Armstrong Teasdale

DOL and OSHA: The Latest Guidance Recommended Actions

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Agenda

- Emergency Family and Medical Leave Expansion Act (EFMLEA)
- Emergency Paid Sick Leave Act (EPSLA)
- DOL Guidance
- DOL Enforcement Risks
- OSHA Anti-Retaliation Risks

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **New form of FMLA leave**
  - Up to 12 weeks
  - Covers an eligible employee's inability to work or telework due to a need to care for son/daughter under 18 years old whose school/care provider is closed/unavailable, due to a public health emergency
  - First 10 days of this leave may be unpaid
    - Employee can substitute accrued paid leave or may be entitled to Emergency Paid Sick Leave Act benefits
    - Employer cannot force use of pre-existing accrued leave first
  - Remaining 10 weeks, paid at two-thirds the regular rate of pay with daily cap of $200 and an aggregate cap of $10,000

Emergency Paid Sick Leave Act (EPSLA)

- **All employees are eligible for EPSLA benefits regardless of length of service**
- **Employees entitled to paid leave for the following absences:**
  1) Employee subject to a quarantine or isolation order related to COVID-19.
  2) Employee advised by a health care provider to quarantine due to COVID-19 concerns.
  3) Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
  4) Employee caring for someone subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
  5) Employee caring for a son/daughter whose school/care provider is closed or unavailable, due to COVID-19 precautions.
  6) Employee experiencing any other substantially similar condition specified by the Secretary of HHS.

Documentation to Support Leave

- **An employer may also require an employee seeking such leave to provide any additional documentation (to the extent permitted under the certification rules for conventional FMLA leave requests)**
  - Notice that has been posted on a government, school or day care website, or published in a newspaper
  - Email from an employee or official of the school, place of care or child care provider
- **An employer must retain this notice or documentation, including while an employee may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.**

Department of Labor (DOL) Guidance

- **Effective Date – April 1, 2020**
  - No credit for paid leave provided prior to effective date
- **Use of Accrued Leave during EPSLA**
- **When is Coverage Measured?**
  - On the date that an employee working for that employer seeks to take leave

DOL Guidance - Continued

- **Employer with fewer than 500 employees anywhere in the U.S.**
  - "at the time…the employee's leave is to be taken," the entity **is covered** under both EFMLEA and EPSLA.
  - A business with a workforce of around 500 people should monitor its headcount very closely on a daily basis to determine when it is and is not obligated to comply with EFMLEA and EPSLA.

DOL Guidance - Continued

- **Which workers count?**
  - All employees count, but properly classified independent contractors do not.
  - Workers who must be counted to assess EFMLEA and EPSLA coverage:
    - "employees on leave; temporary employees who are jointly employed [with] another employer…; and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship)."

DOL Guidance - Continued

- **When are workers of related entities aggregated?**
  - Default rule: A corporation or other employing entity will be treated as a single employer for purposes of EFMLEA and EPSLA coverage.
  - DOL's guidance recognizes the following exceptions to this normal rule: (1) joint employers and (2) integrated business

DOL Guidance - Continued

- **Joint Employers**
  - If “a corporation has an ownership interest in another corporation, the two corporations **are separate employers unless they are joint employers under the FLSA** with respect to certain employees.”
  - If the FLSA’s joint-employer test is satisfied, all of the “common employees” of a parent entity and its subsidiary “must be counted in determining” EFMLEA and EPSLA coverage.
  - The four factors examine whether the separate entity does the following:
    - (i) hires or fires the employee
    - (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
    - (iii) determines the employee's rate and method of payment; and
    - (iv) maintains the employee's employment records.

DOL Guidance - Continued

- **Integrated Business Test**
  - "If two entities are an integrated employer under the FMLA, **then employees of all entities making up the integrated employer will be counted** in determining employer coverage for purposes of expanded family and medical leave under the [EFMLEA]."
  - Revised Guidance: DOL now says the integrated-business test applies to both EPSLA and emergency FMLA.
  - FMLA regulations provide the following factors for the court to consider in determining whether two or more entities constitute an integrated employer:
    - (1) common management;
    - (2) interrelation between operations;
    - (3) centralized control of labor relations; and
    - (4) degree of common ownership/financial control.

