COMPLIANCE ALERT

Alliant EMPLOYEE BENEFITS

» 4/02/20 | 2020-11

DOL Releases Comprehensive FFCRA Regulations

Introduction

Effective April 1, 2020 (ending December 31, 2020), the Families First Coronavirus Response Act (FFCRA) requires private employers with fewer than 500 employees (and certain public agencies with one or more employee) to provide emergency paid sick leave (EPSL) for six COVID-19 related purposes and up to 12 weeks of emergency FMLA leave (EFMLA) for school closures or where childcare is not available as a result of the COVID-19 crisis. It provides tax credits to offset the cost of these two provisions. (See Alert 2020-10.) The FFCRA also mandates that any group health plan or health insurance issuer provide coverage without cost sharing for COVID-19 testing and any office or other visits that result in an order for COVID-19 testing. (See Alert 2020-05.) The Department of Labor (DOL) released a model posting on FFCRA leaves and clarified several key features of the law through a series of FAQs. (See Alert 2020-07 and Alert 2020-09.) On April 1, 2020, it released comprehensive temporary regulations. Much of the preamble to the regulations addresses how the DOL resolved numerous drafting issues and inconsistencies between EPSL and EFMLA provisions. However, the regulations clarify several other outstanding issues and reiterate or add to the basic FCRAA framework. This Alert provides a summary of EPSL and EFMLA provisions and highlights significant clarifications. Notably, many key provisions and clarifications apply to both EPSL and EFMLA and are addressed together after EPSL and EFMLA specific guidance under Common EPSL EFMLA Provisions.

EPSL Act (EPSLA)

Basic Entitlement

The FFCRA requires covered employers to provide immediate EPSL to employees who are unable to work for six COVID-19 related reasons including where the employee:

(1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

(2) has been advised by a health care provider (as defined by FMLA) to self-quarantine due to concerns related to COVID-19;

(3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

(4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);

(5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or

(6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Regulations clarified a few key aspects in this list. Clarifications that apply jointly to EPSL and EFMLA are discussed below under Common EPSL EFMLA Provisions. Clarifications that are unique to EPSL are addressed here.

Covered Employers

Covered employers include private employers with fewer than 500 employees, as well as certain public agencies with one or more employee(s). There is, however, an exemption for employers with fewer than 50

employees that applies only to EPSL reason (5) that is addressed below under Common EPSL EFMLA Provisions. Counting employees is also addressed under Common EPSL EFMLA Provisions.

Eligible Employees

The regulations confirm that all employees of a covered employer are eligible to take EPSL regardless of their duration of employment, as long as their employer has work for them to do and they are prevented from working due to one of the six COVID-19 related reasons. The ability to exclude employees who are health care providers or emergency responders is addressed below under Common EPSL EFMLA Provisions.

Importantly, the regulations provide that *EPSL is a per person entitlement and not a per job entitlement* with an absolute upper limit of 80 hours. Should an employee change positions during the period of time in which EPSL is in effect, he or she is not entitled to a new round of paid sick leave. Once an employee takes the maximum 80 hours, he or she is not entitled to any EPSL from a subsequent employer.

Hours Paid

The regulations confirm the amount of EPSL compensation is the greater of the employee's regular rate of pay or the applicable state or federal minimum-wage. Employees will only receive 2/3 of this amount to care for a family member who is self-isolating, to care for a child whose school or place of care has been closed, or if the employee is experiencing any other substantially similar condition (reasons (4)-(6)). Employees receive 100% of their wages for EPSL reasons (1) through (3). EPSL has a cap where sick leave may not exceed $200 per day and $2,000 in the aggregate when capped at 2/3 of wages (reasons (4)-(6)), and $511 per day and $5,110 in the aggregate when paid at 100% of wages (reasons (1)-(3)).

Next, DOL addressed several drafting issues and inconsistencies with respect to hours paid. The regulations confirm that a full-time employee is entitled to 80 hours of EPSL. An employee is considered full-time if normally scheduled to work at least 40 hours each work week. The regulations clarify that an employee without a normal schedule is considered full-time if the average number of hours per work week the employee was scheduled to work (including 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 EPSL; or (ii) the entire period of the employee's employment.

