**DEPARTMENT OF LABOR ISSUES REVISED RULES AND REGULATIONS FOR THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

**By: R. Eddie Wayland**

On April 1, 2020, the Department of Labor (DOL) issued its interim regulations in connection with the Families First Coronavirus Response Act (FFCRA), as title 29 of the Code of Federal Regulations part 826. Recently the DOL published revised updated regulations, which made corrections to both the preamble and to multiple various sections of the regulations for the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act under the FFCRA. While the majority of these corrections affirm much of the advice the DOL had previously provided regarding the FFCRA, significant additional guidance and clarification was also provided on many important topics. These more significant changes are summarized and addressed below.

**Emergency Paid Sick Leave Act (EPSLA**) **Clarification and Changes**

Paid sick leave taken when an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis should be limited to the *actual time* the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. An employee who is waiting for the results of a test and is able to telework may not take sick leave if his or her employer has work for the employee to perform, the employer permits the work to be performed where the employee is waiting, and there are no extenuating circumstances, such as serious COVID-19 symptoms preventing the employee from performing the work.

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 was quarantined. The DOL elaborated that an employee may take leave pursuant to the EPSLA if he or she is unable to perform work and is caring for an individual who has been advised to self-quarantine by a health care provider because of a belief that the individual has COVID-19, may have COVID-19 due to known exposure or symptoms, or the individual is particularly vulnerable to COVID-19.

Generally, an employee does not need to take paid leave due to the child’s school or place of care closures if another suitable individual, such as a co-parent, co-guardian, or the usual childcare provider, is available to provide the care the employee’s child needs.

Since intermittent leave is permitted under the EPSLA, an employee’s use of intermittent leave combined with paid sick leave should not be construed as undermining the employee’s salary basis for Fair Labor Standards Act (“FLSA”) purposes.

Importantly, the DOL clarified that if a part-time employee’s schedule varies from week to week, the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which sick leave begins shall be used in place of the number of hours that such employee works on average over a two-week period. The DOL is of the belief that Congress intended to use the daily average to compute the two-week average because there are fourteen calendar days over a two-week period and this provides part-time employees whose weekly schedule varies with paid sick leave equal to fourteen times the number of hours that the employee was scheduled per calendar day.

**Emergency Family and Medical Leave Expansion Act (EFMLEA) Clarification and Changes**

Section 826.23 explains that an employee may elect to use, or the employer may require an employee to use, accrued leave that is available to the employee to care for a child, such as vacation or paid time off concurrently with the EFMLEA so that the employee receives full pay during the period for which they have preexisting accrued vacation or paid time off.

Section 826.24 changes the unpaid period of time for the EFMLEA from ten days to two weeks. However, as a practical matter, the unpaid period for employees who work a regular Monday through Friday schedule will still be ten days because that is the number of days ordinarily worked in two weeks.

An employer is required to use an average of the employee’s regular rate over multiple workweeks, computed by adding up all the compensation paid over the relevant time period and dividing it by the total sum of all hours worked during the same time period, pursuant to Section 826.25. The relevant time period should be the six-month period ending on the date on which the employee first takes paid leave. If an employee has not been employed for at least six months, the average regular rate should be computed over the entire term of the employment.

Under Section 826.70, an employee who takes leave pursuant to the EFMLEA can take a maximum of twelve workweeks of leave during the April 1, 2020 to December 31, 2020 period, even if that period spans two FMLA leave twelve-month periods. For example, if an employer’s twelve-month period begins on July 1, and an eligible employee took seven weeks of leave pursuant to the EFMLEA in May and June of 2020, the employee could only take up to five additional weeks of leave pursuant to the EFMLEA even though the first seven weeks fell in the prior twelve-month period.

**Definitions**

The DOL is treating the definition of “son or daughter” the same under the EPSLA and EFMLEA. That is “son or daughter” includes both children under 18 years of age and children 18 or older who are incapable of self-care because of a mental or physical disability.

