DOL's Virus Paid Leave Rule: What Employers Should Know

By **Tal Marnin, Henrik Patel, Victoria Rosamond and Caroline Cima** (April 13, 2020)

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The U.S. Department of Labor is issuing Q&A guidance on a rolling basis and, on April 1, issued a temporary rule with respect to the federal Families First Coronavirus Response Act, or FFCRA.

Effective April 1 through Dec. 31, the FFCRA requires all employers with under 500 employees (subject to certain exemptions) to provide eligible employees within the U.S. up to two weeks of paid sick leave, or PSL, and up to 12 weeks of expanded family and medical leave.

The following is an overview of the most important PSL and expanded family and medical leave provisions for employers, followed by key takeaways for employer compliance with the FFCRA.

Paid Sick Leave

What the Employer Must Provide

PSL is available to all employees regardless of tenure if such employee satisfies certain COVID-19 related criteria (including caring for a child due to school closure or unavailability of the child care provider). PSL is paid at 100% of the employee's regular rate of pay if taken for certain reasons affecting the employee directly (capped per employee at $511 per day or $5,110 in the aggregate), or 67% of the employee's regular rate of pay if taken for certain reasons affecting those whom the employee cares for (capped per employee at $200 per day or $2,000 in the aggregate).

Key Takeaway: Employers must provide PSL to all employees in a variety of COVID-19-related circumstances, including circumstances that may overlap with expanded family and medical leave (as noted below), and employers should be clear about the underlying reason for each employee.

Expanded Family and Medical Leave

What the Employer Must Provide and How it Interacts With FMLA

Expanded family and medical leave is available to all employees employed for at least 30 calendar days. Expanded family and medical leave only allows an employee to care for the employee's child if the school or place of child care, or the child care provider, is unavailable due to the COVID-19 emergency (this reason overlaps with one of the PSL-qualifying reasons).

The first two weeks of expanded family and medical leave are unpaid, but an employee may use PSL or regular accrued but unused paid time off during this period. For a remainder of up to 10 weeks, expanded family and medical leave is paid at 67% of the employee's regular rate of

pay (capped per employee at $200 per day and $10,000 in the aggregate).

If an employer was subject to the Family and Medical Leave Act before April 1, then the employee's expanded family and medical leave will be limited to the extent the employee has previously taken FMLA leave, such that the employee may only take a total of 12 weeks of leave between the FMLA and expanded family and medical leave during the applicable 12-month period.

If an employee is home with his or her child because the school or place of care is closed, or the child care provider is unavailable, the employee may be eligible for both PSL and expanded family and medical leave, but only for a total of 12 weeks.

Key Takeaway: Employers must provide expanded family and medical leave to certain employees in child-specific COVID-19-related circumstances. Employers should track (1) FMLA leave already taken by eligible employees and factor such leave into expanded family and medical leave duration; and (2) PSL leave and, if the reason for leave overlaps, factor such leave into expanded family and medical leave duration — and also for potential payment for the first two weeks of expanded family and medical leave.

Small Business Exemption From PSL and Expanded Family and Medical Leave

How to Qualify for the Exemption

Employers with fewer than 50 employees may qualify for an exemption from certain portions of the FFCRA if doing so would "jeopardize the viability of the business."

To do so, an authorized officer of the business must determine and document that: (1) leave would cause the employer's expenses and financial obligations to exceed available business revenue; (2) leave would pose a substantial risk to the financial health of the business; or (3) leave would prevent the employer from operating at minimum capacity.

The exemption applies to all expanded family and medical leave requests but only those PSL requests relating to child care. Exempt employers must still provide PSL taken for any reason other than child care.

Key Takeaway: Employers with fewer than 50 employees should consider if this exemption fits their business needs. If so, the employer should not submit documentation to the DOL and should instead maintain formal records for its own files to demonstrate a need for the exemption. There is no application or submission process.

Offsetting Payroll Tax Credit

How to Secure and Apply Credits

Employers will receive an offsetting payroll tax credit against their portion of payroll tax obligations, referred to as the payroll tax credit.

The payroll tax credit is equal to (1) 100% of qualified PSL and expanded family and medical leave wages (subject, in each case, to the applicable caps) that are paid by an employer for each calendar quarter; plus (2) the costs to maintain health insurance coverage for the eligible employee during the applicable leave period.

An employer is not required to provide leave if the applicable employee does not provide supporting materials sufficient for a payroll tax credit.

Key Takeaway: Employers should retain the full amount of the payroll tax credit from the payroll taxes that they are otherwise required to withhold and pay to the Internal Revenue Service. That includes withheld federal income taxes and employee and employer share of Social Security and Medicare taxes, in each case, for all employees (not just employees who have taken PSL or expanded family and medical leave).

If the payroll tax credit exceeds the available payroll taxes, employers should then request an advance refund of the excess from the IRS (which the IRS expects to process within two weeks). Employers should consult applicable IRS forms[1] for more information regarding satisfactory documentation, and should work with employees to secure this documentation. All documentation secured and submitted should be retained by employers.

Employer Size Determinations

Which Employers Are Covered

Employers who have fewer than 500 employees within the U.S., at the time the leave is to be taken, are subject to the FFCRA. Employer size is evaluated each time leave is to be taken by an employee.