An employee is considered part-time if normally scheduled (or actually scheduled) to work fewer than 40 hours each work week. DOL, however, needed to resolve several practical issues with respect to part-time employees with varying schedules and inconsistencies with EFMLA. Resolving these inconsistencies, the new rule is as follows:

(1) If the part-time employee has a normal weekly schedule, the employee is entitled to up to the number of hours normally scheduled for him or her to work over two workweeks.

(2) If the part-time employee lacks a normal weekly schedule, the number of hours is calculated as follows:

(i) If employed for at least six months, the employee is entitled to up to the number of hours equal to fourteen times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes EPSL (including leave of any type).

(ii) If employed for fewer than six months, the employee is entitled to up to the number of hours equal to fourteen times the number of hours the employee and the employer agreed to at the time of hiring that the Employee would work, on average, each calendar day. If there is no agreement, the employee is entitled to up to the number of hours equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment (including leave of any type).

Quarantine or Isolation Order Defined
DOL broadly defined quarantine or isolation orders for purposes of EPSL reasons (1) and (4), ending questions about whether state and local stay-at-home orders are covered. A quarantine or isolation includes any 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 his or her 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., certain age ranges or medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those employees to be unable to work *even though their employers have work for them*.

Caveats on Being Advised by a Health Care Provider to Self-Quarantine
Reasons for leave (2) and (4) address when a health care provider has advised self-quarantine due to concerns related to COVID-19. The regulations clarify that leave for these reasons is limited to cases where the health care provider believes: (1) the employee has COVID-19; (2) the employee may have COVID-19; or (3) the employee is particularly vulnerable to COVID-19. Moreover, following the advice of a health care provider to self-quarantine must prevent the employee from being able to work.

Symptoms and Medical Diagnosis
With respect to reason for leave (3) (experiencing symptoms and seeking diagnosis), DOL clarified that symptoms of COVID-19 that could trigger this EPSL reason for leave are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, EPSL taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID-19 symptoms may take EPSL for time spent making, waiting for, or attending an appointment for a test for COVID-19. Employees may not take EPSL to self-quarantine without seeking a medical diagnosis.

Defining Who Qualifies as "an Individual"
With respect to reason for leave (4) (caring for an individual), DOL clarified that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. The individual being cared for must be an immediate family member, roommate, 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 self-quarantined or was quarantined. Also, employees must have a genuine need to care for the individual.

Intermittent Leave
By clear and mutual agreement, leave may be taken intermittently to allow an employee to telework. At a work site, leave can be taken intermittently only for school closures or where childcare is not available as a result of the COVID-19 crisis (EPFML and EPSL qualifying reason (5)). Any other requested use of intermittent leave under EPSL is not allowed due to the unacceptably high risk that the employee might spread COVID-19 to other employees at a worksite. Additional details are discussed below under Common EPSL EFMLA Provisions.

Use of other PTO
EPSL will running concurrently with EFMLA where the reason for leave overlaps (school closures or where child care is unavailable as a result of COVID-19). In such cases, employers may require employees to take existing PTO or other appropriate paid leave concurrently with EPSL and EFMLA to bring wages from 2/3 to 100% of pay. Thus, an employee may elect to use, *or an employer may require* an employee to use, accrued leave that would be available to care for a child concurrently.

However, when an employee uses EPSL (or exhausts EPSL) for other qualifying reasons that do not overlap with EFMLA or where EPSL is already paid at 100% of wages (reasons (1)-(3) are already paid at 100% and (5) and (6) do not overlap with EFMLA), it appears that employers cannot require use of other PTO. Although the regulations lack clarity on this point (requiring use of other PTO to top of EPSL reasons (5) and (6)), they do

expressly provide EPSL mandates are provided in addition to any other right or benefit, including paid sick leave, to which the employee is entitled under state, local, or federal law or by policy or bargaining agreement. Further, an employee must be allowed to first use EPSL before using any other available leave.

Notice and Documentation

Employees must provide employers notice of their need to take EPSL as soon as practicable. It is reasonable for an employer to require notice after the first work day is missed (absent extenuating circumstances). Oral or written notice is acceptable and employers cannot require documentation beyond what is described below. Where employees fail to provide proper notice, employers should notify the employee and give them an opportunity to provide notice and documentation before denying leave.

