

Thus far, 2020 has been a year of challenges and change. Since COVID-19 hit, employers have been faced not only with concerns about how to deliver their goods and services to customers, and maintain the financial livelihood of their businesses, the safety of their employees, and new leave issues associated with health and childcare concerns. Meanwhile, employees have been faced with questions about the viability of their positions during the uncertain economic times and personal demands inherent with increased illness and school closures.

Over the past few months, some of the biggest questions I have been presented with regarding COVID-19 relate to the appropriateness and application of leave benefits. Employers are struggling with situations involving employee exposure to the virus and leave requirements in situations where an employee's family member is ill or subject to a quarantine. Employees want to know if they can work remotely or request leave in light of the fact their child's school or daycare is closed. Employers and employees alike have questions regarding required paid leave and the length of time they may away from the office.

Prior to March, individuals who worked for larger employers could request a leave of absence (or intermittent leave) under the Family and Medical Leave Act for their own serious medical condition or if they had to assist in providing care for a family member with a serious health condition. However, many small businesses are were not covered by FMLA. Additionally, for many employees for whom coverage was available were not eligible for paid leave.

In March 2020, the Families First Coronavirus Response Act ("FFCRA") was signed into law. The FFCRA expanded the Family and Medical Leave Act ("The Emergency Family Medical Leave Expansion Act - EFMLA") and created the Emergency Paid Sick Leave Act ("PSLA"). The FFCRA provides for paid leave in circumstances that were not previously covered. It applies to most private employers that have fewer than 500 employees, as well as public employers who have at least one employee. Furthermore, individual employees are covered under the Emergency Paid Sick Leave Act regardless of whether they are full time or part-time. In order to be eligible, they need to have been employed by the employer for a minimum of thirty days.

Significantly, all employees of covered employers are eligible for two weeks of paid sick time if an employee is unable to work or telework due to a need for leave because:

- 1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- 2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- 3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 4) The employee is caring for an individual who is subject to an order described in sections 1 - 3 or has been advised to self-quarantine as described in section 2;
- 5) The employee is caring for his or her child because their school or place of childcare has been closed or their childcare provider is unavailable due to COVID-19 precautions;

- 6) The employee is experiencing any other similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

Specifically, the FFCRA provides that full time employees are entitled to up to 80 hours of paid leave for any of these reasons except for the care of a child relating to the closure of their school or childcare facility. Part time employees are entitled to paid leave up to the average number of hours they would work in a two-week period. Once the 80-hour entitlement is exhausted, there is no additional leave under PLSA even if an employee experiences another qualifying event.

Full time employees who need leave because their child's school or day care has been closed or is unavailable due to COVID-19 are entitled to up to two weeks of paid sick leave followed by up to ten weeks of paid expanded family and medical leave (at 40 hours /week). Part time employees who need leave because of the closure or unavailability of their child's school or childcare are eligible for leave for the number of hours they normally would have been scheduled to have worked during that period.

The rate of pay individuals are entitled to is subject to daily and aggregate caps, which differ based upon the reason for the leave. Those who need leave due for self-care purposes set forth in the first three subsections described above, are capped at either their regular rate of pay or the applicable minimum wage (whichever is higher), up to \$511 per day and a \$5,110 aggregate over a two-week period.

Individuals who need leave in order to care for someone who is subject to a quarantine order, self-quarantine or is experiencing other substantially -similar conditions recognized by the Secretary of Health and Human Services, are entitled to pay at 2/3 of their regular pay rate or 2/3 of the minimum wage (whichever is higher), subject to a cap of \$200 per day and a \$2,000 aggregate over a two week period.

If an individual needs leave to care for their child due to a school closure or the unavailability of their childcare provider, the individual is entitled to pay at 2/3 of their regular pay rate or 2/3 of the minimum wage (whichever is higher), subject to a cap of \$200 per day and a \$12,000 aggregate over a twelve week period.

Significantly, employers may not require an employee to exhaust their current sick leave before they can use leave under the PSLA. Likewise, the PSLA does not diminish the rights of the benefits of an employee that is entitled to any other federal state or local law, CBA or existing employer policy. Thus, the paid leave that is provided under the PSLA is in addition to any other paid leave the employer is already obligated to provide by law or by agreement.

With summer in full swing, questions have arisen about the applicability of the FFCRA to cancelled summer school / summer camp programs. In response to these questions, the Department of Labor has indicated that the same rules apply. The Department of Labor's guidance provides that an employee who requests leave to care for a child based on the closure of a summer camp or similar summer program, must provide the name of the camp or program that would have been the place of care had it not been closed, the name of the child, and a statement that no other suitable

person is available to provide care. Significantly, a parent needs to be able to substantiate that it is more likely than not that their child would have attended the program had it not been closed.

Providing additional paid leave to employees does have a cost. Employers should be aware that the FFCRA provides tax credits for employer's portion of payroll taxes for wages paid to employees who are taking sick leave or FMLA leave pursuant to the FFCRA. Small businesses with fewer than 50 employees may qualify for an exemption from paying employees paid sick leave or expanded FMLA due to the closure of a child's school or childcare facility if it would jeopardize the viability of the business.

A critical element of the FFCRA is that it provides for leave when an individual is unable to work *or telework*. Often, employers and employees find that telework is a viable option that allows employees to self-quarantine, care for a family member or stay home with a child due to a school or daycare closure, while still being able to conduct business. To the extent this is possible, it may be the best interest of both the employer and employee to allow skilled employees capable of working remotely to do so. However, in those situations where an employee cannot work or telework due to COVID-19 related reasons, a limited safety net is available.