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FFCRA Department of Labor Temporary Rule

Section-by-Section Analysis of Key FFCRA Rule Provisions

The Department of Labor (DOL) has promulgated temporary regulations to implement provisions of the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) of the Families First Coronavirus Response Act, Public Law 116-127 (FFCRA), which was enacted in response to the COVID-19 pandemic. The Rule became effective on April 1, 2020, and sunsets on December 31, 2020. This update analyzes the Rule's key provisions.

Key Definitions and Terms (29 CFR § 826.10)

There are new or expanded definitions of the terms "child care provider" and "place of care." "Child care provider" includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under state law and satisfies the state and local requirements. Eligible child care providers need not be compensated or licensed if they are family members or friends, such as neighbors who regularly care for the employee's child.

"Son or daughter" is defined as it is under the FMLA and has the same meaning under both the EPSLA and EFMLEA. The EPSLA did not define "son or daughter," so this is a helpful clarification and assures employees they can receive EPSLA and EFMLEA if they must care for adult children who are incapable of self-care due to a disability. Interestingly, in a webinar on March 27, 2020, Equal Employment Opportunity Commission (EEOC) representatives stated it is unclear at this time whether COVID-19 infection is, or could be, a disability under the Americans with Disabilities Act (ADA). If a COVID-19 infection qualified as an ADA disability, it might allow employees to care for adult children with a COVID-19 infection under EPSLA or traditional FMLA.

The Rule clarifies that a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority *that cause the employee to be unable to work*, even though their employer has work that the employee could perform but for the order. This also includes when a federal, state, or local government authority has advised categories of citizens (*e.g.,* of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be

unable to work even though their employers have work for them. This guidance is new and there is a lot to consider. Employers must closely evaluate the "but for" test, in particular, as it relates to businesses that continue to operate as "essential businesses." This also clarifies that employees who are directed not to work under laws such as New York's Matilda's Law may receive EPSLA leave.

Several significant caveats are offered concerning telework. First, telework is inappropriate if there are extenuating circumstances (such as serious COVID-19 symptoms) that prevent employees from performing work. Employers should closely evaluate directing employees to telework when they or their family members are seriously ill. Second, employees who are teleworking for COVID-19-related reasons must always record — and be compensated for — all hours actually worked, including overtime, in accordance with Fair Labor Standards Act (FLSA) requirements. An employer is not required to compensate employees for unreported hours worked while teleworking for COVID-19-related reasons unless the employer knew or should have known about such telework. Finally, the DOL clarifies that the continuous workday rule does not apply to telework for COVID-19-related reasons, as it would undermine the objective of employers and employees adopting flexible telework arrangements that would permit supervision of children or care for ill family members. The DOL explained as follows in the Preamble to the Temporary Rule:

> *The FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons. But section 790.6 and the Department's continuous workday guidance generally provide that all time between performance of the first and last principal activities is compensable work time. See 29 CFR 790.6(a). Applying this guidance to employers with employees who are teleworking for COVID-19 related reasons would disincentivize and undermine the very flexibility in teleworking arrangements that are critical to the FFCRA framework Congress created within the broader national response to COVID-19.*

Paid Leave Entitlements (29 CFR § 826.20)

Employees can receive EPSLA leave for one of six reasons. When employees are subject to a federal, state, or local quarantine or isolation order related to COVID-19 (EPSLA reason #1), they may take leave only if "but for" being subject to the order, they would be able to perform work that is otherwise allowed or permitted by their employers. This means employees must be unable to work because they are subject to the order; employees are not entitled to leave because the business or customers are subject to such orders. Several conditions must be met for employees to qualify for leave:(1) employers must have work for them to do; (2) employers must allow or permit employees to do work; and (3) employees must be unable to perform the work because of a quarantine or isolation order.

The Preamble provides an example of a lawyer that is under a stay at home order and is allowed to telework. In this circumstance, the DOL says the lawyer does not qualify for EPSLA leave. However, the example goes on to describe the lawyer being unable to telework because of a power outage or similar extenuating circumstance. The DOL says, in this instance, the attorney would be eligible for EPSLA leave during the period of the power outage or extenuating circumstance. The DOL's use of a "but for" test arguably considerably limits the instances when employees are eligible for leave despite being subject to quarantine or isolation orders. For example, employees would not be eligible if employers do not have work for employees because they close their business even if orders forced employers to close, or indirectly caused them to close because customers were forced to stay home under stay-at-home orders. Not surprisingly, employees also are not entitled to leave if they are allowed and able to telework.

Employees can receive EPSLA leave if they have been advised by health care providers to self-quarantine due to concerns related to COVID-19 (EPSLA reason #2).

Health care providers must advise employees to self-quarantine based on a belief that they have COVID-19, may have COVID-19, or are particularly vulnerable to COVID-19, and following their health care provider's advice to self-quarantine prevents them from being able to work, either at their normal workplace or by teleworking.

Employees may receive EPSLA leave if they are experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider (EPSLA reason #3). The symptoms can include fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). However, the EPSLA leave is limited to the time employees are unable to work because they are taking affirmative steps to obtain medical diagnoses such as making, waiting for, or attending an appointment for a test for COVID-19. Leave of this type is not available if employees are self-quarantining without seeking a medical diagnosis or if employees are able to telework while waiting for test results and their employers have work for them to perform and permit telework from the location where the employees are waiting. Employees may continue to take leave while experiencing symptoms or after testing positive for COVID-19, regardless of symptoms, provided their health care providers advise them to self-quarantine. Employees who are unable to telework may take leave while awaiting test results regardless of their symptom severity. Employees who have COVID-19 symptoms, seek medical advice, but do not meet criteria for the test (and thus are not technically seeking a diagnosis of COVID-19), may be eligible for leave under EPSLA reason #2 if their health care providers advise them to self-quarantine and they meet the other requirements for EPSLA reason #2.

Employees may receive EPSLA leave if they are caring for an "individual" who is either subject to an order as described in EPSLA reason #1 or is directed to self-quarantine as described in EPSLA reason #2 (EPSLA reason #4). The EPSLA's definition of an "individual" is broader than the FMLA's definition of covered family members; it means 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. For this purpose, "individual" does not include persons with whom the employee has no personal relationship.

Leave for EPSLA reason #4 is allowed only if *but for* a need to care for an individual, employees would be able to perform work for their employers, either at their normal workplace or by teleworking. In other words, employees may not receive EPSLA leave if their employers do not have work for them. Additionally, employees must have a genuine need to care for an individual, and they must be unable to perform work for their employers because the care recipient depends on them to care for them because the care recipients are subject to a quarantine or isolation order described in EPSLA reason #1 or having been advised to self-quarantine for reasons described in EPSLA reason #2.

Employees may receive EPSLA leave if they are caring for their "son or daughter" whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual school or place of care, or if the son or daughter's child care provider is unavailable, for reasons related to COVID-19 (EPSLA reason #5). This leave is only available if no other suitable person is available to care for the son or daughter during the leave period. The Rule states employees generally do not need to take leave if another suitable person, co-parent, co-guardian or usual care provider is available to provide the care. As child care and supervision is a very personal decision, we expect employees may resist employer efforts to enforce this limitation.

Similar to other EPSLA leave reasons, employees may not take leave for EPSLA reason #5 unless, but for a need to care for the son or daughter, the employee would be able to perform work for their employers, either at their normal workplace or by teleworking. Employees caring for their son or daughter may not take EPSLA leave where their employers do not have work for them or they do not need to care, and actually are not caring, for their son or daughter. This same limitation and rule apply for EFMLEA.

Interestingly, the IRS has stated in a separate FAQ that, for care of a child over 14 during daylight hours, special circumstances must exist requiring an employee to provide care. The DOL Rule does not specifically mention this, but it appears the IRS FAQ is consistent with the principle that employees must actually be needed to care for covered children. Again, employees may resist employer attempts to enforce this, but the IRS has emphasized the need for employers to establish the right to tax credits. Therefore, employers should consider demanding greater justification for employee claims that they are needed to care for children over the age of 14 during daylight hours when seeking leave for EPSLA reason #5.

Employees are also technically eligible to take EPSLA leave if they have "a substantially similar condition" as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor (EPSLA reason #6). Guidance has not yet been issued on this EPSLA reason. The Rule states that guidance may be provided at any time from April 1, 2020, to December 31, 2020 (the date the EPSLA is no longer in effect).

As is the case with traditional FMLA, the taking of leave under the EPSLA or EFMLEA does not impact an employee's exempt status under FLSA sections 6 and/or 7.

Calculating EPSLA Leave Hours (29 CFR § 826.21)

The Rule clarifies who would be considered full-time and, therefore, entitled to 80 hours of EPSLA leave. Employees are deemed full-time if they are normally scheduled to work at least 40 hours each workweek. Employees who do not have a normal weekly schedule also may be considered full-time if the average number of hours per workweek the employee is scheduled to work, including hours for which the employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of: (i) the six-month period ending on the date on which the employee takes EPSLA leave; or (ii) the entire period of the employee's employment.