Documentation must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

Additionally, an employee requesting EPSL must provide either: (1) the name of the government entity that issued the quarantine or isolation order; or (2) the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.

An employee requesting paid sick leave to care for an individual must provide either: (1) the government entity that issued the quarantine or isolation order to which the individual is subject; or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the reason for the request.

An employee requesting to take EPSL or EFMLA to care for a child must provide: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Job Protection or Restoration

The regulations confirm that upon return from EPSL an employee has a right to be restored to the same or an equivalent position. However, EPSL does not protect employees from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took EPSL. Employers that deny restoration must be able to show that an employee would not otherwise have been employed at the time reinstatement was requested.

EFMLA

Basic Entitlement

The FFCRA requires covered employers to provide up to 12 weeks of leave if an eligible employee is unable to work (or telework) due to a need for leave to care for a son or daughter if their school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency, defined as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

The first two weeks of EFMLA are unpaid, with the intent that EPSL be available for this unpaid portion, and that the remaining potential 10 weeks are paid. Originally the FFCRA provided that the first 10 days of EFMLA are unpaid and the remaining potential 10 weeks were paid. The regulations changed the 10 days language in the law to two weeks with the understanding that this was likely the intent of Congress and to better coordinate with EPSL and existing FMLA entitlements.

Clarifications that apply jointly to EPSL and EFMLA are discussed below under Common EPSL EFMLA Provisions. Clarifications that are unique to EFMLA are addressed here.

Covered Employer

Covered employers include private employers with fewer than 500 employees, as well as certain public agencies with one or more employee(s). There is, however, an exemption for employers with fewer than 50 employees that is addressed below under Common EPSL EFMLA Provisions. Counting employees is also addressed under Common EPSL EFMLA Provisions. An exemption for certain federal workers is not addressed here.

Eligible Employees

Regulations confirm EFMLA covers all employees who have been employed by a covered employer for at least thirty calendar days. An employee is considered to have been employed for at least thirty calendar days if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin.

DOL also incorporated the eligibility break in service rule from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). That rule provides that the thirty-day eligibility provision is waived if: (1) an employee was laid off on or after March 1, 2020, (2) prior to the layoff the employee worked for the employer for at least 60 days, and (3) the employee is later rehired.

Lastly, the regulations note that if an employee employed by a temporary placement agency is subsequently hired by the employer, days worked as a temporary employee for the employer count toward the thirty-day eligibility period.

The ability to exclude employees who are health care providers or emergency responders is addressed below under Common EPSL EFMLA Provisions.

Hours Paid

As noted above, the first two weeks of regularly scheduled hours of EFMLA are unpaid, with the intent that EPSL cover this unpaid portion, and that the remaining potential 10 weeks of regularly scheduled hours are paid. The regulations confirm the amount payable is not less than 2/3 of an employee's regular rate of pay based on their normally scheduled hours of work. Importantly, there is a cap where paid leave may not exceed $200 per day and $10,000 in the aggregate per employee.

The regulations also offered calculations on regularly scheduled hours and what to do when hours vary. The regulations address regularly scheduled hours as follows:

> (1) If the eligible employee has a normal work schedule, regularly scheduled hours are the number of hours the employee is normally scheduled to work on that workday;
>
> (2) If the eligible employee has a work schedule that varies to an extent that an employer is unable to determine the number of hours the eligible employee would have worked on a day leave is taken, and has been employed for at least six months, the regularly scheduled hours are the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date on which the employee first takes EFMLA (including leave of any type); or
>
> (3) If the eligible employee has a work schedule that varies to such an extent that an employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken, and the employee has been employed for fewer than six months, the average number of hours the employee and the employer agreed to at the time of hiring that the employee would work each workday. If there was no agreement, the scheduled number of hours is equal to the average number of hours per workday that the eligible employee was scheduled to work over the entire period of employment (including leave of any type).

