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The FFCRA Is in Effect: What Now for Employers?

April 8, 2020

The 500 Employee Calculation

The 500 Employee Calculation

Private Employers are subject to Paid Sick Leave Act and EFMLA (subject to exceptions) if they have fewer than 500 employees – but how is that calculation made?

The 500 Employee Calculation

- To determine the number of employees:
 - Count all employees **within the United States**
 - Headcount, not FTE
 - Every part-time employee is counted as if he or she were a full-time employee

The 500 Employee Calculation

- The calculation includes:
 - All employees, regardless of their duration of employment
 - Employees on leave
 - Temporary employees who are jointly employed under the FLSA
 - Day laborers

The 500 Employee Calculation

- The calculation does **not** include:
 - Independent contractors
 - Employees who have been laid off or furloughed, and not reemployed

The 500 Employee Calculation

- All employees of joint employers or of integrated employers must be counted together:
 - Typically a corporation is considered a single employer, and employees must be counted together
 - Where one corporation has an ownership interest in another corporation, the two employers are separate employers, unless they are joint employers with respect to certain employees
 - If two or more entities meet the integrated employer test, then all employees making up the integrated employer must be counted

The 500 Employee Calculation

- The calculation is fluid, and dependent upon the number of employees **at the time an employee would take leave**

Health Care Provider Exception

- Extremely broad coverage
- Different from “health care provider” for purposes of FMLA certification

Health Care Exception

- **“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, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.”

Health Care Exception

- **Any individual employed by** an entity that contracts with any of the above institutions, employers, or entities institutions **to provide services or to maintain the operation of the facility**
- This also includes **anyone employed by** any entity that provides medical services, produces medical products, or is otherwise involved **in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments**

First Responder Exception

- Very broad – usually think firefighters, police officers, EMTs, National Guard
- Any employee who is necessary for **the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19**. This includes, but is not limited to, 911 operators, 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**

Small Business Exception

- Limited Exception – EFMLEA and the childcare portion of the EPSLA. Still have to provide paid sick leave and comply with posting requirement for EPSLA
- Requires circumstances where compliance would jeopardize organization as a “going concern”
- No filing requirement or application process for exception

Small Business Exemption

- **An officer of the company** must certify in writing:
 - The small business's expenses and financial obligations would exceed available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; **or**
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor and these services are needed for the small business to operate at a minimal capacity.

Reasons for Paid Sick Leave

- Subject to a **federal, state or local quarantine or isolation order**
- Have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- Are experiencing symptoms of COVID-19 **and seeking a medical diagnosis**
- Are caring for **an individual** who is subject to a quarantine or isolation order or has been advised by a healthcare provider to self-quarantine as described above.
- Are **caring for his or her child** whose school or place of care has been closed or whose **childcare provider** is unavailable due to COVID-19 precautions
- Are experiencing any other substantially similar condition specified by the Secretary of Health & Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

Reasons for Emergency FMLA

- Coverage under the EFMLEA exists only when the employee is **unable to work (or telework)** because the employee's child's school or care center is closed, or the child's care provider is unavailable due to COVID-19
- It isn't available for the remaining five reasons, such as the employee's own illness from the coronavirus. (FMLA may still apply). Thus, it applies in a much narrower range of instances – only those related to the closing of schools or unavailable child care

What's Not Covered?

- The DOL has clarified that employees on layoff or furlough are **not** entitled to benefits under FFCRA until they return to work.
- Generally, if an employer sent an employee home and stopped paying the employee because it does not have work for the employee to do, the employee will not get paid sick leave or expanded FMLA, but the employee may be eligible for unemployment benefits.
- This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local order, such as a Stay-At-Home Order, before or after April 1, 2020.

Documentation for Leave

- The DOL said the employee must provide **a signed statement** containing:
 - The employee's name.
 - The date(s) for which leave is requested.
 - The coronavirus-qualifying reason for leave.
 - A statement that the employee can't work or telework because of this reason.

Documentation for Leave

- In addition, an employee must provide the name of the **government entity** that issued the quarantine or isolation order to which the employee is subject, if that is the reason for paid sick leave
- An employee seeking leave because he or she is self-quarantined must provide the **name of the health care provider** making the quarantine recommendation
- Someone caring for a person who is quarantined must provide either the government entity that issued the quarantine or isolation order or the **name of the health care provider** who advised the individual to self-quarantine

Documentation for Leave

- The DOL said an individual requesting expanded family and medical leave must provide:
 - The name of the child being cared for
 - The name of the school, place of care or child care provider that closed or became unavailable due to coronavirus reasons
 - A statement representing that **no other suitable person** is available to care for the child during the period of requested leave
- We also recommend asking for **ages of children** and statement for why care is required for any child **14 or older**
- No medical documentation or state orders required.

