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Department of Labor Issues Draft Regulations for Implementing Paid Sick Leave and Expanded Family and Medical Leave

On April 1, 2020, the U.S. Department of Labor ("DOL") published a draft of its regulations for implementing paid sick leave under the Emergency Paid Sick Leave Act ("EPSLA") and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). These regulations are scheduled to become published in their final form on April 6, 2020. A summary of the key takeaways from the regulations is provided below:

Definition of "Son" and "Daughter"

The regulations confirm that the same definition of the terms "son" and "daughter" apply under both the EPSLA and the EFMLEA to ensure consistency in the application of the two statutes. "Son" or "daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.

Definition of "Telework"

"Telework" refers to work the employer permits or allows an employee to perform while the employee is at home or at a location other than the employee's normal workplace. An employee is able to telework if: (1) the employer has work for the employee; (2) the employer permits the employee to work from the employee's location; and (3) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work. Telework may be performed during normal hours or at other times agreed upon by the employer and employee. Employers are encouraged to permit highly flexible work schedules that allow employees to work remotely, potentially at unconventional times.

Paid Sick Leave Entitlement

Employees may take paid sick leave under the EPSLA for the following qualifying reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;

a. For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority that cause the employee to be unable to work even though the employer has work that the employee could perform but for the order. This also includes when a federal, state, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.

b. An employee may use paid sick leave for qualifying reason (1) only if being subject to one of these orders prevents the employee from working or teleworking. The question is whether the employee would be able to work or telework but for being required to comply with an order.

c. An employee subject to a quarantine or isolation order may not take paid sick leave where the employer does not have work for the employee as a result of the order or other circumstances. For example, if the business closes due to a downturn in business or because it has been ordered to close, the employee still would not be able to work even if not required to stay home, and therefore the employee may not take paid sick leave for qualifying reason (1).

2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

   a. The need for leave must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or the employee is particularly vulnerable to COVID-19.

   b. Following the health care provider's advice to self-quarantine must prevent the employee from being able to work. If the employee is able to telework, leave may not be taken under qualifying reason (2).

3. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider;

   a. Any paid sick leave taken for qualifying reason (3) is limited to the time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

   b. An employee cannot take leave for qualifying reason (3) if the employee is in self-quarantine without seeking a diagnosis.

   c. An employee cannot take leave for qualifying reason (3) if the employee is able to telework while awaiting COVID-19 test results. However, if the employee is unable to telework while awaiting test results, the employee may take leave for qualifying reason (3).

d. If an employee is experiencing symptoms of COVID-19 but is not seeking a medical diagnosis, the employee may not take leave for qualifying reason (3). However, if a health care provider advises the employee to self-quarantine and doing so renders the employee unable to work, the employee may take leave for qualifying reason (2).

e. If an employee is experiencing symptoms of COVID-19, is advised by a health care provider that the employee does not meet the criteria for testing for COVID-19 and is advised to self-quarantine, and self-quarantine renders the employee unable to work, the employee may take leave for qualifying reason (2), but not for qualifying reason (3).

4. The employee is caring for an individual who is subject to an order as described in qualifying reason (1) or was advised by a health care provider for qualifying reason (2);

   a. "Individual" means an immediate family member, roommate, or similar person with whom the employee has a relationship that creates an expectation that the employee would care for that person. "Individual" does not include persons with whom the employee has no personal relationship.

   b. An employee caring for an individual may not take paid sick leave for qualifying reason (4) where the employer does not have work for the employee.

5. The employee is caring for his or her son or daughter whose school or place of care has been closed for a period of time, whether by order of a state or local official or authority or at the decision of the individual school or place of care, or the child care provider of such son or daughter is unavailable, for reasons related to COVID-19; or

   a. The employee may not take paid sick leave under qualifying reason (5) if another suitable person is available to care for the child during the period of leave.

   b. The employee may only take paid sick leave under qualifying reason (5) if the need to care for the child prevents the employee from being able to work or telework.

   c. The employee may not take paid sick leave under qualifying reason (5) if the employer does not have work for the employee.

6. The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

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Expanded FMLA Leave Entitlement

EFMLEA leave may only be taken when the employee is unable to work due to a need to care for the employee's child whose school is closed or child care provider is unavailable (i.e., the same reason as qualifying reason (5) for paid sick leave). The employee may not take EFMLEA leave if another suitable person is available to care for the child during the period of leave or if the employer does not have work available for the employee.

Impact of Intermittent Leave on Exempt Employee Status

Taking paid sick leave or EFMLEA leave does not impact an employee's status or eligibility for an exemption under the Fair Labor Standards Act. Thus, taking leave on an intermittent basis does not undermine the employee's salary basis for the exemption.

Amount of Paid Sick Leave

Full time employees are entitled to 80 hours of paid sick leave. An employee is full time if he or she is normally scheduled to work at least 40 hours each workweek. If an employee has a variable work schedule, he or she is also a full time employee if he or she was scheduled to work at least 40 hours per workweek over the previous six months (or, if the employee has been employed for less than six months, over the entire period of employment).

If a part time employee works a regular schedule, the employee is entitled to paid sick leave in the number of hours normally worked in two weeks. If a part time employee has a variable work schedule, he or she is entitled to paid sick leave as follows:

- If the employee has been employed at least six months, fourteen times the average number of hours that the employee was scheduled to work each calendar day over the previous six months.

- If the employee has been employed less than six months, fourteen times the number of hours the employee and the employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there was no such agreement, then fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment.

Compensation for Paid Sick Leave

For each hour of paid sick leave taken for qualifying reasons (1), (2), and (3), the employee must be paid the greater of the employee's regular rate, the federal minimum wage, or the state or local minimum wage. For each hour of paid sick leave taken for qualifying reasons (4), (5), and (6), the employee must be paid two-thirds of the foregoing amount.

Wages for sick leave taken for qualifying reasons (1), (2), and (3) are capped at $511 per day and $5,110 in the aggregate. Wages for sick leave taken for

qualifying reasons (4), (5), and (6) are capped at $200 per day and $2,000 in the aggregate.

Compensation for Expanded FMLA Leave

The first two weeks of EFMLEA leave are unpaid (though the employee may be eligible for paid sick leave during such time for qualifying reason (5)). After the initial two weeks of EFMLEA leave, the employee is entitled to two-thirds of the employee's regular rate times the employee's scheduled number of hours for each day of leave taken. Such wages are capped at $200 per day and $10,000 in the aggregate per employee.

If the employee has a normal work schedule, the "scheduled number of hours" means the number of hours the employee is normally scheduled to work on that workday.

If the employee has a variable work schedule and has been employed for at least six months, the "scheduled number of hours" means the average number of hours the employee was scheduled to work each workday over the previous six months.

If the employee has a variable work schedule and has been employed for less than six months, the "scheduled number of hours" means the average number of hours the employee and the employer agreed at the time of hiring the employee would work each workday. If there is no such agreement, then the "scheduled number of hours" is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment.

If an employee elects or is required to use leave available under the employer's existing policies (such as vacation or PTO) concurrently with EFMLEA leave, then the employer must pay the employee a full day's pay for that day.

Calculating the Regular Rate

As noted above, wages for paid sick leave and EFMLEA leave are paid based on the greater of the employee's regular rate of pay, federal minimum wage, or state or local minimum wage. In most cases, the employee's regular rate of pay is likely to be the greatest of these three options. The regulations establish particular guidelines for calculating the regular rate of pay—specifically, employers are to calculate the "average regular rate." First, employers are to follow the existing regulations set forth in 29 C.F.R. Parts 531 and 778 to compute the regular rate for each full workweek in which the employee has been employed over the previous six months (or, if the employee has been employed for less than six months, over the entire period of employment). (Generally, the regular rate is calculated by dividing all non-overtime compensation by all hours worked in the workweek—but please see the regulations in 29 C.F.R. Parts 531 and 778 for specific details about what to exclude from the regular rate calculation.) Next, the employer must compute the average of those weekly regular rates, weighted by the number of hours for each workweek.

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The DOL provides the following example of how to calculate the average regular rate over a two-week period. An employee receives $400 in non-excludable compensation in one week for working 40 hours, and $200 of non-excludable compensation in the next week for working ten hours. The regular rate in the first week is $10 per hour ($400 ÷ 40 hours), and the regular rate for the second week is $20 per hour ($200 ÷ 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ÷ 50 hours). NOTE: For the sake of simplicity, this example only examined the average regular rate over a two-week period. As specified in the preceding paragraph, an employer must compute the average regular rate over a six-month period (or the entire duration of employment, if less than six months).

Eligibility Under the EPSLA

All employees are eligible for paid sick leave under the EPSLA except: (1) health care providers and emergency responders; and (2) employers with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of a business as a going concern. Employees are eligible for paid sick leave under the EPSLA regardless of the duration of their employment.

Eligibility Under the EFMLEA

All employees who have been employed by an employer for at least 30 days are eligible for expanded family and medical leave under the EFMLEA except: (1) health care providers and emergency responders; and (2) employers with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of a business as a going concern.

An employee is "employed by an employer for at least 30 days" if: (1) the employer had the employee on its payroll for 30 calendar days before the day the employee's leave would begin; or (2) the employee was laid off on or after March 1, 2020 and rehired on or before December 31, 2020, and the employee had been on the employer's payroll for 30 or more of the 60 days before the employee was laid off. An example of the latter would be an employee who was originally hired by an employer on January 15, 2020, but laid off on March 14, 2020; this individual would be eligible for leave under the EFMLEA and the EPSLA, if the same employer rehired the employee, for instance, on October 1, 2020.