EFMLA and other FMLA Leave Interaction and Entitlement

The regulations also confirm prior guidance indicating that where an employee has already taken some of their 12 week FMLA leave entitlement in the current twelve-month leave year, the maximum twelve weeks of EFMLA leave is reduced by the amount of the FMLA leave already taken in that year. If an employee has exhausted his or her twelve workweeks of FMLA or EFMLA leave, he or she may still take EPSLA leave for a COVID-19 qualifying reason. Importantly, eligibility requirements for employees to take EFMLA differ from standard FMLA leave (12 months of employment and 1,250 hours worked) so not all employees who are eligible to take EFMLA will be eligible or have had the opportunity to take FMLA leave for other reasons. Employer coverage also differs under the EFMLA and the FMLA in that EFMLA applies to all employers with fewer than 500 employees, while the FMLA generally does not apply to employers with fewer than 50 employees.

Another significant difference between FMLA and EFMLA is that the EFMLA entitlement does not reset with the standard twelve-month FMLA leave year. Employees are limited to a total of twelve weeks of expanded family and medical leave under the EFMLA, even if the applicable time period (April 1 to December 31, 2020) spans two twelve-month leave periods as an employer defines under the FMLA.

Lastly, if an employee's prior use of EPSL did not overlap with EFMLA, the first two weeks of EFMLA may be unpaid. For example, if an employee takes two weeks of paid sick leave for a qualifying reason under EPSLA section (1)–(3), the employee has exhausted available EPSL and may not take additional EPSL for any remaining qualifying reason. If the employee then needs to take leave under the EFMLA, the employee may do so, but the first two weeks will be unpaid.

Use of other PTO

As noted above, it is the intent of the FFCRA that EPSL reason for leave (4) (leave for a school closure or where childcare is not available) provide partial wage replacement during the first two week of EFMLA leave provided for this same purpose. EPSL and EFMLA will run concurrently for this overlap. As explained below, and somewhat surprisingly, employers can also require use of PTO concurrently to top off wages to 100%.

Under longstanding FMLA principles, employers may only require the use of PTO or other paid leave during FMLA leave that is completely unpaid. For unpaid FMLA leave an employer can require that employees use PTO or other paid leave concurrently. If, however, during FMLA leave an employee also receives benefits, in any amount, from another source, the FMLA leave is not unpaid and employers cannot require the use of other PTO. *The EFMLA regulations do not follow this rule and employers may require use of PTO concurrently with EPSL and EFMLA to bring wages from 2/3 to 100% of pay*. Thus, an employee may elect to use, *or an employer may require* an employee to use, accrued leave that under the employer's policies would be available to care for a child concurrently with FFCRA paid leave to reach 100% of pay.

Alliant note: Employers may want to require employees top of wages using existing PTO to possible shorten the duration of leave. Leave entitlements can stretch when employees take statutory leave and then follow that up with time off from a vacation or PTO policy.

Notice and Documentation

Employees must provide employers notice of their need to take EFMLA as soon as practicable. It is reasonable for an employer to require notice after the first work day is missed (absent extenuating circumstances). Oral or written notice is acceptable and employers cannot require documentation beyond what is described below. Where employees fail to provide proper notice, employers should notify the employee and give them an opportunity to provide notice and documentation before denying leave.

Documentation must include a signed statement containing the following information to take EFMLA to care for a child: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Employers are not required to use existing FMLA certification forms (or processes) for EFMLA, but may use practices they have in place. This includes notices of eligibility, rights and responsibilities, or written leave designations. For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for a family member with a serious health condition related to COVID-19, all normal FMLA certification requirements still apply.

Job Protection or Restoration

The regulations confirm that upon return from EFMLA an employee has a right to be restored to the same or an equivalent position. However, EFMLA does not protect employees from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took EFMLA. Employers that deny restoration must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested.

EFMLA includes another job restoration caveat. Specifically, employment restoration requirements will not apply to EFMLA for employers with fewer than 25 employees if the position held by the employee does not exist due to economic conditions or changes in the operations of the employer. Also, job restoration can be denied to key employees as has always been the case under the FMLA.

Alliant note: The fewer than 25 employee threshold does not seem to add to the existing rule that FMLA does not protect employees from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took leave. Clarification would be welcome.

Common EPSL EFMLA Provisions

Covered Employers and Who to Count for the Fewer than 500 Employee Threshold

Both EPSL and EFMLA leaves apply to all private employers that employ fewer than 500 employees. The regulations clarify several important aspects of determining this threshold.