Anyone who does not satisfy the full-time employee requirements is considered to work part-time. If part-time employees have a normal weekly schedule, they are entitled to an amount of EPSLA leave equal to the number of hours they normally are scheduled to work over two workweeks. If part-time employees do not have a normal weekly schedule, employers are directed to calculate EPSLA hours by using one of several methods. If employees have worked at least six months, employers should provide 14 times the average number of hours employees were scheduled to work each calendar day over the six-month period ending on the date on which employees take EPSLA leave, including any hours for which employees took leave of any type. If employees have not worked at least six months, employers should provide 14 times the number of hours they agreed employees would work on average, each calendar day, at the time of an employee's hiring; if there was no agreement at the time of hiring, employers should provide 14 times the average number of hours per calendar day employees were scheduled to work over the entire period of their employment, including hours for which employees took leave of any type.

The Rule addresses a contradiction in the EPSLA statute, which stated part-time employees would be provided an amount of EPSLA leave "equal to the average number of hours that the employee was scheduled per day over the 6-month period." The statutory language would not have provided part-time employees two weeks of compensation; the DOL included the 14-day multiplier to address this oversight and fulfill the apparent legislative intent.

Calculating EPSLA Leave *Pay* (29 CFR § 826.22)

Employers should pay employees who take leave for EPSLA reasons #1-#3 the higher of the employee's average "regular rate" of pay, the federal minimum wage to which the employee is entitled, or any state or local minimum wage to which the employee is entitled. Employees taking such leave are subject to a maximum limit of $511 per day

and $5,110 in the aggregate. Employers should pay employees who take leave for EPSLA reasons #4-#6 two-thirds of their average "regular rate" of pay. Employees taking such leave are subject to a maximum limit of $200 per day and $2,000 in the aggregate.

Calculating EFMLEA Leave *Entitlement* (29 CFR § 826.23)

The EFMLEA provides eligible employees a 12-week benefit that is only available from April 1, 2020, through December 31, 2020. Any EFMLEA leave employees take counts toward their usual 12 workweeks of FMLA leave for any other qualifying reason in the 12-month period employers generally use to determine FMLA entitlement.

Employees may elect to use, or employers may require employees to use, accrued leave that, under the employer's policies, would be available to employees to care for a child, such as vacation or personal leave or paid time off, concurrently with the expanded family and medical leave under the EFMLEA. The DOL acknowledged in the Preamble that traditional FMLA allows a broader use of company paid leave policies (*i.e.,* sick leave); however, the DOL believed this limitation was appropriate because EFMLEA leave is solely to care for family (*i.e.,* a child whose school or place of care is closed or whose child care provider is unavailable).

Calculating EFMLEA Leave *Pay* (29 CFR § 826.24)

The initial two weeks of EFMLEA leave is unpaid. As noted, employees may substitute available EPSLA leave or accrued paid personal time for this unpaid EFMLEA leave. For each day an employee uses EFMLEA leave after the initial two-week period, employers must pay eligible employees two-thirds of their average "regular rate" of pay for each hour an employee is scheduled to work that day, subject to the maximum of $200 per day and $10,000 in the aggregate for the additional 10-week period.

Unlike EPSLA leave, employers calculate EFMLEA leave in the same manner for full- and part-time workers. Employers pay employees based on their "scheduled number of hours." If employees have a normal weekly schedule, the scheduled number of hours are the hours they are normally scheduled to work. If employees' work schedules vary, employers calculate scheduled number of hours using one of several methods. If employees have worked at least six months, the scheduled number of hours is the average number of hours employees were scheduled to work each workday, over the six-month period ending on the date employees first take EFMLEA leave, including hours for which employees took leave of any type. If employees have not worked at least six months, the scheduled number of hours is the average number of hours they agreed employees would work each workday, at the time of an employee's hiring; if there was no agreement at the time of hiring, the scheduled number of hours is the average number of hours per workday employees were scheduled to work over the entire period of their employment, including hours for which employees took leave of any type. The DOL explained this rule allowed employers to compute pay for each day of EFMLEA leave taken, when employee work schedules vary from day to day, without a different week-to-week requirement.

EFMLEA leave may be computed in hourly increments instead of a full day. For each hour of EFMLEA leave taken after the first two weeks, the employer must pay an employee two-thirds of the employee's average "regular rate" of pay up to statutory caps.