Telework is defined broadly to effectuate the statute’s underlying purposes; the definition also outlines when an employee is able to telework. Telework is no less work than if it were performed at an employer’s worksite. Therefore, employees who are teleworking for COVID-19 related reasons must *always* record, and be compensated for, all hours actually worked, including overtime, in accordance with the FLSA. However, an employer is *not* required to compensate employees for unreported hours worked while teleworking, unless the employer knew or should have known about such telework. Section 790.6’s continuous workday guidance, that requires an employer to compensate its employees for all work done between the first and last principal activity performed, does not apply because it disincentivizes and undermines the very flexibility in teleworking arrangements that are critical to the FFCRA. However, the DOL’s guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID-19 related reasons.

**Documentation of Need for Leave**

 According to Section 826.100, an employee must provide his or her employer with documentation in support of leave pursuant to the EFMLEA or the EPSLA. Such 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. An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. An employee requesting paid sick leave pursuant to a Federal, State, or local government quarantine or isolation order must provide the name of the government entity that issued the order. An employee requesting paid sick leave because he or she has been advised by a health care provider to self-quarantine related to COVID-19 must provide the name of the health care provider who advised him or her to self-quarantine. An employee requesting paid leave because he or she is caring for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine related to COVID-19 must provide his or her employer with either the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject or the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19. An employee who is requesting leave because he or she is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19 must provide his or her employer with the following information: (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.

**Continued Health Care Coverage**

 Section 826.100 states that an employee who takes leave pursuant to the EFMLEA or the EPSLA is entitled to continued coverage under the employer’s group health plan on the same terms as if the employee did not take leave, including medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, and other benefit coverages. Employees in a group health plan who take paid sick leave pursuant to the EFMLEA or the EPSLA remain responsible for paying the same portion of the plan premium(s) that the employee paid prior to taking leave.

For unpaid leave, or where the pay provided is insufficient to cover the employee’s premium(s), employers can obtain payment as follows: (1) Payment would be due at the same time as it would be made if by payroll deduction; (2) Payment would be due on the same schedule as payments are made under COBRA; (3) Payment would be prepaid pursuant to a cafeteria plan at the employee’s option; (4) The employer’s existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid Family Medical and Leave Act (FMLA) leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or (5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

If an employee chooses not to retain group health plan coverage while taking leave pursuant to the EFMLEA or the EPSLA, the employee is entitled upon returning from leave to be reinstated on the same terms as prior to taking the leave, including family member coverage.

**Recordkeeping**

 An employer is required to retain all documentation provided by an employee explaining his or her need for leave for four years according to Section 826.140, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for leave, the employer is required to document and retain such information for four years.

 If an employer denies an employee’s request for leave pursuant to the Small Business exception, the employer must document its authorized officer’s determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years as well.

**Prohibited Acts**

The EPSLA provides that employers who fail to provide sick leave as required are considered to have failed to pay the minimum wage in violation of Section 6 of the FLSA, and such employers are therefore subject to enforcement proceedings accordingly. In addition, the EPSLA prohibits employers from discharging, disciplining, or in any other manner discriminating against an employee who takes paid sick leave under the EPSLA, files any complaint under or relating to the EPSLA, or institutes any proceeding under or relating to the EPSLA.

The FMLA enforcement provisions apply for purposes of the EFMLEA, except that an employee’s right to file a lawsuit directly against an employer does not extend to employers who were not previously covered by the FMLA. As intermittent leave is permitted under the EFMLEA, an employee’s use of intermittent leave combined with either paid sick leave should not be construed as undermining the employee’s salary basis for FLSA purposes.

**Takeaway**

As is obvious by the length of this article, the DOL’s rules and regulations concerning the EPSLA and EFMLEA cover a lot of ground and many aspects of employment law. These regulations have added many additional burdens and requirements on employers during these trying times. It is advisable to consult with experienced legal counsel to ensure that employers are meeting the requirements of the new laws and do not open themselves up to agency enforcement or to private legal action.

*R. Eddie Wayland is a partner with the law firm of King & Ballow. You may reach Mr. Wayland at (615) 726-5430 or at rew@kingballow.com. Mr. Wayland gratefully acknowledges Hunter Yoches, Kristin Titley, Darius Walker, and Rachael Rustmann (K&B’s task force for COVID-19 related issues) for their ongoing assistance in monitoring and updating this evolving situation and circumstances.*

*The foregoing materials, discussion and comments have been abridged from laws, court decisions, and administrative rulings and should not be construed as legal advice on specific situations or subjects.*