken may be counted toward the employee's leave entitlements under the FFCRA."

In the Temporary Rule, the DOL provides for the following:

Employer-approval for intermittent leave is appropriate for the following:

- *Qualifying reasons that do not exacerbate risk of COVID-19 contagion.*
- *Taking FFCRA leave intermittently to care for a child, whether the employee is reporting to the worksite or teleworking*

The employer-approval condition will not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis.

3. The definition of "Health Care Provider" is revised

The most significant change contained in the revisions to the Temporary Rule is in the revised definition of "Health Care Provider." FFCRA allows employers to exclude health care providers and certain employees of health care providers from eligibility for EPSL and EFMLA if the employer chooses to do so.

The definition of a "Health Care Provider" who can be excluded from coverage is defined under the revisions to the Temporary Rule to include only employees who meet the definition of that term under the FMLA regulations or those who are employed to provide diagnostic services, preventative

services, treatment services or other services that are integrated with and necessary to the provision of patient care, which, if not provided, would adversely impact patient care. It is clear that employees who handle marketing, billing, and other functions not related to patient care services can no longer be exempted from the paid leave requirements of the FFCRA.

The DOL revised the definition of "Health Care Provider" applicable to FFCRA and found 29 CFR 826.30(c)(1) to mean the following:

(1) Health care provider—(i) Basic definition. For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is

(A) Any Employee who is a health care provider under 29 CFR 825.102 and 825.125, or;

(B) Any other Employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

(ii) Types of Employees. Employees described in paragraph (c)(1)(i)(B) include only:

(A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance

to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A) of this section; and

(C) Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnosis and treatment.

The Act goes on to clarify who is not included in the definition of "Health Care Provider."

"Employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

It also clarifies what "integrated into and necessary to the provision of health care services" means as follows:

"Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples."

4. Required notice for leave must be provided to Employer "as soon as practicable"

In the revisions to the Temporary Rule, DOL clarifies that notice may not be required in advance and may only be required after the first workday for which an employee takes paid sick leave. However, advance notice for EFMLA is not prohibited if the need is foreseeable.

Thus, revised 29 CFR 826.90(b) now states that “advanced notice of expanded family and medical leave is required as soon as practicable; if the need for leave is foreseeable.”

The Rule provides the following example of when an employee has a foreseeable situation and must therefore notify the employer without delay:

If an employee learns on Monday morning before work that his or her child's school will close on Tuesday due to COVID-19 related reasons, the employee must notify his or her employer as soon as practicable (likely on Monday at work). If the need for expanded family and medical leave was not foreseeable—for instance, if that employee learns of the school's closure on Tuesday after reporting for work—the employee may begin to take leave without giving prior notice but must still give notice as soon as practicable.

The documentation must include the following:

- The employee's name;
- The dates for which leave is requested;
- The qualifying reason for leave; and
- An oral or written statement that the employee is unable to work.

These revisions to the Temporary Rule are a well defined and welcomed addition to the temporary rule that has functioned relatively well and has supported home health care, mental and physical wellness and the need to continue with “business as usual” to the extent possible in a reasonable manner.