Intermittent Leave

Intermittent Leave

- General Rule:
 - Intermittent leave is subject to agreement by the employer
 - Requires clear and mutual understanding between the parties

Intermittent Leave

- Employees Reporting to the Worksite:
 - Can be used for Paid Sick Leave due to school or daycare closure, or unavailability of Child Care Provider
 - Cannot be used for any other Paid Sick Leave reason.
 - Can be used for EFMLA
 - Can be used in any increment of time

Intermittent Leave

Leave is available only when an employee is unable to telework; hours for telework is subject to a flexible definition

Intermittent Leave

- Teleworking Employees:
 - Employer and Employee may agree on intermittent leave for EFMLA or any qualifying reason under the Paid Sick Leave Act
 - Can be used in any increment of time
 - Only available when the employee cannot telework

Teleworking Pay Considerations

- Computation of Telework hours:
 - Non-exempt employees who telework must be compensated for all hours actually worked, including overtime
 - Employer is generally not required to compensate employees for unreported hours worked while teleworking unless the employer knew or should have known about such telework
 - Rejects continuous workday requirement as inconsistent with the objectives of the Act

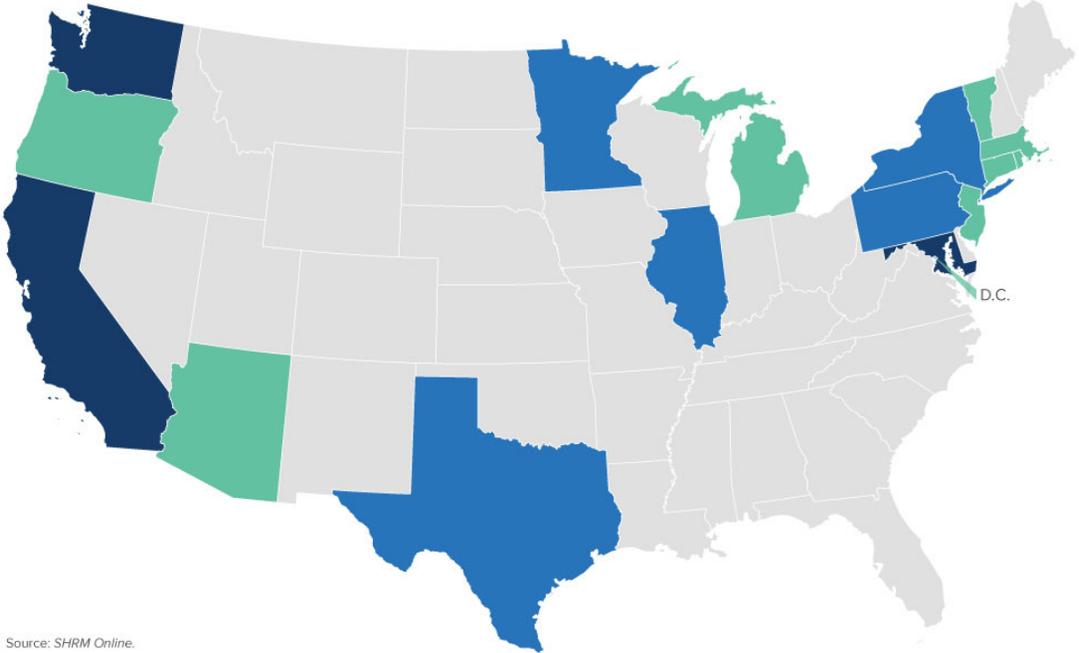
Considerations for Managing Potential Abuse

- Transparent communications
- Paid Sick Leave – 80 hours total
- Documentation Requirements
- FMLA documentation where appropriate
- Impact of prior and future FMLA entitlement
- School/childcare certification requirements

FFCRA and State/Local Leave Laws

- Section 5107(1)(A) of FFCRA:
 - “Nothing in [the EPSLA] shall be construed to in any way diminish the rights or benefits that an employee is entitled to under any other Federal, State, or local law.
- Where state or local law mandates paid sick leave, that leave is **in addition to** paid sick leave provided by the FFCRA, unless the law expressly provides otherwise (e.g., New York).

Paid-Sick-Leave Laws by State



Source: SHRM Online.

- STATEWIDE & LOCAL LAWS**
 - California
 - Maryland
 - Washington
- STATEWIDE LAW ONLY**
 - Arizona
 - Connecticut
 - Massachusetts
 - Michigan
 - New Jersey
 - Oregon
 - Rhode Island
 - Vermont
 - Washington, D.C.
- LOCAL LAW(s) ONLY**
 - Pennsylvania
 - Illinois
 - Minnesota
 - New York
 - Texas*

*Austin ordinance halted during legal challenge

State Emergency COVID-19 Paid Sick Leave Measures

Jurisdiction	Measure
Colorado	State DOL issued emergency rule requiring employers in leisure and hospitality, food services, child care, education, and certain healthcare fields (home health care, nursing home, and community living facility) to provide up to 4 days of paid sick leave to employees experiencing flu-like symptoms or being tested for COVID-19.
New Jersey	Expanded scope of existing paid sick leave law to permit employees to use earned sick leave if they can't work due to one of several COVID-19 related reasons, including business closure caused by Governor's shutdown order.
New York	Enacted law requiring most employers to provide paid sick leave for COVID-19 reasons. Runs concurrently with FFCRA. Employers with 500+ employees must provide 14 days paid leave.
Washington State	Amended paid sick leave law to entitle employees to use accrued paid sick leave if they are in COVID-19 related isolation or quarantine as instructed/ordered by health official or provider

Local Emergency COVID-19 Paid Sick Leave Measures

Jurisdiction	Measure
Los Angeles	Requires employers with over 500 employees to provide paid sick leave.
San Francisco	Amended paid sick leave ordinance to permit use of accrued leave for COVID-19 reasons and to no longer require doctor's note for sick leave eligibility.
Seattle	Amended paid sick leave ordinance to allow use of accrued paid sick leave for COVID-19 reasons.