The Rule clarifies if employees elect to use or are required to use leave available under the employer's policies consistent with employees' need for leave, such as vacation or personal leave or paid time off, concurrently with unpaid EFMLEA leave, the employer must pay an employee a full day's pay for that day. The employer, however, can take no more than $200 a day or $10,000 in the aggregate in tax credits for EFMLEA paid leave.

The Rule also clarified that employers begin paying employees who take EFMLEA leave after two weeks, rather than 10 days. In the Preamble, the DOL explained the EPSLA and EFMLEA are designed to work in tandem to provide continuous income for an employee to care for their child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID-19-related reason. Referencing two weeks in the Rule ensures consistent administration of these two overlapping paid FFRCA leaves.

Calculating the "Average Regular Rate" under the FFCRA (29 CFR § 826.25)

Employers must use an "average regular rate" to compute pay for EPSLA and EFMLEA leave. Employers do this in two steps. First, using the methods contained in 29 CFR Parts 531 and 778, employers must calculate the regular rate for each full workweek in which an employee has been employed over the lesser of: (i) the six-month period ending on the date on which the employee takes Paid Sick Leave or Expanded Family and Medical Leave; or (ii) the entire period of employment. Then, employers must "average" the weekly regular rates by weighting them by the number of hours worked for each workweek. In other words, the Rule requires employers to add up all of the earnings that are not excluded from the regular rate as required by the FLSA and divide those wages by all of the hours worked by the employee to obtain the weighted average of the regular rate over the applicable time period in (i) or (ii).The DOL provided the following example in the Preamble to illustrate this point:

> For example, consider an employee who receives $400 of non-excludable compensation in one week for working 40 hours and $200 of non-excludable compensation in the next week for working ten hours. The regular rate in the first week is $10 per hour ($400 ± 40 hours), and the regular rate for the second week is $20 per hour ($200 ± 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ± 50 hours).

The DOL explained in the Preamble that the Rule's method of determining the regular rate for EPSLA and EFMLEA leave was necessary to ensure it was representative of the employee's regular rate from week to week.

Employee Eligibility (29 CFR § 826.30)

The EPSLA and EFMLEA have different employee eligibility requirements. All employees employed by a covered employer are eligible to take EPSLA leave regardless of their duration of employment, but employees must be employed for at least 30 calendar days to be eligible for EFMLEA leave, subject to certain exceptions discussed below. Each day employees are on their employer's payroll count toward the EFMLEA 30-day requirement, regardless of whether employees actually work during those days or weeks. Employees who are laid off or otherwise terminated by employers on or after March 1, 2020, are considered to have been employed for at least 30 calendar days provided (1) their employers rehire or otherwise reemploy them on or before December 31, 2020; and (2) the employees had been on their employers' payrolls for 30 or more of the 60 calendar days before the date they were laid off or otherwise terminated.

Health Care Provider and Emergency Responder Employee Exclusions

Both the EFMLEA and the EPSLA provide that employers may elect to exclude employees who are "health care providers" or "emergency responders" from taking EPSLA or EFMLEA leave. If employers choose to exclude such employees, the employees are still entitled to all earned or accrued sick, personal, vacation, or other leave under their employers' policies. If employers do not elect to exclude such individuals, their EPSLA and EFMLEA leaves are subject to all EPSLA and EFMLEA requirements and should be treated in the same manner for tax credit purposes.

For purposes of the exclusion, "health care provider" is defined much broader than the FMLA's usual health care provider definition. The FMLA definition addresses the type of medical professionals who are capable of diagnosing serious health conditions and issuing related FMLA medical certifications. According to the Rule, the EPSLA and EFMLEA excludes as "health care providers" individuals who are not diagnosing medical professionals, including any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. The list of individuals who may qualify is long and includes not only medical professionals, but other workers who are needed to keep hospitals and similar health care facilities well-supplied and operational. Anyone employed at a doctor's office, hospital, nursing facility, and other health-related entities could be exempted from EPSLA and EFMLEA leave requirements.

The FMLA's health care provider definition under FMLA regulation § 825.102 continues to apply for other FFCRA purposes, such as identifying health care providers who may advise an employee to self-quarantine for COVID-19-related reasons.

The Rule broadly defines "emergency responder" as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

The DOL explains these broad exclusions ensure providing EPSLA and EFMLEA leave do not come at the expense of fully staffing the necessary functions of society during the COVID-19 pandemic, including the functions of emergency responders.

Finally, the Rule explains that the Director of the Office of Management and Budget (OMB) has authority to exclude certain U.S. Government Employers with respect to categories of Executive Branch Eligible Employees from the requirement to provide EFMLEA leave, and also has authority to exclude certain Employees from the definition of "Employee" for purposes of the EPSLA.