First, the determination is based on the number of employees at the time an employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, so that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

Next, the regulations confirm which employees to count. 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. Independent contractors do not count towards the 500-employee threshold, nor do employees who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States, a U.S. Territory, or the District of Columbia.

The regulations do provide some clarification on applying the joint employer and integrated employer tests. The application of those tests, however, remains difficult because they are both fact specific and require a nuanced analysis. The regulations explain that joint or integrated employers must combine employees 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 EPSL and EFMLA*. In sum, both sets of rules establish when one employer may need to count employees they share. The definition of employer also includes successors in interest (generally where one entity acquires another and largely continues or maintains its prior business operations).

Alliant note: Under joint employer rules, an employer will typically count additional employees that it shares with another employer either through a shared work arrangement with related entities or where two entities have employment obligations to a single employee (e.g. staffing arrangements). The integrated employer test more broadly looks at whether two related entities must each count all of the employees of the other entity based on the degree of shared connectivity and control. These determinations require careful analysis by employment law counsel.

Small Employers

Under the regulations, employers with fewer than 50 employees are exempt from the requirement to provide both EPSL and EFMLA when: (1) leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer 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. The employer may deny EPSL and EFMLA only to those otherwise eligible employees whose absence would cause conditions in items (1) through (3) above. Employers should retain documentation supporting its determination for at least four years.

Intermittent Leave

The regulations make several important clarifications regarding the use of intermittent leave for both EPSL and EFMLA. One basic condition applies to all employees who want to take leave intermittently—they and their employer must agree (by clear and mutual understanding). The agreement must extend to the increments of time in which leave may be taken. Absent agreement, no leave under the FFCRA may be taken intermittently. A written agreement is not required but may be a best practice under certain circumstances. Next, telework allows for intermittent leave if agreed to, however, if performing work at a work site leave can be taken intermittently only for school closures or where childcare is not available as a result of the COVID-19 crisis (EPFML and EPSL qualifying reason (5)). Any other requested use of intermittent leave under EPSL is prohibited due to the unacceptably high risk that the employee might spread COVID-19 to other employees at a worksite. Only the amount of leave actually taken may be counted toward the employee's leave entitlements.

Clarification on Son or Daughter Definition and Use of Leave

Under the regulations, both EPSL and EFMLA will now use the same definition of son or daughter as provided in existing FMLA regulations. Specifically, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence. This eliminates the narrower definition in the FFCRA applicable to EFMLA that limited the age of a son or daughter to under 18 regardless of whether the individual is incapable of self-care.

The regulations also clarify that leave is only available when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual (e.g., a co-parent, co-guardian, or the usual child care provider) is available to provide care for the child.

Telework Clarification

The DOL is waiving application of the continuous workday rule to teleworking for COVID-19 related reasons because the FFCRA encourages employers and employees to implement highly flexible telework arrangements. The continuous workday rule generally provides that all time between performance of the first and last principal work activities is compensable work time. With this limited waiver, an employee may

agree with an employer to perform telework for COVID-19 related reasons from 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays. Following this example, an employer must compensate the employee for 7.5 hours actually worked but not all 14 hours between the employee's first principal activity at 7 a.m. and last at 9 p.m. This is designed to allow an employee to help teach children whose school is closed or otherwise work at times when there are fewer distractions.

An employee is able to telework if: (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from working.

There must be Available Work

DOL has explicitly confirmed its prior guidance, and hopefully ended any remaining confusion regarding the ability of employees whose hours have been reduced or have been furloughed, that EPSL and EFMLA are only available if employees are unable to work *even though their employers have work for them*. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order (EPSL example) or who needs to care for a child whose school has closed (EFMLA example) would not be able to work regardless of the stay-at-home order or school closure. State unemployment insurance provisions would apply instead of EPSL or EFMLA.

An important corollary to this clarification is that employees cannot take either EPSL or EFMLA if their employer has work for them that they can safely do while complying with a stay-at-home order (EPSL example) or while caring for a child whose school has closed (EFMLA example).