Pending State COVID-19 Paid Sick Leave Laws (Recent)

Jurisdiction	Proposed Measure	Status
Ohio	Requires 14 days paid leave to employees unable to work due to same reasons provided under FFCRA. Also because of COVID-19 related business closures, or seeking assistance because of domestic violence, sexual assault, or stalking.	Introduced 3/25. No movement
Kentucky	Requires employers with at least 10 employees to allow workers to accrue at least 3 paid sick days per year. Permanent law (not specifically virus-related)	Introduced 3/4; Moved to Committee 3/6.

“Hazard” Pay/Bonuses

- Many employers are implementing incentive bonuses for employees who come to work during state of emergency
- Be cognizant of how such plans might interact with FLSA
 - **No impact on employee’s “hours worked” for OT threshold**
 - **May impact employee’s “regular rate” for OT compensation**

FLSA “Regular Rate”

- OT must be paid at 1.5x employee’s “regular rate”
- Regular rate: “all remuneration for employment paid to, or on behalf of, the employee,” unless an exclusion applies
- “Discretionary bonuses” excluded if not promised ahead of time
- “True gifts” are excluded. Cannot be tied to “hours worked”

Calculating Bonus Into Regular Rate

- Pay OT at normal rate throughout bonus period
- Once period ends and bonus amount can be determined:
 1. Apportion back the bonus amount over the number of workweeks within “bonus period.”
 2. For weeks where overtime earned, pay (1) additional bonus compensation at 1.5x hourly rate of pay allocable to bonus, (2) multiplied by # of OT hours

Example

Employee earns \$4k bonus over 10 week period, and works 50 hours during one of the weeks.

- \$4000 bonus/10 weeks = \$400 per week.
- Bonus OT rate for that week is **\$12.00/hour** ($\$400/50 \times 1.5$)
- Additional overtime owed is **\$120.00** ($\12.00×10 hours) – in addition to what was already paid for 10 OT hours.

Calculating Pay under FFCRA

Calculating Pay under FFCRA

- Paid Sick Leave
 - Leave for qualifying reasons set forth in 826.20(a)(1) through (3):
 - Employee's average regular rates;
 - Federal minimum wage; or
 - Any state or local minimum wage requirement
 - Capped at \$511 per day/\$5,110 in the aggregate
- Leave for qualifying reasons set forth in 826.20(a)(4) through (6)
 - Two-thirds pay
 - Capped at \$200 per day/\$2,000 in the aggregate

Calculating Pay under FFCRA

- EPSLA Calculations
 - Full-time employees: 80 hours
 - Full time = at least 40 hours per workweek
- Part-time employees:
 - Number of hours employee works on average over a two week period
 - If hours vary, a six month look back is utilized
 - 14 times the number of hours that the employee was scheduled per calendar day averaged over the six month period
 - “Reasonable expectation” for employees employed fewer than six months

Calculating Pay under FFCRA

- EFMLA
 - Two thirds pay
 - Capped at \$200 per day/\$10,000 in the aggregate
 - Varied schedule requirements

Calculating Pay under FFCRA

- Supplemental Pay
 - Paid sick leave is in addition to, and not a substitute for, other sources of leave
 - Employer may not deny leave under the Acts on the grounds that employee has already taken leave from another source, even if COVID-19 related
 - FMLA's 12 workweeks within a twelve-month cap remains in effect
 - Leave provided prior to effective date does not satisfy requirements
 - Employers may provide supplemental benefits, but will be capped on tax credits

IRS Documentation and Tracking

- Records must be kept for **four years**
- Documentation to show **how the employer determined the amount of paid sick leave and expanded family and medical leave** paid to eligible employees, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave
- Documentation to show how the employer determined the **amount of qualified health plan expenses allocated to wages**

IRS Documentation and Tracking

- Copies of any completed IRS Forms 7200 submitted to the IRS.
- Copies of the completed IRS Forms 941 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.

IRS Documentation and Tracking

- <https://www.irs.gov/pub/irs-pdf/f7200.pdf>
- <https://www.irs.gov/pub/irs-pdf/f941.pdf>
- The FFCRA pays for these benefits via fully refundable tax credits. Employers do not have to pay up front and seek reimbursement later; instead, they can offset the cost of leave by keeping a portion of the quarterly federal employment taxes they would otherwise deposit with the IRS
- For this purpose, the cost of leave includes more than just the employee's straight wages. It also includes the cost of providing group health insurance and any Medicare taxes attributable to the employee's wages while on leave. As a result, employers may likewise pay for those costs by retaining an equal amount from their quarterly tax deposits



QUESTIONS?

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