Employer Coverage (29 CFR § 826.40)

The EPSLA and EFMLEA cover all private employers that employ fewer than 500 employees at the time employees take EPSLA and/or EFMLEA leave. The Rule confirms employers should determine whether they are covered by counting their employees at the time employees take leave. Therefore, if an employee requests EPSLA leave on April 15 and the employer has fewer than 500 employees as of April 15th, the employer is covered and must grant leave. If another employee requests EPSLA leave on May 15, and that same employer employs more than 500 employees on May 15, the employer is no longer covered and is not required to provide the employee EPSLA leave.

To determine coverage, employers must count all full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency.

Employers should not count individuals who are independent contractors under the FLSA. Significantly, the DOL states employers should exclude employees who have been "laid off" or "furloughed" and have not subsequently been reemployed; but notably, there is no definition of the term "furlough." Significantly, excluding individuals on all furloughs, even if furloughed employees expect to return to work, will reduce the employee count resulting in more employers being covered under the EPSLA and EFMLEA. Additionally, employers should count only employees who are employed within the United States, the District of Columbia, or any U.S. Territory or possession.

Section 826.40(a) further explains that employers should count all employees commonly employed by joint employers or all employees employed by integrated employers in determining the number of employees they employ for this purpose. The FLSA's test for joint employer status applies in determining who is a joint employer for purposes of coverage, and the FMLA's test for integrated employer status applies in determining who is an integrated employer under both the EPSLA and the EFMLEA.

Private employers with fewer than 50 employees may be exempt from providing employees with EPSLA for EPSLA reason #5 or with EFMLEA. To be exempt, small employers must show: (1) providing the leave would cause the employer's expenses and financial obligations to exceed available business revenue and cause the company to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting leave would pose a substantial risk to the financial health or operational capacity of the company because of their specialized skills, knowledge of the business, or responsibilities; or (3) the company 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 employer to operate at a minimal capacity. Such employers may not necessarily deny leave to all of their employees. The employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the company's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

If small employers decide to deny leave based on this exemption, they must document the facts and circumstances that meet the criteria set forth in the Rule to justify the denial. Employers should not send the documentation to the DOL, but rather retain the records for their own files.

Most public employers must comply with the EPSLA and EFMLEA. All covered public agencies must comply with both the EPSLA and the EFMLEA regardless of the number of employees they employ, although such employers may exclude employees who are health care providers or emergency responders as described in § 826.30(c). Section 826.40(c) also provides further information about which parts of the federal government must comply with these Acts. Only public employers of employees covered by Title I of the FMLA are subject to the requirements of the EFMLEA. Employers of federal employees covered by Title II of the FMLA are not subject to requirements of the EFMLEA.

Intermittent Leave & Reporting to Worksite (29 CFR § 826.50)

An employer and employee must agree for employees to take EPSLA or EFMLEA leave intermittently. Such an agreement can, but is not required to, be memorialized in writing; a clear and mutual understanding is sufficient.

If employers and employees agree, employees can take the entire amount of EPSLA or EFMLEA leave for school/care center closures intermittently, including in any time increment to which they agree. This is consistent with the expectation that employees taking leave for these reasons may need to cease working throughout the day to supervise or care for children.

Given that leave for EPSLA reasons #1, #2, #3, #4, or #6 is intended, in significant part, to prevent COVID-19 spread, employees may not report to work at their employers' worksites when taking such leave. Additionally, such leave generally would be taken continuously until employees exhaust or no longer need the leave. However, if employees are teleworking, employers and employees can agree to take EPSLA leave intermittently for any EPSLA reason and in any agreed upon increment of time, but only when the employee is unavailable to work because of a COVID-19-related reason.

Only actual leave time taken can be counted against an employee's leave entitlement.

Coordinating EPSLA and EFMLEA (29 CFR § 826.60)

The benefits provided by the EPSLA run concurrently with those provided under the EFMLEA when taken for school or child care closure/unavailability. The first two weeks of leave (up to 80 hours) may be paid under the EPSLA; the subsequent weeks are paid under the EFMLEA. An employee's prior use of EPSLA leave will impact the amount of EPSLA leave that remains available to the employee. Employees who have exhausted their 12-workweek FMLA entitlement are not precluded from taking EPSLA leave.