DOL Guidance - Continued

- **Calculating Paid Leave Benefits for Nonexempt Employees**
  - Identify the Employee's Normally Scheduled Weekly Hours.
    - For nonexempt employees, normally scheduled regular *and* overtime hours are included in the analysis.
  - The DOL explains that EFMLEA requires an employer "to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week."

  Example: If an employee's normally scheduled weekly hours are 40 hours + 2 overtime hours/week, the employee would be entitled to 42 hours of EFMLEA leave on a weekly basis.

DOL Guidance - Continued

- Calculate the Employee's "Regular Rate" for EFMLEA Purposes. Employers can calculate the regular rate using the following instructions:
  - (1) add all compensation that is part of the employee's "regular rate" (including, for example, all "commissions, tips, or piece rates") over the lesser of (i) the six-month period preceding leave and (ii) the employee's entire term of employment for the employer; and
  - (2) divide that sum by the employee's total hours worked during the same period
- Example: Total pay over 6 months is $9,614.00 and the employee worked 1092 hours during that period, the "regular rate" for paid leave purposes would be $8.80 per hour.

DOL Guidance - Continued

- Apply Daily Caps to the Product of Normally Scheduled Hours, Times the Regular Rate.
  - For each day of paid leave, the employer multiplies the employee's normally scheduled hours by the employee's "regular rate."

Example: Employee is taking 10 days paid leave

8.4 hours per day x regular rate of $8.80= $73.92

  - The employee is entitled to that product if two-thirds of the employee's daily rate for EFMLEA (or for EPSLA taken to care for another person), subject to a daily cap of $200.

Example: Employee taking off to care for son out of school. Two-thirds of $73.92 is $49.30, which is Employee's entitlement in daily EFMLEA/EPSLA leave.

DOL Guidance - Continued

- Employers can supplement capped EFMLEA and EPSLA leave to make up the difference between normal daily pay and capped pay under the paid leave laws
- No requirement to supplement capped benefits
- Tax credits are available only for the amount required by the paid leave laws

DOL Guidance - Continued

- **New basis for an employee's existing 12 weeks of FMLA leave—not a new bank of 12 weeks**
  - The sum of traditional FMLA leave and emergency FMLA leave taken cannot exceed 12 weeks
  - EFMLEA leave goes away at the end of the year
  - If 12 weeks of traditional leave has already been taken, no entitlement to EFMLEA benefits during the same 12 month period
- **Special Intermittent leave rules apply**
  - Not available for onsite work; permissible for telework

DOL Guidance - Continued

- **Small Business Exemption**
  - An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern.

DOL Guidance - Continued

- Small Business Exception
  - Exception covers paid leave to care for a child whose school or caregiver is closed/unavailable due to the pandemic
  - Applies to employers with fewer than 50 employees
  - An authorized officer of the business must determine that one of three conditions exists: (1), (2), or (3)
    - (1) “The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

DOL Guidance - Continued

- (2) The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) 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 or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity."

DOL Notice Requirements

- **Notice must be posted by April 1, 2020**
  - Required of all employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA
  - Placed in conspicuous area where all employees can see it
    - Email or posting to internal/external employer website appropriate where employees are not on-site
  - Not required to be shared with recently laid-off employees or applicants, but shared with new hires

The poster may be found here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

DOL Enforcement

- DOL will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, **provided that the employer has made reasonable, good faith efforts to comply with the Act.**
- After April 17, 2020, this limited stay of enforcement will be lifted, and the DOL will fully enforce violations of the Act, as appropriate and consistent with the law.

DOL Enforcement - Continued

- An employer acts "reasonably" and "in good faith" when all of the following facts are present:
  - The employer remedies any violations, including by making all affected employees whole as soon as practicable.
  - The violations of the Act were not "willful" based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited…").
  - DOL receives a written commitment from the employer to comply with the Act in the future.

