PUBLIC AFFAIRS
COVID -19
INFO SERIES

NATIONAL RESTAURANT ASSOCIATION®

U.S. DEPARTMENT OF LABOR IMPLEMENTING REGULATIONS

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

BACKGROUND

The recently enacted "Families First Coronavirus Response Act" (FFCRA) went into effect on April 1, 2020 and will expire on December 31, 2020. The Act created two temporary leave programs – Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave Expansion (EFMLE) – that require private sector employers with less than 500 employees to provide leave to employees impacted by COVID-19.

Under the Act, covered employers qualify for 100 percent (full costs of both leave programs) reimbursement through refundable tax credits administered by the U.S. Department of the Treasury.

ADDITIONAL RESOURCES

U.S. Department of Labor's FFCRA Temporary Regulations

U.S. Department of Labor's FFCRA Resources

IRS Guidance on FFCRA

Littler Mendelson legal compliance document

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The U.S. Department of Labor through its Wage and Hour Division is responsible for implementing and enforcing the new leave mandates. The Department issued implementing regulations on April 1, 2020, which detail employer and employee obligations, as well as an exemption available to qualifying small employers with fewer than 50 employees. Below are key aspects of the Department's regulations.

EFFECTIVE DATE

- FFCRA leave requirements are effective April 1, 2020; and expire on December 31, 2020. There is no retroactivity, meaning an employer did not have to comply until April 1, 2020.

DEFINITIONS

• Full-time.
The Department makes clear that "full-time" employees for EPSL purposes are those who normally are scheduled 40 or more hours per week.

• Part-time.
The Department states that an employee who is not full-time is part-time and that employee receives leave hours equivalent to the number of hours the employee works on average over a two-week period.

• Child.
The Department defines a child, for both EPSL and EFMLE, as a son or daughter under 18 years of age, as well as, a son or daughter 18 years or older with a mental or physical disability who is incapable of self-care due to the disability.

EMPLOYER COVERAGE

• "500 or fewer" Employees
If the employer has fewer than 500 employees, the employer is required to provide paid leave under both programs. The Department clarified that the 500 threshold is a "live count" dependent on the total number of employees employed within the United States at the time an employee would take leave. In making this determination, employers should count full-time employees, part-time employees, employees on leave, and temporary employees and day laborers (including those from a temporary placement agency, and employees who are jointly employed with another employer. Employers do not have to count independent contractors, employees who have been laid off or furloughed and have not subsequently been reemployed. This "live count" will require an employer, who is close to the 500 number, to monitor closely the number of employees. For example, if total employee numbers drop below 500, the law will apply; but if the employee numbers increase to 500 or more, the law will not apply.

• Joint Employers
If two entities are joint employers under the Department's Fair Labor Standards Act (FLSA), they both must count all their common employees. Note: The Department amended its joint employer test under the FLSA on March 16, 2020.

• Corporations
A corporation (including various divisions) is generally considered a single employer and must count all its employees. If a corporation has an ownership interest in another corporation, the two corporations will be considered separate unless they are joint employers under the Department's Fair Labor Standards Act.

• Multiple Entities

To determine if multiple entities are considered as one employer or separate employers, the Department adopts the integrated employer test under the traditional Family Medical and Leave Act. The integrated employer test requires an analysis of common management, degree of common ownership and control, and interrelation between operations. The Department advises that if multiple entities constitute an integrated employer, then employees of all entities will be counted in determining employer coverage for purposes of the Act's leave requirements.

EMERGENCY PAID SICK LEAVE ("EPSL")

• Covered employers are required to provide EPSL to full-time employees up to 80 hours, and part-time employees up to the number of hours they work on average over a two-week period. There are no eligibility requirements, meaning the employee is eligible immediately upon hire. There are very specific reasons for EPSL, detailed below.

1. employee is subject to a quarantine or isolation order related to COVID-19;
2. employee has been advised to self-quarantine by a health care provider because of CVOID-19;
3. employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Employee is caring for an individual, which includes "an employee's immediate family member, a person who regularly resides the employee's home, or similar person with whom the employee has a relationship that creates the expectation that the employee would care for the person if he/she is advised to quarantine or self-isolate." The key is there must be an existing relationship with the person; and
5. employee is caring for a son or daughter whose school or place of child care is closed or whose child care provider is unavailable due to COVID-19.

• For reasons 1-3 above, EPSL must be paid at 100% of employee's regular rate of pay, capped at $511 per day and $5,110 total.