The Rule clarifies the circumstances when employees may use unpaid periods of EFMLEA leave with other accrued employer-provided leave. Where eligible employees take EFMLEA leave after taking all or part of their EPSLA leave for a reason other EPSLA reason #5, all or part of their first 10 days (or first two weeks) of EFMLEA leave may be unpaid because they will have exhausted their EPSLA leave entitlement. Under those circumstances, eligible employees may choose to substitute earned or accrued employer-provided paid leave during this initial two-week period. The term substitute means the preexisting employer-provided paid leave, which had been earned or accrued pursuant to the employer's established policies, will run concurrently with the unpaid EFMLEA leave. Accordingly, eligible employees receive pay pursuant to their employer's preexisting paid leave policy during this period of otherwise unpaid EFMLEA leave. If eligible employees do not elect to substitute paid leave for unpaid EFMLEA leave, or employer policies do not require employees to substitute employer-provided paid time for unpaid EFMLEA leave, employees will remain entitled to any paid leave that they had earned or accrued under the terms of their employer's plan.

Coordinating EFMLEA and FMLA (29 CFR § 826.70)

EFMLEA amended FMLA to allow eligible employees to use their basic 12-week FMLA leave entitlement to care for the same reasons as EPSLA leave reason #5 (to care for their son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 reasons). If eligible employees have already taken the full 12 workweeks of FMLA leave for other FMLA reasons, they may not take EFMLEA leave. Eligible employees can take a maximum of 12 workweeks of EFMLEA leave during the period in which the EFMLEA leave may be taken (April 1, 2020, to December 31, 2020), even if that period spans two FMLA leave 12-month periods. For example, if an employer's 12-month period begins on July 1, and an eligible employee took seven weeks of EFMLEA leave in May and June, 2020, the eligible employee could only take up to five additional weeks of EFMLEA leave between July 1 and December 31, 2020, even though the first seven weeks of EFMLEA leave fell in the prior 12-month period. We expect this may require some employers and leave administrators to modify existing leave systems to track and calculate EFMLEA leave entitlements accurately.

As discussed above, the first two weeks of EFMLEA leave is unpaid and eligible employees may substitute EPSLA leave at two-thirds the employee's regular rate of pay (up to the statutory daily cap of $200) or, if EPSLA leave is exhausted, accrued paid leave provided by the employer during this period. After the first two weeks of leave, EFMLEA leave is paid at two-thirds the eligible employee's regular rate of pay, up to $200 per day per eligible employee.

Because the remaining period (after the initial two weeks) of EFMLEA leave is not unpaid, the FMLA provision for substitution of accrued paid leave is inapplicable, and neither eligible employees nor employers may require substitution of accrued paid leave. However, employers and eligible employees may agree, where federal or state law permits, to have paid leave supplement EFMLEA pay to enable employees to receive full pay or wages. For example, eligible employees and their employers may agree to supplement EFMLEA leave by applying one-third of an hour of accrued vacation for each hour of paid EFMLEA leave. If eligible employees and their employers do not agree to supplement paid leave in the manner described above, employees will remain entitled to all the paid leave which they earned or accrued under their employer's plan for later use. This option is not available to federal agencies if such partial leave payment would be contrary to a governing statute or regulation.

Employer Notice Obligations (29 CFR § 826.80)

All covered employers must post the DOL's model notice in a conspicuous place, but they can also satisfy the requirement by emailing or direct mailing the notice or posting on an internal or external employee information website. As with traditional FMLA, the notice can be provided in a different format, but it must at a minimum include all of the information on the model notice. Employers who provide the notice to sensory-impaired individuals must comply with all applicable requirements under federal or state law. There is no required translation or provision of the notice other than in English, although a Spanish version is available. Employers who are covered under EFMLEA but no other FMLA provisions can satisfy notice requirements by posting this notice. Even if a small employer chooses to exempt any employees as permitted, the employer is still required to post a notice.

According to the Preamble, an employer is not required to provide the FMLA "specific notice obligations" for EFMLEA (*i.e.,* notice of eligibility and rights and responsibilities or leave designation). However, FMLA employers with established practices on specific notices may prefer to apply existing practice to EFMLEA users.

Employee Notice & Documentation Obligations (29 CFR §§ 826.90 and 826.100)

Employees seeking leave under the EPSLA and EFMLEA generally have notice and documentation obligations similar, but a bit more relaxed than that required for traditional FMLA. As with traditional FMLA, notice obligations focus on the requirement to provide notice, the time frame for providing notice, and the content of such notice. The temporary rule covers all of these requirements and closely aligns them with an employee's obligation to provide supporting documentation.

