



CLIENT ALERT

COVID-19: Additional Guidance from U.S. Department of Labor on New Paid Leave Benefits under Families First Coronavirus Response Act

The U.S. Department of Labor (“DOL”) has provided new guidance on the Emergency Paid Sick Leave Act (“EPSLA”) and Emergency Family and Medical Leave Act (“EFMLA”) which were enacted as part of the Families First Coronavirus Response Act (“FFCRA”). With EPSLA and EFMLA taking effect on Wednesday, April 1, 2020, DOL has published a helpful list of Questions and Answers, which are found [here](#). Important highlights are summarized below.

Health Care Providers (broadly defined) May Not Be Eligible for Paid Leave.

At the option of their employers, individuals who are “Health Care Providers” may be deemed ineligible for the paid leave required under the EPSLA or EFMLA. The term “Health Care Provider” is broadly defined to include (among other categories, including work to alleviate COVID-19):

“anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider”

Importantly, the definition also includes any entity “where medical services are provided that are similar” to the above institutions, along with individuals “employed by an entity that contracts with any of the above institutions . . . to provide services or to maintain the operation of the facility.”

Documentation.

Employers can require employees seeking leave to care for a child under either EPSLA or EFMLA to provide documentation that the child’s school is closed or care provider unavailable due to COVID-19.

Employee’s Inability to Work.

The FFCRA permits eligible employees to take paid leave under the EPSLA or the EFMLA where the employee is “unable to work” because of one of the COVID-19 qualifying reasons. Importantly, however, DOL cautions that “to the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available.”

Intermittent Leave.

- Teleworking. DOL supports “voluntary arrangements that combine telework and intermittent leave” where an employee is unable to work his or her normal schedule for one of the qualifying reasons under the FFCRA. This intermittent leave while teleworking can be taken in any increment allowed by the employer. For example, “[i]f you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.”
- Working On-Site. By contrast, for employees working on-site, leave under the EPSLA taken for any of the qualifying reasons except for caring for a child whose school is closed or caregiver is unavailable must be taken in full day increments, and such leave must be taken each consecutive business day until this category of leave is exhausted.

No Entitlement to Leave When Employer is Closed or Employee Furloughed.

An employee is not entitled to paid leave when the employer is temporarily closed or if the employee has been furloughed.

Small Business Exemption

Small businesses are exempt from certain of the paid leave requirements of the EPSLA and EFMLA when providing such leave “would jeopardize the viability of the business as a going concern.” In determining whether this standard is met, DOL has indicated that impacts on revenue and expenses, satisfying operational needs, and the availability of workers will be taken into account.

Krokidas & Bluestein will continue to monitor these legislative and regulatory changes, and we are available to advise clients during this challenging period. If you have questions about employers’ obligations and best practices in light of COVID-19, please contact Attorneys Paul Holtzman (pholtzman@kb-law.com), Jill Brenner Meixel (jmeixel@kb-law.com), Allison Belanger (abelanger@kb-law.com) or Brian Richichi (brichichi@kb-law.com).