

New Week, New Rules - What Employers Need to Know Today

By: Lee Geiger on March 30, 2020 on graydon.law

Finally! We have some answers. After what seems like an eternity (but was actually only 11 days), the Department of Labor (“DOL”) has issued more guidance for employers on how to implement the new Paid Sick Leave and Emergency Family & Medical Expansion leave.

The DOL’s guidance again comes in a Q&A format. The DOL built upon the prior 14 questions ... with an additional 45, covering 25 additional pages. The full text is available [here](#). Suffice it to say, there is a lot of “guidance” in the document. Employers will like some of it, hate some of it and scratch their heads about the rest. Regardless of your view, at least we have some answers.

It is important to keep in mind that the Family First Coronavirus Response Act (“FFCRA”) comes in two parts: Emergency Paid Sick Leave Act (“PSL”) and the Emergency Family & Medical Leave Expansion Act (“EFMLEA”). The new Q&As draw definite distinctions between the two laws. In the interest of space, I will not rehash the elements of PSL and EFMLEA. If you’re looking for a great summary written in human-speak, [read this post by our colleague, Julie Pugh, Esq.](#) When you’re done reading the post, read it again. You’ll pick up more each time you read it until everything clicks.

This article is intended as a **very** high level summary of some of the key provisions of the guidance. As usual, the answer to many of your questions is “It depends.” (Seriously. This is not just me being funny. Many of the DOL’s answers start with “It depends.”) With that in mind, please be sure to seek guidance from an experienced employment attorney when sifting through these employment decisions. We can not only provide information about the laws, but also provide input on what other companies are doing to address similar issues. We’re all in this together.

Without further ado, here we go ...

Q: Is EFMLEA leave in addition to “regular” FMLA leave?

A: No. Eligible employees can receive only 12 total weeks of FMLA/EFMLEA leave during a 12-month period. That means that employees who took 3 weeks of leave in January are only eligible for 9 weeks of combined FMLA/EFMLEA leave. Note that PSL is available regardless of how much FMLA leave a person has taken.

Q: What documentation should employers retain to be eligible for the tax credits?

A: DOL response: “If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. **You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit**, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.” Here’s the kicker ... the IRS has not yet released “forms, instructions or information” for the procedures to claim the tax credit. Best advice: use common sense. Ask for a doctor’s note or something to substantiate the need for leave like you otherwise would. If school/daycare is closed, have the employee print something demonstrating the closure, even if it’s a parent update email from their child’s teacher. Something is better than nothing. Ideally, the IRS will issue guidance soon.

Q: If an employee can telework, is she entitled to PSL and/or EFMLEA?

A: It depends. If the employee is able to telework and complete her job (even if at off-hours), she is not entitled to PSL or EFMLEA. However, if the employee is only able to complete a portion of her job and otherwise qualifies for PSL or EFMLEA, the employer can agree to allow the employee to take PSL or EFMLEA intermittently to cover for the time the employee is unable to work.

Q: Is intermittent leave available to employees?

A: It depends. The quick answer is that the employer has a lot more discretion when it comes to intermittent leave under PSL and EFMLEA than under “regular” FMLA. If telework is available, the employer can allow intermittent leave for the telework. If telework is not available (e.g., factory work), the reason for the leave is critical. If the employee seeks PSL for his own illness/quarantine or to care for another individual sick with COVID-19, intermittent leave is not available because “the intent of the FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.” Put a more direct way: “if you are sick or near someone who is sick, STAY HOME!”

However, if the intermittent leave is to care for a child whose school or place of care is closed, or whose child care provider is unavailable, the employer has discretion to allow intermittent leave under both PSL and EFMLEA. However, the employer also has the ability to say “no” to this intermittent request.

Q: Can employees get PSL or EFMLEA if the worksite is closed?

A: No. The DOL was very clear that if the worksite is closed, employees need to seek unemployment. This includes closure pursuant to a federal, state or local directive - i.e., if your business is “non-essential,” employees are not eligible for PSL or EFMLEA. Likewise, employees on furlough, layoff or any other leave related to a downturn in the business are not eligible. If the company closes or furloughs employees on PSL or EFMLEA, the paid leave stops. These employees can seek unemployment compensation.

Q: Can employees use PSL or EFMLEA to supplement a reduction in hours?

A: It depends on the reason hours were reduced. If reduced due to a downturn in business, employees may not supplement with PSL or EFMLEA. However, if the reduced hours are for a COVID-19 qualifying reason, the employee may be able to supplement.

Q: May employees collect both unemployment and PSL/EFMLEA?

A: No. It's one or the other. No double-dipping.

Q: May employees supplement PSL/EFMLEA with PTO or other paid leave provided by the employer?

A: Yes. Some PSL and EFMLEA is paid at 2/3 of the regular rate. If the employee has accrued PTO, vacation, personal, medical, sick or other leave, the employee has the option to supplement with those leaves. However, the employer cannot force employees to supplement the pay.

Q: Who is an "employee" eligible for paid leave?

A: Both PSL and EFMLEA use the Fair Labor Standards Act's definition of "employee". This includes eligible full-time and part-time employees and "joint employees" working on your site temporarily or through a temp agency.

Important distinction: employees are eligible for PSL regardless of length of employment. Employees must have been employed for 30 calendar days to qualify for EFMLEA.

Q: Who is a son or daughter?

A: The DOL is falling back on the "regular" FMLA definition of son or daughter. Specifically: "'son or daughter' is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis - someone with day-to-day responsibilities to care for or financially support a child." This is a very expansive definition of "child" and is ripe for abuse under these circumstances.

The DOL also clarified that, like "regular" FMLA, the term "'son or daughter' is also an adult son or daughter who (1) has a mental or physical disability, and (2) is incapable of self-

care because of that disability.” This primarily impacts only EFMLEA because the PSL inclusion of “individual” needing COVID-19 care already covered adult children.

Q: Did the DOL provide guidance for the “small business exemption”?

A: Yes. The DOL defines “small businesses” as those with fewer than 50 employees. There may be exceptions to the PSL and EFMLEA requirements “when doing so would jeopardize the viability of the small business as a going concern.” There are specific elements that employers must satisfy to meet this test. Contact your employment attorney to discuss further.

Q: Did the DOL define “health care provider” and “emergency responder”?

A: Yes. The DOL also offered an expansive definition of both “health care provider” and “emergency responder.” Those individuals may be excluded from PSL and EFMLEA eligibility. It underscores the importance of these individuals on the front lines of the battle against COVID-19. If you are a health care employer, these provisions may be helpful to you.

The DOL guidance also includes information for employees to use to file complaints with the DOL if they feel their employer has not handled leave properly. They include phone numbers and the email address for the complaint hotline! “Phonebook/Billboard attorneys” will be on the lookout for these individuals because the FMLA allows plaintiffs to recover attorney fees. Expect the first lawsuits to be filed in mid-April. Don’t be on that list. As I often say ... “Our best clients call us before they get into trouble. Our best paying clients call us after.”

A few final action items:

- Have you posted the DOL’s FFCRA notice? Here is a [link](#) if you need it.
- Have you implemented a COVID-19 / Pandemic policy?
- Do you have leave of absence forms for employees to use when requesting PSL or EFMLEA?

Stay safe and know that Graydon is here to help you navigate the Coronavirus crisis. We can help with policies, forms or whatever your business needs. Our goal is to help you sleep a little better at night.