If an employee is hired by the employer after being employed by a temporary placement agency, then the employer will count the days the employee worked as a temporary employee toward the 30-day eligibility period.

An employee who has been employed by a covered employer for at least 30 calendar days is eligible for EFMLEA leave regardless of whether the employee would otherwise be eligible for leave under the FMLA. For example, an employee need not have been employed for 1,250 hours of service and twelve months of

employment as otherwise required under the FMLA to be eligible for leave under the EFMLEA.

Exclusion of Health Care Providers and Emergency Responders

As noted above, "health care providers" and "emergency responders" may be excluded from eligibility for leave under the EPSLA and the EFMLEA.

Who is a health care provider under the EPSLA and EFMLEA?

A "health care provider" is:

- Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

- Any individual employed by an entity that contracts with any of the foregoing institutions to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility.

- Anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Additionally, any individual that the highest official of a state, territory, or the District of Columbia determines is a health care provider necessary for that locality's response to COVID-19 is a "health care provider" who may be excluded from eligibility.

Who is an emergency responder under the EPSLA and EFMLEA?

An "emergency responder" is anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a state, territory, or the District of Columbia determines is an emergency responder necessary for that locality's response to COVID-19.

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Exemption for Health Care Providers and Emergency Responders

Notably, an employer's exercise of the option to exempt health care providers and/or emergency responders from eligibility under the EPSLA and/or the EFMLEA does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Nor can an employer prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.

Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from taking paid leave under the EPSLA or the EFMLEA, such leave is subject to all other requirements of those laws, and should be treated in the same manner for purposes of the tax credit created by the FFCRA.

Covered Employers

Generally, all private employers that employ fewer than 500 employees at the time an employee would take leave must comply with the EPSLA and the EFMLEA except: (1) health care providers and emergency responders; and (2) employers with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of a business as a going concern.

How does an employer determine the number of employees for purposes of EPSLA and EFMLEA?

Employers must count all full time and part time employees employed within the United States at the time the employee would take leave. "Within the United States" means employees within any state of the United States, the District of Columbia, or any territory or possession of the United States. For purposes of the employee count, every part time employee is counted as if he or she were a full time employee. The total employee count includes:

- All employees currently employed, regardless of how long those employees have worked for the employer;
- Any employees on leave of any kind;
- Employees of temporary placement agencies who are jointly employed under the Fair Labor Standards Act ("FLSA"), by the employer and another employer (regardless of which employer's payroll the employee appears on); and
- Day laborers supplied by a temporary placement agency (regardless of whether the employer is the temporary placement agency or the client firm).

Individuals who do not count as employees for this determination include: independent contractors under the FLSA; workers who have been laid off and have not subsequently been reemployed; and workers who have been furloughed and have not subsequently been reemployed.

The regulations also provide guidance on how to count employees of joint employers:

- All common employees of joint employers or all employees of integrated employers must be counted together.

- Generally, a corporation (including its separate establishments or divisions) is considered a single employer and all of its employees must be counted together.

- Where one corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees.

- In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA. If two entities are an integrated employer under this test, then employees of all entities making up the integrated employer must be counted.

Small Business Exemption

An employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing leave under the EPSLA and the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. **The exemption applies only to the requirement to provide leave because the school or child care provider of the employee's child is closed or unavailable (qualifying reason (5))**. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

- Providing leave 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;

- The absence of the employee 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(s) requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

To elect this small business exemption, the employer must document that a determination has been made pursuant to the criteria set forth above. However, the employer should not send such documentation to the DOL, but rather retain the records in its files.

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Leave to Care for Child Due to School/Childcare Closure – Intersection Between EPSLA and EFMLEA

Both the EPSLA and EFMLEA authorize paid leave for employees unable to work as a result of a need to care for a son or daughter whose school or childcare is no longer available due to COVID-19.

When both leave allocations apply, an employee utilizes two weeks of paid leave under the EPSLA, which runs concurrently with the first two weeks of unpaid EFMLEA leave. Once paid sick leave is exhausted, the remaining applicable leave time is paid under EFMLEA. When an employee has already taken traditional FMLA leave during the applicable 12-month period, however, the maximum amount of leave available is reduced by the amount of FMLA leave already taken.

Employers should take this opportunity to ensure that employees are aware of the applicable 12-month FMLA accrual period, such that appropriate leave is made available. As EFMLEA benefits must be used by December 31, 2020, employees do not become entitled to additional EFMLEA leave even if a new FMLA "year" begins during the remainder of this calendar year. Put differently, the maximum allowable amount of COVID-19-related leave under EFMLEA is 12 weeks.

