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NEW DEPARTMENT OF LABOR REGULATIONS CLARIFYING THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT:

UPDATE FOR EMPLOYERS

On April 10, 2020, the United States Department of Labor (the "DOL") issued additional information and amendments in its ongoing series of regulations related to the Families First Coronavirus Response Act (the "FFCRA") to correct and clarify its prior guidance. The DOL's new correction is effective as of April 10, 2020.

I. Background

The FFCRA contains two Acts with major implications for employers: (1) the Emergency Paid Sick Leave Act (the "EPSLA") and (2) the Emergency Family and Medical Leave Expansion Act (the "EFMLA"). Both the EPSLA and EFMLA became effective on April 1, 2020 and are explained in detail in our Employer Alert Regarding COVID-19.

This Pappas Wright Update examines the most recent information from the DOL and its effect on employers who are covered by the EFMLA and EPSLA. Notably, the new correction has added additional criteria that an **employee** may need to satisfy in order to be entitled to leave under the EPSLA and/or EFMLA.

II. Changes to Employee Eligibility for Paid Sick Leave Entitlements Under the EPSLA and EPSLA

The Emergency Paid Sick Leave Act provides that an employee is entitled to up to two weeks of paid sick leave if at least one of six criteria is met. Below, we have provided an overview of those criteria. Please note, the changes effective April 10, 2020 are underlined and highlighted for ease of reference on the revisions.

An employer covered by the EPSLA is required to provide an employee with paid sick leave under the EPSLA if the employee is unable to work or telework (work remotely) and requests paid sick leave because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
(4) The employee is caring for an individual who **depends on the employee to care for them** and that individual is subject to Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine **because of the health care provider's belief that the**

(5) **individual has COVID-19, the individual may have COVID-19 due to known exposure or symptoms, or the individual is particularly vulnerable to COVID-19.**

(6) The employee is caring for their own child (under the age of 18) if the child's school or place of childcare is closed due to COVID-19 or the child's childcare provider is unavailable due to COVID-19; or,

(7) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. **(There has not been any additional clarification on such conditions)**

As noted above, the DOL has provided further clarification on leave needed to care for "an individual." The original EPSLA language left this criteria significantly open-ended. Some even wondered if employees would be eligible for paid leave to care for a neighbor or friend. The new DOL guidance provides further limiting clarifications.

Specifically, the DOL has now confirmed:

- When an employee seeks leave to "care for an individual", the employee must establish that the individual in question **depends on the employee** for care; and that
- The individual has been advised to self-quarantine by a health care provider because::
  - **the individual has COVID-19,**
  - **the individual may have COVID-19 due to known exposure or symptoms, or**
  - **the individual is particularly vulnerable to COVID-19.**

The DOL's new amendment further clarified what information is required to substantiate the need for leave. Specifically, an employee must provide their employer with:

- 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 COVID-19 related concerns.

In its original drafting, the EPSLA left many questions regarding eligibility and substantiating documentation unanswered. Today, we now have some clarity that an employee seeking leave to care for someone, other than their own child, will be required to meet and establish a need-based level of proof. We recommend all businesses incorporate these requirements into the employee request forms and processes under the EPSLA. This will curb approval of inappropriate requests and facilitate better documentation for employers to establish the tax credits available to fund the leave.

III. Changes to Employee Eligibility for Leave under the EFMLA

The Emergency FMLA expands the existing Family and Medical Leave Act (FMLA) providing an additional basis upon which an employee may qualify for protected leave. The Emergency FMLA is distinct from traditional FMLA in five main ways:

1. EFMLA applies to any employer with less than 500 employees. *(this now extends FMLA coverage to employers who were previously exempt with 50 or less)*
2. An employee may qualify for EFMLA by simply being on the employer's payroll for 30 days or more. *(the 1250 hours, 12 month traditional FMLA prerequisites do not apply)*
3. EFMLA provides paid leave.
4. EFMLA has nothing to do with a serious health condition.
5. EFMLA provides up to 12 weeks of leave from April 1, 2020 through December 31, 2020 even if the leave spans two employer FMLA-periods.

As all employers know, traditional FMLA is focused on an employee's own serious health condition. EFMLA is based purely on childcare. EFMLA. An eligible employee may be entitled to leave under the EFMLA if the employee is unable to work or telework due to a need to care for the employee's own child whose school or place of childcare is closed due to COVID-19 or the child's childcare provider is unavailable due to COVID-19.

Given the nature of COVID-19 and all of its unknowns, businesses all throughout the United States have suffered in various ways. Employees range from front-line heroes to non-essential individuals who have been laid off. Significant sectors of employees have been moved out of employer worksites and shifted to performing remote work. There are then, of course, many employees who are home sick. For one of many different reasons, many households have two caregivers at home while schools and daycares are closed. What then, do employers do, to determine who qualifies for EFMLA leave?

On April 10, 2020, the DOL provided a broad clarification on the childcare provisions. Specifically, the DOL's correction states that an employee will be entitled to leave under the EFMLA **only if there is no other suitable person available to care for the child during the period where leave is requested**. While "suitable person" is not otherwise defined – this does provide employers with some authority to clarify that an employee is seeking such leave on a needed basis. This clarification mirrors the intent of the change in the EPSLA, as well, which requires an employee establish he/she is needed to care for the individual that forms the basis of the leave request.

This modification should be incorporated into an employer's leave request form and/or process. Specifically, to ensure compliance with the documentation needed by the IRS to approve the tax credits, employers should require leave EFMLA and EPSLA leave requests based on childcare to be supported by documentation confirming: EFMLA:

(1) the name and age of the child (or children) to be cared for;

(2) the name of the school that has closed or place of care that is unavailable;

(3) a representation that no other person will be providing care for the child during the period for which the employee is taking leave; and,

(4) If the child or children in question are between the ages of 14-17, a statement that special circumstances exist requiring the employee to provide care during daylight hours.

IV. Limitation on EFMLA Spanning Two Employer FMLA-Periods

Under the traditional FMLA provisions, an employee has up to 12 weeks of leave during a 12-month period of time. If that leave is exhausted within the one-year timeframe, an employee may be denied FMLA leave on that basis.

In its most recent guidance on April 10, 2020, the DOL clarified that EFMLA does not provide two separate leave entitlements if an employer's FMLA leave 12-month period ends/begins from April 1 through December 31, 2020. The EFMLA is a one-time use 12-week allotment. Specifically, the DOL's new guidance states that an eligible employee may take a maximum of 12 weeks of EFMLA leave during the period between April 1, 2020 and December 31, 2020, even if that period spans two FMLA leave 12-month periods. The 12-week leave entitlement under the EFMLA does not reset with the employer's FMLA leave period. Traditional FMLA leave would be subject to the same rules as before. It is important to remember that an employee may only use a total of 12-weeks of FMLA, which includes both traditional FMLA leave and EFMLA leave.

To put the DOL's EFMLA clarification differently, an employee will never be entitled to more than 12 weeks of EFMLA leave from April 1, 2020 through December 31, 2020. A few examples to help illustrate this point:

- If an employer's 12-month period for FMLA eligibility starts in September 2020 and an employee has already taken 4 weeks of EFMLA in July 2020, the employee will only have 8 weeks of EFMLA leave remaining to use before December 31, 2020.
- If an employer's 12-month period for FMLA eligibility starts in October 2020 and an employee used 12 weeks of EFMLA during the summer, the employee will not have any EFMLA leave left to use.

V. Limitations on Paid Sick Leave Wages

An employee who is entitled to paid sick leave under the EPSLA will receive paid leave in an amount determined by the reason for leave.

Under the EPSLA, an employee will be entitled to sick leave wages at a rate equal to 100% of the greatest amount between the employee's regular rate of pay, the Federal minimum wage, and

the applicable State or local minimum wage if the employee takes paid sick leave for one of the following reasons.

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or,
(3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

Many employers have contemplated various ways to address the maximum caps provided under the EPSLA, considering the tax credit implications. The DOL's most recent guidance clarifies a gray area that existed with regard to such pay. Specifically, the DOL's correction states that an employer shall not be required to pay sick leave wages exceeding $511 per day and $5110 in the aggregate to an employee who takes paid sick leave under the EPSLA pursuant to reasons 1-3 above.

Further, for employers who compensate their employees at their regular rate of pay which exceeds the maximum allowed, the DOL has confirmed an employer will not be eligible to receive IRS tax credits for EPSLA wages paid in excess of the $511/$5110. **Therefore, if you have employees whose salary/wages exceed the $511/$5110 maximums, please ensure your payroll and finance departments are fully aware that the tax credits may only be up to the maximum amount, even if the employer pays more for the leave on their own accord.**

In certain other situations, an employee will be entitled to a lesser rate of pay for sick leave wages under the EPSLA. An employee will be entitled to sick leave wages at a rate of at least 2/3 of the greatest amount between the employee's regular rate of pay, the Federal minimum wage, and the applicable State or local minimum wage if the employee takes paid sick leave for one of the following reasons.

(4) A need to care for an individual who is dependent on the employee for care and
    a. is subject to a Federal, State, or local quarantine or isolation order or
    b. has been advised by a health provider to self-quarantine due to the health provider's belief that the individual has COVID-19, may have COVID-19 due to known exposure or symptoms, or is particularly vulnerable to COVID-19;
(5) A need to care for the employee's own child (under the age of 18) if the child's school or place of childcare is closed due to COVID-19 or the child's childcare provider is unavailable due to COVID-19; or,
(6) The employee's experience of any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. **(Such conditions have not yet been defined)**

Again, the DOL has clarified that an employer has no requirement to pay wages in excess of the minimum. Further, the DOL's correction also confirms an employer will not be

eligible to receive IRS tax credits for EPSLA wages paid in excess of the $200/$2000 maximums.

VI. Employer Supplement of EFMLA Leave Pay with Accrued Paid Time Off

Under the EFMLA, an employee receives payment either in the amount of 2/3 their rate of pay or $200/day if they make over $300/day. Employers continue to determine their workforce structures and continuity of payroll options in response to COVID-19 and the economic uncertainty it has brought.

Many employers have wondered about supplementing the EFMLA wages with other accrued paid time off. Specifically, the question of whether this was an employee's right to elect or an employer's option to require remained open until yesterday. One of the remaining clarifications obtained through the DOL's correction, was an explicit acknowledgement that **employers may require employees to supplement their EFMLA pay with accrued paid time off ("PTO") per the employer's own policy.** The supplemental use of other leave accruals allows an employee to receive their regular wages.