• For reasons 4-5, EPSL must be paid at 2/3 employee's regular rate of pay, capped at $200 per day and $2000 total.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ("EFMLE")

• Covered employers are required to provide EFMLE to eligible employees who are unable to work because the employee is caring for his/her child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19. This is the only reason for EFMLE.

• For EFMLE, the employee must have been employed by the employer for at least 30 calendar days. An employee is entitled to take up to 12 weeks of leave. The first two weeks (10 days) of this leave are unpaid, though the employee may substitute paid sick leave under the EPSL or paid leave under the employer's preexisting policies for these 2 weeks of unpaid leave. The following period of up to 10 weeks must be paid at 2/3 the employee's regular rate of pay, capped at $200 per day, or $10,000 total.

SMALL BUSINESS EXEMPTION

• Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability related to COVID-19, if the leave payments would "jeopardize the viability of their business as a going concern."

• The Department states the exemption is available where:

- The leave requested 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; or
- The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

• If a small business believes it qualifies for the exemption and denies an employee's request for leave, the Department advises the employer to document the determination by its authorized officer and keep such documentation for four years. The Department does not require the employer to submit the document. Small businesses claiming an exemption must still post the FFCRA poster.

LAYOFFS AND FURLOUGHS

• The Department clarifies that FFCRA does not take away an employer's right to make lawful organizational changes, i.e., employees who are laid off, terminated or furloughed are not entitled to FFCRA paid leave.

STAY-AT-HOME ORDERS

• The Department makes clear than an employee, who is subject to a quarantine or isolation order, may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.

• The Department provides the following 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 would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order but rather due to the closure of his place of employment. That said, he may be eligible for state unemployment insurance…"

• The Department further clarifies in a footnote that this is true even if the closure of the coffee shop was substantially caused by the shelter-in-place order—whether it is because customers are staying at home and not going there so there is not enough work, or whether the order forced the coffee shop to close.

EXISTING EMPLOYER LEAVE POLICIES

• If the employer is already providing leave policies, the EPSL and EFMLE are on top of whatever the employer is already providing.

STATE/LOCAL LEAVE LAWS

• The Department makes clear that any leave taken under EPSL and/or EFMLE is in addition to any other forms of leave the employee has earned under state and local paid leave laws.

EMPLOYER NOTICE REQUIREMENTS

• FFCRA requires employers to post and keep posted a notice of the law's requirements. On March 25, 2020, the Department made a model notice (poster) available, which can be accessed at https://www.dol.gov.whd. In addition to posting the notice in a conspicuous place where employees may view it, an employer may distribute the notice to employees by 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, though email or online.

EMPLOYEE NOTICE REQUIREMENTS

• When an employee requests EPSL or EFMLE, the employee should provide information and documentation of the following: (a) his/her name; (b) dates leave is requested; (c) qualifying reason for leave; (d) oral or written statement that employee is unable to work because of the qualified reason for leave; (e) name of the health care provider who advised the employee to self-quarantine; and (f) the name of the child being cared for, including the name of the closed school, unavailable child care provider and reason why there is no other suitable person is able to care for the child.

RECORDKEEPING

• To qualify for the tax credits administered by the IRS, the Department states that employers are required to maintain for four years the following items:

- Documentation to show how the employer determined how much EPSL or FMLA+ was paid to employees (including records of actual work performed, telework, and paid leave credits);
- Documentation to show how the employer determined the amount of qualified health plan expenses that were allocated to wages; and
- Copies of any completed IRS Forms 7200 (Advance Payment of Employer Credits Due to COVID-19) that the employer submitted to the IRS, and the completed IRS Forms 941 (Employer's Quarterly Federal Tax Return) that the employer submitted to the IRS (or, if applicable, records provided to a third party payer to meet an employer's employment tax obligations/entitlement to the credits claimed on IRS Form 941).

• Employers must maintain records regarding an employee's request for leave (detailed above) for four years, regardless of whether the employer grants or denies the employee's request for leave.

• Additionally, an employer may request from the employee "such additional material as needed for the Employer to support a request for tax credits."

U.S. DOL ENFORCEMENT

• The Department announced that it will not bring enforcement actions against any private sector employer for violations of the Act until April 17, 2020, provided that the employer has made "reasonable, good faith efforts to comply with the Act."

REIMBURSEMENT: REFUNDABLE TAX CREDITS – IRS GUIDANCE

• Under FFRCA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of Treasury, for all qualifying EPSL and EFMLE wages paid to an employee who takes leave under the Act.

• The IRS recently issued guidance (linked below) explaining how employers can access those credits now. Employers do not have to pay up front and seek reimbursement later; instead, they can offset the cost of leave by keeping a portion of the quarterly federal employment taxes they would otherwise deposit with the IRS.