Similarly, if an employee utilizes paid sick leave for a reason other than attending to a school or childcare closing, and then later becomes entitled to EFMLEA leave for a covered childcare reason, the employee is entitled to up to the full twelve weeks of EFMLEA leave to care for his or her child, but does not receive compensation for the first two weeks of that leave. The employee may, however, substitute PTO or other accrued leave to the extent applicable under the employer's relevant policies.

While the FMLA generally contains stringent eligibility requirements (such as having worked for the employer for at least one year and having worked at least 1,250 hours in the preceding 12 months), employees taking EFMLEA leave need only have been employed for 30 days. This lowered threshold does not, however, apply to other types of FMLA leave (baby bonding, etc.), for which eligibility requirements remain unchanged.

Employer Notice Requirements

The Department of Labor has prepared a model notice that is available for download from its website (https://www.dol.gov/whd) and must be posted in a conspicuous place at an employer's worksite. The same notice should also be distributed to remote employees via email or regular mail. Spanish language versions of the notice are also available.

Employee Notice Requirements

An employee unable to work as a result of school or childcare closure is required to provide reasonable notice to an employer as soon as practicable after the first workday (or portion thereof) for which leave is required. Employers are

permitted to require that employees comply with usual notice procedures, absent unusual circumstances.

Documentation provided by an employee confirming a need to utilize EPSLA or EFMLEA leave should include: (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. Depending on the applicable reason(s) for leave, the employee must also indicate whichever of the following apply: the government entity issuing the quarantine or isolation order to which the employee or individual under the employee's care is subject; the name of the healthcare provider advising the employee or individual under the employee's care to self-quarantine; and/or the name of the child and school or childcare facility that has become unavailable, along with a statement confirming that no other suitable person is available to care for the child during the period of requested leave.

Health Care Coverage

An employee taking EPSLA or EFMLEA leave remains entitled to continued health care coverage during his or her absence on the same terms as would have applied had the employee not taken leave. Employers should familiarize themselves with any requirements to notify insurance providers and are encouraged to contact their insurance brokers to ensure that appropriate obligations are satisfied.

If changes are made to healthcare benefits (such as changes to plans or changes to contributions/premiums) while an employee is on leave, the employee should be made aware of changes, and is required to participate/take action as necessary (including paying higher premiums, if applicable) under revisions to the plan.

Return to Work

An employee that utilizes EPSLA or EFMLEA leave is generally entitled to be restored to the same or an equivalent position upon return to work. This does not, however, protect an employee from other employment actions (such as layoffs) that would otherwise have impacted the employee regardless of whether leave was taken.

Recordkeeping

Records of requests and provision of leave under the EPSLA and EFMLEA must be kept for a minimum of four years. As a practical manner, however, records should be kept in employee personnel files (or separate employee medical files, if necessary) and retained in compliance with existing company policies, assuming that the four-year requirement is also satisfied.

Prohibited Acts and Enforcement

Employers are prohibited from discharging, disciplining, discriminating against, or otherwise taking any adverse employment action against employees

exercising their rights under the EPSLA and EFMLEA. Penalties for an employee's failure to provide required leave will be significant.

Additional Considerations Applicable to Interaction of Provisions

The EPSLA and EFMLEA are intended to be expansions of existing law. As a result, the EPSLA must be provided in addition to any other sources of leave which an employee has already accrued or used prior to April 1, 2020. The same holds true with the EFMLEA, except as applied above, in cases in which FMLA has already been utilized during an applicable 12-month period. An employee does not, however, have any right to utilize EPSLA and/or EFMLEA retroactively to apply to any leave taken prior to April 1, 2020.

An employee may choose to utilize EPSLA leave prior to using any other type of paid leave to which the employee may have been entitled, and an employer may not require, coerce, or unduly influence an employee to use an alternate source of paid leave before utilizing EPSLA or EFMLEA leave. An employee may, however, elect to utilize leave (such as PTO) available to that employee concurrently while utilizing EFMLEA leave to care for a child as a result of school or childcare closure. In such a case, the employer is required to pay the employee the full amount contemplated by the employer's leave policy, but the employer's tax credit will remain capped at the threshold set by the EFMLEA.

An employer has no obligation to provide employees with EPSLA and/or EFMLEA benefits that are not utilized prior to the conclusion of an employee's employment.

If an individual changes employers between April 1, 2020 and December 31, 2020, that individual is only entitled to a maximum of 80 hours of paid sick leave, total. The employee is therefore not entitled to an additional 80 hours of paid sick leave for each subsequent employer but is instead entitled only to a total of 80 hours across all employers during the applicable period.

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