Employees are always supposed to provide at least reasonable notice of the need for leave after the first day, or portion of a day, that they seek leave for a qualifying FFCRA purpose. Generally, it will be reasonable for employer to require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. If paid sick leave or expanded FMLA is taken because of a child's school or place of care is closed, or a child care provider is unavailable due to COVID-19 reasons, and the need for leave was foreseeable, then employees must give notice of the need for leave as soon as practicable.

When providing oral notice of their need for leave, employees generally must provide enough information to inform employers that they need leave for FFCRA qualifying reasons. The Rule permits employers to seek verbal notice of the same information employers can seek in supporting documentation. This makes sense, because if employers intend to seek tax credits for FFCRA leave, they must ensure they only approve leaves for which the necessary documentation can be provided. This, in turn, means the employers may require different types of notice and documentation for different leave reasons.

For all leaves, employers can require oral notice and documentation of the requested leave date(s), qualifying leave reasons, and an oral or written statement that the employee is unable to work because of the qualifying leave reason. If employees seek leave because they or a family member are subject to a quarantine or isolation order, they must notify the employer of the government entity that issued the order. If employees seek leave because a health care provider has advised them to self-quarantine due to COVID-19 concerns, they must provide the name of the health care provider who advised them. If employees seek leave because of the closing of their child's school or place of care or the unavailability of a child care provider, employees must provide the name of the son or daughter being cared for; the name of the school, place of care, or child care provider that has closed or become unavailable; and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSLA or EFMLEA leave. The DOL also confirms that for leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.

If employees fail to give proper notice, employers should give them notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave. Employers can request employees to provide additional material they may need to support requests for FFCRA tax credits and can delay or deny leave if materials sufficient to support tax credits are not provided. Given the need for documentation, we recommend employers develop FFCRA leave requests forms to guide notice and documentation practices.

Health Care Coverage (29 CFR § 826.110)

Similar to traditional FMLA, employees who takes EPSLA or EFMLEA leave are entitled to continued coverage under their employer's group health plan on the same terms as if they did not take leave. The Rule defines "group health plan" in the same manner as the FMLA. The scope of employers' obligations to continue group health plan coverage essentially also parallel those when employees take FMLA leave for other reasons. In particular, while employees take EPSLA or EFMLEA leave, employers must maintain the same group health plan benefits provided to employees and their family members covered under the plan before taking leave; this includes medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, and other benefit coverage. This requirement also applies to benefits provided through a supplement to a group health plan, whether or not the supplement is provided through a flexible spending account or other component of a cafeteria plan.

The Rule clarifies that employees remain responsible for paying the portion of group health plan premiums they had paid before taking EPSLA or EFMLEA leave. If premiums are raised or lowered, employees would be required to pay the new employee premium contributions on the same terms as other employees. An employee's share of premiums must be paid by the method normally used during any paid leave, presumably, as a payroll deduction. If leave is unpaid, or employee pay during leave is insufficient to cover an employee's share of the premiums, employers may obtain payment from employee following the methods set forth in the FMLA. Like FMLA, employees may choose not to retain group health plan coverage while taking EPSLA or EFMLEA leave; however, upon returning from leave, they are entitled to have health care coverage reinstated on the same terms prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of preexisting conditions, and so on.

Multiemployer Plans (29 CFR § 826.120)

Employees covered by collective bargaining agreements are entitled to the benefits provided by the FFCRA. An employer must satisfy its obligation to provide FFRCA

benefits afforded to represented employees consistent with its obligations under the terms of the applicable collective bargaining agreement.

If an employer is a signatory to a multiemployer collective bargaining agreement, the employer may satisfy both its paid sick leave and paid FMLA leave obligations by making contributions to the multiemployer fund, plan, or other program based on the number of hours of pay to which each employee is entitled, consistent with the terms of the multiemployer collective bargaining agreement. If required contributions are made to such fund, plan or program, the employer's obligations are satisfied upon transmittal of the payment and the fund, plan, or program then is required to make the appropriate payments to employees.

Return to Work & Job Restoration Rights (29 CFR § 826.130)

Job restoration rights under the EPSLA and EFMLEA mirror those under FMLA. With certain limitations that also exist under FMLA, employees are entitled to be restored to the same or an equivalent position upon return from EPSLA or EFMLEA leave. Like FMLA, the FFCRA does not protect employees from employment actions, such as layoffs, that would have affected employees had leave not been taken. Like FMLA, employers must be able to demonstrate that employees would have been laid off even if they had not taken leave. The DOL clarifies that 29 CFR § 825.216 applies to any failure to provide job restoration.

The EFMLEA amendments to the FMLA specify the FMLA's job restoration provisions do not apply to employers who have fewer than 25 employees if all four of the following conditions are met: (a) the employee took leave to care for their son or daughter whose school or place of care was closed or whose child care provider was unavailable; (b) the employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.,* due to COVID-19 related reasons) during the period of the employee's leave; (c) the employer made reasonable efforts to restore the employee to the same or an equivalent position; and (d) if the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is one year, beginning either on the date the leave related to COVID-19 reasons concludes, or the date 12 weeks after the employee's leave began, whichever is earlier.

As the EFMLEA provisions amend the FMLA, the FMLA's limitation concerning job restoration for "key" employees also applies to EFMLEA leave.

Recordkeeping (29 CFR § 826.140)

The Rule explains employer recordkeeping requirements, including what documents employers should create and retain to support their claim for IRS tax credits. Employers are required to retain all documentation relating to the need for FFCRA leaves for four years, regardless of whether leaves were granted or denied. The four-year retention period applies to documentation noted below. If employees provide oral statements to support their leave requests, employers also must document and maintain that information.

Employers that deny EPSLA or EFMLEA leave requests due to the limited small business exemption (*i.e.,* having fewer than 50 employees for leaves due to EPSLA reason #5 and/or EFMLEA) must document the determination by its authorized officer that it is eligible for the exemption and retain that documentation.

To claim tax credits from the IRS, employers are advised to maintain the following records:

- Documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible

for the tax credit, including records of work, telework, and EPSLA and EFMLEA leave;

- Documentation to show how the employer determined the amount of qualified health plan expenses that it allocated to wages;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- Copies of the completed IRS Forms 941 the employer submitted to the IRS or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and
- Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

For more information on tax credits, employers should consult additional guidance on the IRS website.

Prohibited Acts & Enforcement under EPSLA (29 CFR § 826.150)

Employers are prohibited from discharging, disciplining, or discriminating against employees because they took EPSLA leave, initiated a proceeding under or related to EPSLA leave, or testified or is about to testify in such a proceeding. Employers who violate the EPSLA leave requirements are considered to have failed to pay the minimum wage required by the FLSA. Employers who violate the prohibition on discharge, discipline, or discrimination also are considered to have violated FLSA sections 16 and 17.

Prohibited Acts & Enforcement under EFMLEA (29 CFR § 826.151)

For EFMLEA leave purposes, employers are subject to the FMLA's prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries. Employers who violate EFMLEA prohibitions also are subject to the enforcement provisions set forth in the FMLA, with one exception: employees can only file a lawsuit against their employers for EFMLEA violations if their employers are otherwise covered under the FMLA's traditional leave provisions (meaning, they had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year).

Complaint Filing & DOL Investigation Procedures (29 CFR §§ 826.152 – 826.153)

A complaint alleging any violation of the EPSLA and/or the EFMLEA may be filed in person, by mail, or by telephone, with the DOL Wage and Hour Division. Any such complaint must be in writing and should include a full statement of the acts and/or omissions, with pertinent dates, that are believed to constitute the violation.

Under the EPSLA, the Secretary of Labor may investigate and gather data in the same manner as authorized by sections 9 and 11 of the FLSA. Under the EFMLEA, the Secretary of Labor may investigate and gather data in the same manner as authorized by sections 106(a) and (d) of the FMLA.

Effect on Other Laws, Employer Practices and Collective Bargaining Agreements (29 CFR §826.160)

Employees may use EPSLA leave in addition to any other leave benefit they may be entitled to receive under (1) any other federal, state, or local law; (2) a collective bargaining agreement; or (3) an employer policy that existed prior to April 1, 2020. The only exception is that EPSLA leave will run concurrently with expanded FMLA leave used for EPSLA reason #5.

Employers are prohibited from requiring employees to exhaust other paid leaves or take unpaid time before being able to use EPSLA leave. However, employees may request, or employers may require, the use of leave accruals concurrently with unpaid EFMLEA leave.

Employers need not pay unused EPSLA or EFMLEA leave upon an employee's separation from employment or after the FFCRA expires on December 31, 2020.

The maximum amount of EPSLA leave available to an employee is 80 hours. This is a per-person maximum, not a per-employer maximum. If employees change employers before using their allotment of EPSLA leave hours, they will not receive a new allotment of EPSLA leave from their new employer. Instead, employees will only be entitled to receive the difference between 80 hours (or the employee's part-time equivalency) and what they previously used while employed with their prior employers. Employers should consider asking employees hired on or after April 1, 2020, the amount of EPSLA they previously used with prior employers as part of their new hiring orientation or onboarding processes.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with Jackson Lewis' latest available information and resources.

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.