To make this determination, employers should include full-time and part-time employees, employees on leave, employees who are jointly employed with another employer, and day laborers supplied by a temporary agency. Independent contractors should not be included.

The number of employees of related, but separate, entities may need to be aggregated in determining employer coverage for purposes of PSL and expanded family and medical leave, if the entities are deemed an integrated employer.

Factors to be considered include: (1) common management; (2) interrelation of operations; (3) centralized control of labor relations; and (4) degree of common ownership or financial control. The test for determining employer size under the FFCRA is different than the test used for the Coronavirus Aid, Relief, and Economic Security Act for small business loans under the new Paycheck Protection Program.

Key Takeaway: Because employer size is evaluated each time leave is requested by an employee, employers should ensure that they maintain an accurate headcount of employees and that they evaluate the right group of employees when assessing FFCRA applicability (including via the integrated employer test).

Interaction Between PSL, Expanded Family and Medical Leave, and Other PTO

How to Use Paid Leaves Together

PSL is a new leave requirement and is in addition to other leave provided under applicable law, a collective bargaining agreement or an employer's existing policy. Additionally, PSL cannot be used concurrently with a company's paid time off policy, without agreement by both the employer and employee. Even if both agree to the concurrent use of PTO, the employer will not receive a payroll tax credit for any such top-up payments beyond the applicable PSL cap.

With regard to expanded family and medical leave, an eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care of a child, such as accrued vacation, personal leave or PTO.

If expanded family and medical leave is used concurrently with other paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy, even if that amount is greater than $200 per day or $10,000 in the aggregate. However, as with PSL, the employer will not receive a payroll tax credit for any such top-up payments.

Key Takeaway: A covered employer should not deny an employee PSL even if it already provided such leave before April 1, or if the employee uses other types of paid sick leave under law or under the employer's policy (however, employers do not need to apply PTO on top of PSL). In contrast, employers cannot deny an employee's election to use PTO concurrently with expanded family and medical leave, and, if weary of future PTO use, can require this simultaneous application).

Interaction Between PSL, Expanded Family and Medical Leave, and Furloughs or Hour Reductions

How to Balance Paid Leave Against Employment Actions

If an employer is open, but places employees on furlough on, before or after April 1 because it does not have enough work or business for the employees, the furloughed employees cannot take PSL or expanded family and medical leave during the furlough. The furloughed employees may, however, be eligible for unemployment insurance benefits.

Similarly, if an employer reduces the scheduled work hours of employees, such employees cannot use PSL or expanded family and medical leave for the hours that they are no longer scheduled to work because this reduction is not due to a COVID-19 qualifying reason — even if the reduction in hours was somehow related to COVID-19. An employee may, however, take PSL or expanded family and medical leave if a COVID-19-qualifying reason prevents the employee from working his or her full-time schedule.

Key Takeaway: Employers should evaluate the underlying reasons for certain employment actions, and should not assume that all employees affected by COVID-19 automatically qualify for PSL or expanded family and medical leave. Employers should consider whether it is more beneficial (both for the employer and for the employee) to implement certain actions (such as furloughs and/or hour reductions) or to place employees on paid leave.

PSL and Expanded Family and Medical Leave Requirements During Employer Closures

How to Balance Paid Leave Against Business Events

Employers with closed worksites do not have to provide PSL or expanded family and medical leave, except for any such leave used before the employer closed (i.e., if an employer sends the employees home and stops paying them because it does not have work, the employees will not get PSL or expanded family and medical leave), but the employees may be eligible for unemployment insurance benefits.

This is true whether the particular employer closes the worksite for lack of business or is required to close pursuant to a federal, state or local directive, even though the first specified reason for PSL is that an employee is unable to work because he or she is subject to a federal, state or local COVID-19 quarantine or isolation order, which includes a broad range of governmental orders such as shelter-in-place or stay-at-home orders.

The DOL rule clarifies that an employee may take such PSL only if the order itself prevents the employee from working or teleworking and that, if an order forces a business to close or customers to stay at home, an employee would not be eligible for PSL because the reason the employee is not working is that the business or customers are subject to the order, not because the employee is subject to the order.

Key Takeaway: Employers should not assume that a closure or order entitles employees to PSL and/or expanded family and medical leave, and should evaluate leave requests that cite to a quarantine order on a case-by-case basis. Employers should also carefully monitor orders that require closings or customers to remain home, and should document the date on which each applicable order goes into effect.

Notice and Record-Keeping Requirements

What to Post and What to Keep

Employers must post in conspicuous places a notice of the FFCRA requirements. Employers may satisfy this posting requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website.

Employers are required to retain all documentation provided by employees seeking PSL or expanded family and medical leave for four years (and to document oral statements in support of the requested leave if there is no written documentation), regardless of whether leave was granted or denied.

Enforcement

Will Employers Be Punished for Unintentional Noncompliance?

The DOL will observe a period of nonenforcement through April 17 so long as the employer has acted reasonably and in good faith to comply with the FFCRA. Employers should make every effort to comply and, should an inadvertent violation occur, should remedy the error, make the employee whole, and write to the DOL that the employer is committed to future FFCRA compliance.

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[1] https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility.