More Labor Department FAQ’s on Paid Sick Leave and Expanded FMLA

May 15, 2020, by Dennis J. Merley, Felhaber Larson

The Department of Labor (DOL) is back at it again, issuing new FAQ’s regarding the FFCRA. Most relate to how to determine the hours and pay to which employees working irregular hours are entitled if and when they take Emergency Paid Sick Leave (ESPL) and Expanded Family and Medical Leave (Expanded FMLA). They conclude with a very helpful discussion of what happens to Expanded FMLA when school lets out for the summer.

The highlights are as follows:

**How do you calculate EPSL entitlement for an employee working irregular hours?**

The DOL says if you cannot determine “normal hours”, you need to estimate based on the average number of hours the employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. This includes hours actually worked and hours for which the employee was scheduled but did not work due to taking leave.

Once you determine the number of sick leave hours to which the employee is entitled, you must pay those hours at the employee’s regular rate (See below).

Rounding is permitted, provided that it is done consistently for all employees.

**How do you calculate the number of hours to pay for expanded family and medical leave to an employee working regular hours?**

Here, since you are paying for work hours missed, the calculation is based on the number of hours the employee was normally scheduled to work that day. For employees who work irregular hours, you must determine the employee’s average workday hours based on the number of hours your employee was scheduled to work per workday (not calendar day) divided by the number of workdays over the six-month period referenced in the preceding paragraph. This average must
include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

Again, rounding is permitted, provided that it is done consistently for all employees.

**How do you calculate an employee’s average regular rate for the purpose of the FFCRA?**

This is basically a reiteration of the DOL’s basic regulations for determining the hourly rate for ordinary overtime, but using the same six-month period as in the preceding paragraphs. Therefore, if you just paid your employee a basic hourly wage or salary, the regular rate would be the basic hourly wage or the hourly-equivalent of the salary.

For an employee paid differently (e.g. piece rate, commission, etc.), you calculate the rate as you would for regular overtime.

- Figure out what they earned during the six-month period that would ordinarily be included in the regular rate of pay. As such, amounts paid for overtime premium, sick leave and other payments normally not included in the overtime calculation also would not be included here.
- Determine the number of hours actually worked during the six months – leave hours do not apply.
- Divide the calculated payment by the hours worked to arrive at the average regular rate.

**When can an employer require an employee to use existing leave under a company policy?**

To properly understand the DOL’s guidance here, it is helpful to recall and break down the EPSL and Expanded FMLA benefits available to employees:

- Remember that employees may get 12 weeks of Expanded FMLA to care for a child whose school or day care is closed due to COVID-19. The first two weeks are unpaid, and the remaining 10 weeks are paid at two-thirds of the regular rate of pay.
- Remember also that employees may use two weeks of EPSL. They receive full pay if they have to quarantine due to COVID-19 or are seeking a diagnosis due to COVID-19 type symptoms. They get two-thirds pay if they have to stay home to care for a child whose school or day care is closed due to COVID-19.
- Since EPSL and Expanded FMLA can both be used to care for children whose school or day care has closed due to COVID-19, an employee can apply their two weeks of EPSL to those first two weeks of unpaid Expanded FMLA.
The DOL is now reminding us that:

- As a general rule, EPSL is in addition to any other leave under existing policy, collective bargaining agreement or applicable law. Therefore, if an employee is using EPSL for any reason, an employer may not require employer-provided paid leave to run concurrently.
- The use of any paid leave is voluntary. Thus, if an employee is on Expanded FMLA due to school or day care closure, the employee may (1) elect to use EPSL during the first two weeks of such leave (the unpaid weeks), (2) elect to use the employer’s paid leave if it applies (e.g. vacation or PTO), or (3) elect to use neither. However, they may not “double dip” by using both.
- For expanded FMLA over the remaining 10 weeks of leave during which employees receive two thirds pay, the employer may require any applicable leave (e.g. vacation or PTO) to run concurrently. However, even though the employee would be getting their full pay, the employer may only obtain tax credits for the two thirds pay that is required under the Expanded FMLA regulation.
- Finally, if the employer and employee agree (and if doing so does not violate federal or state law), the employee may use employer-provided paid leave to supplement the two thirds pay to which the employee is entitled during Expanded FMLA.

If an employee of a temporary placement agency with over 500 employees is placed at a business with fewer than 500 employees, is that employee entitled to FFCRA benefits?

The temporary staffing agency is not obligated to make FFRCA available to the employee because it is not covered by the law.

Whether the second business does or does not have to provide the benefits depends on whether the two entities are considered joint employer, to wit: if the second business directly or indirectly exercises significant control over the terms and conditions of the individual’s work, they are a joint employer and must provide paid sick leave or expanded family and medical leave. Significant controls determined by looking at whether the second business has the power to hire or fire you, supervises and controls the schedule and/or conditions of employment, determines the rate and method of pay, and maintains your employment records.

Interestingly, if the second business is considered a joint employer, the first business is prohibited from any adverse treatment because the employee has used sick leave, and cannot interfere with the employee’s ability to use FMLA or retaliate for having taken the leave.
If an employee has been teleworking successfully since March, can they now claim a need to take expanded FMLA because their child’s school is closed? Can I ask the employee for documentation of the need for leave?

The DOL says that an employer can require the same information in these circumstances as for any employee seeking expanded FMLA – a note explaining the qualifying reason the employee needs the leave, including any changed circumstances as to why the employee is now unable to work.

The DOL cautions, however, that there are many good reasons why a leave is needed now as opposed to two months ago. For example, the employee’s spouse may have been available to care for the children originally but has now been called back to their workplace or is teleworking. Therefore, do not be too quick to judge someone who was teleworking but now claims inability to do so.

Nevertheless, employees are still subject to discipline for misrepresenting the need for EPSL or Expanded FMLA.

If an employee claims to have COVID-19 symptoms and seeks EPSL to get a diagnosis, can the employer demand proof that such diagnosis was sought?

For the most part, no. An employer can ask the employee to identify the symptoms and a date for a test or doctor’s appointment but. You may not, however, require the employee to provide further documentation or may not request any form of certification that a diagnosis or treatment was actually sought or obtained. The DOL notes that this restriction is intended to allow employees to more easily seek a diagnosis and therefore slow the spread of the virus.

This may mean that employees can more easily take time off for up to two weeks without having to verify the need for it, which will create scheduling and production hardships. However, at least the EPSL that such employees might receive will be offset by tax credits so the employer should not be out of pocket for this.

Of course, once an employee seeks additional time off, such as ordinary FMLA or sick leave following a positive test, the certification procedure/employer sick leave requirements may be applied.

If an employee took EPSL and/or Expanded FMLA to care for children whose school had closed, do they get to stay on leave now that the school year is over?
No. Leave was available only because the school closed due to COVID-19. Since that is no longer the reason why school is closed, there is no more basis for claiming entitlement to such leaves.

The answer may differ regarding day care providers that remain closed since their business is not typically tied to the school calendar. Thus, if the daycare remains closed due to COVID-19 reasons, the employee may stay on leave.

**Bottom Line**

The parameters and permutations of all of this will likely continue to change for as long as the pandemic is with us. We will of course continue to keep you updated.