Exemption for Health Care Providers or Emergency Responders

The FFCRA allows employers to exclude employees who are health care providers or emergency responders from leave requirements under both the EPSLA and EFMLA. This exemption does not affect the use of any other accrued leave health care providers or emergency responders may have.

The DOL used the definition of health care provider from existing FMLA regulations as a starting point, but exercised its authority to expand the definition to include any individual who is capable of providing health care services necessary to combat the COVID-19 crisis. For purposes of this exclusion, DOL defined "health care provider" to include 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 (including any permanent or temporary institution, facility, location, or site where medical services are provided). This includes any individual employed by an entity that contracts with any of these institutions to provide services or to maintain the operation of the facility and 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.

Similarly, for purposes of this exclusion, DOL defined "emergency responder" broadly to include 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 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.

Benefits Continuation
Both EPSL and EFMLA require continuation of group health plan benefits (as defined under FMLA) during leave on the same terms (and cost) as active employees. Generally, employees do not lose eligibility for group health plan coverage when they take a limited amount of PTO or other paid sick leave. DOL confirms the application of this principle to EPSL.

The FMLA, and now EFMLA, also require continuation of group health plan coverage. Under both EPSL and EFMLA leaves, the employee's share of premiums must be paid by the method normally used during any paid leave, which will generally be through payroll deductions. For unpaid leave, or where the pay provided by EFMLA or EPSL is insufficient to cover the employee's premiums, the rule on payment of premiums refers back to existing FMLA practices (pay in advance on agreement, pay post tax as you go, or pay on return by agreement). Paying post tax as you go is a strong recommendation.

The regulations also address voluntary benefits, which can be facilitated by an employer but are not part of its group health plan. DOL provides that maintenance of individual health insurance policies purchased by an employee, is the responsibility of the employee.

Employees on ESPL or EFMLA leave must be given notice of any benefits changes during leave and an opportunity to respond accordingly. If an employee chooses not to retain group health plan coverage while taking EPSL or EFMLA, the employee is entitled upon returning from leave to have benefits reinstated on the same terms as prior to taking the leave.

Recordkeeping Requirements and Required Posting
All records regarding any aspect of EPSL and EFMLA must be retained for at least four years. Record retention will be critical to the receipt of any tax credits. For more information on EPSL and EFMLA tax credits, including forms and documentation, see Alert 2020-10.

The FFCRA also implemented a required workplace posting. In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by e-mail or post the required notice electronically on an employee information website. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through e-mail, or online. (See Alert 2020-07 DOL Releases FFCRA Poster and FAQs on Posting.) Multilingual versions are not required, but a Spanish version is available.

Multiemployer Plans Option
The regulations confirm existing guidance with respect to compliance options for multiemployer plans. Specifically, an employer that is a signatory to a multiemployer collective bargaining agreement may satisfy its obligations under both the EFMLA and the EPSLA by making contributions to a multiemployer fund, plan, or other program consistent with its bargaining obligations and its collective bargaining agreement. The contributions must be based on the amount of paid sick leave and expanded family and medical leave to which the employee is entitled under the applicable provisions of the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. The fund, plan, or other program must allow employees to obtain their pay for the leave to which they are entitled under the FFRCA. Alternatively, an employer that is part of a multiemployer collective bargaining agreement may choose to satisfy its obligations under the FFCRA by any other means consistent with its collective bargaining agreement.

Conclusion
We will continue to monitor this very fluid situation and provide the latest information on the COVID-19 pandemic, including emerging legal challenges and practical recommendations. Our full suite of resources is available on Alliant's COVID-19 Resource Page.

Compliance Alert is presented by the Compliance Practice Group of Alliant Employee Benefits

CA License No. 0C36861

© 2020 Alliant Employee Benefits, a division of Alliant Insurance Services, Inc. All rights reserved.

Disclaimer: This material is provided for informational purposes only based on our understanding of applicable guidance in effect at the time and without any express or implied warranty as to its accuracy or any responsibility to provide updates based on subsequent developments. This material should not be construed as legal or tax advice or as establishing a privileged attorney-client relationship. Clients should consult with and rely on their own independent legal, tax, and other advisors regarding their particular situations before taking action. These materials and related content are also proprietary and cannot be further used, disclosed or disseminated without express permission.