Retaliation Claims and COVID-19

- **EPSLA and EFMLEA both have anti-retaliation protections.**
- **Employers cannot retaliate against employees who exercise their rights under these statutes.**
- **Retaliation might include:**
  - Not promoting an employee who otherwise would have been promoted
  - Unwarranted discipline or termination
  - Denying an employee benefits given to those not on leave under EPSLA or EFMLEA
  - Using leave as a negative factor in employment decisions

Retaliation - Continued

- **No case law interpreting the leave or anti-retaliation provisions under newly enacted EPSLA and EFMLEA exists, but the burden of proof would likely be similar to a traditional FMLA claim.**
- **To pursue a retaliation claim under traditional FMLA, employee must show:**
  - she/he engaged in a protected activity
  - an adverse action was taken, and
  - the protected activity caused the adverse action to be taken.
- **If that is shown, employer must then show there was a legitimate business reason for the action.**
- **If employer offers a legitimate reason, employee must then show the reason is a pretext for the retaliatory action.**

Retaliation - Continued

- **Possible Remedies Include:**
  - Back pay
  - Front pay
  - Liquidated damages
  - Attorney fees and costs
- **DOL has announced a 30-day temporary non-enforcement policy; no enforcement during this time as long as employer has acted reasonably and in good faith to comply.**

Retaliation - Continued

- **The Occupational Safety and Health Act of 1970 (Act) also prohibits retaliation against an employee who exercises a right protected under the Act.**
- **Section 11(c) has always protected employees from discharge or discrimination for the following protected activity:**
  - filing a complaint
  - expressing a legitimate safety concern to a supervisor
  - instituting or causing to be instituted any proceeding under or related to the OSH Act
  - testifying in a proceeding, or
  - exercising any right afforded by the Act (the catchall).

Retaliation - Continued

- An employee's engagement in protected activities does not make her/him immune from discharge or discipline for legitimate reasons.
- If engaging in protected activity was a substantial reason for the action, or if action would not have taken place "but for" engagement in protected activity, 11(c) has been violated.
- Remedies are similar to those under EPSLA and EFMLEA

Retaliation - Continued

- **Example: Employee who has generalized fear about being exposed to virus in workplace.**
  - Very fact specific
  - Will likely depend upon considerations such as:
    - geography (NYC v. a rural area with no cases);
    - how crowded is the work area;
    - number of employees in the workplace who have contracted virus;
    - protective equipment offered, such as gloves, N95s, cleaning practices; and
    - is the person immunocompromised.

Retaliation - Continued

- **Recent OSHA Guidance may shed light on OSHA's view of employee concerns, although situation is fluid:**
  - Low Exposure Risk - Jobs that don't require contact with people known to be, or suspected of being, infected nor frequent close contact with general public.
  - Medium Exposure Risk -Jobs that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected, but who are not known or suspected to be infected.
    - In areas without ongoing community transmission, workers in this group may have frequent contact with travelers who may return from international locations with widespread cases.
    - In areas where there is ongoing community transmission, workers in this category may have contact with the general public (schools, high density work environments and some high density retail settings).
  - High or Very High Exposure Risk –Health care and mortuary workers, depending upon their functions.

Retaliation - Continued

- **Procedure for 11(c)**
  - Employee must file complaint within 30 days
  - OSHA investigates and decides whether claim valid; if so, it files civil suit in name of employee
- **11(c) has no private right of action**
- **Many states have parallel statutes allowing employees to file suit**

Recordability of COVID-19 Cases on OSHA 300 Log

- **OSHA Guidance states that if an employee contracts COVID-19 in the workplace, and it's deemed work-related, and meets other recording criteria, case must be entered on OSHA 300 log.**
  - Exception: Illnesses that are the result of eating or drinking food either bought on the premises or brought in are not recordable.
- **How would an employer ever know if virus was contracted in the workplace as opposed to outside the workplace, and if contracted in the workplace, that it was contracted as a result of performing work as opposed to eating or drinking in the workplace?**
- **A high number of infected employees in the same area might point to it having been contracted in the workplace, but that would still not indicate whether it was contracted as a result of eating/drinking.**

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