

Service

Labor & Employment

Coronavirus-Related School or Daycare Closures

Our April 6, 2020 post, [20 Need-to-Know Provisions for Employers from the Department of Labor \(DOL\) temporary regulations](#), alerted employers to a significant gap in DOL guidance concerning the circumstances under which an employer may *require* an employee to use leave under a company policy (commonly called paid time off “PTO”) concurrent with leave under the Families First Coronavirus Response Act (FFCRA), and when the employee can choose. As has become typical, updated DOL guidance mixes some clarity with confusion. Our summary below reflects our understanding of the new guidance in light of DOL temporary regulations issued on April 1, 2020.

As a reminder, there are two forms of leave under the FFCRA: (1) emergency sick pay provided under the Emergency Paid Sick Leave Act (EPSLA) and (2) expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA). In general, EPSLA leave is limited to two weeks of pay for six different reasons related to COVID-19 (including childcare reasons), while EFMLEA is available for 12 weeks but only for reasons related to a child’s school or place of care closure due to COVID-19.

The bright-line rule is that emergency sick leave is in addition to any other sick pay provided under an employer’s policies, other laws or a collective bargaining agreement. Thus, employers cannot require employer-provided paid leave to run concurrently with (cover the same hours as), or substitute for, paid sick leave under EPSLA.

It gets tricky when an employee needs an extended leave (beyond two weeks) to care for a child whose school or place of care has shut down due to COVID-19. The FFCRA requires employers to pay only two-thirds of the employee’s regular rate of pay, capped at \$200 per day (and \$10,000 in the aggregate). Some employees, worried about losing out on a significant amount of income,

may ask their employers to use a blend of EPSLA, EFMLEA and employer-provided PTO to make themselves whole.

In its updated guidance, the DOL states that during the first two weeks of EFMLEA leave (which is unpaid), and assuming the employee has not already used any EPSLA time, an employee may elect to use *either* paid leave available under the employer's policies or emergency sick pay under EPSLA – but not both. Where an employee has *already* used some or all of EPSLA leave for reasons other than childcare, the EPSLA leave bank is thereby exhausted, and the employee can choose to substitute accrued PTO for the first two weeks of unpaid EFMLEA. This should simplify EPSLA administration somewhat, as the employee has only two options: either apply EPSLA leave under the statute (assuming EPSLA has not already been used for another reason) or employer PTO during the first two weeks of a school or daycare closure leave.

For the remaining 10 weeks of expanded family and medical leave, employers may choose to *require* concurrent use of PTO, as is permitted under the “regular” Family and Medical Leave Act. The DOL regulations further suggest that such a requirement would be pursuant to a company-wide policy, not applied on a piecemeal basis. Further, even if an employer does not choose to require concurrent use of PTO and EFMLEA, DOL guidance and regulations give employees the right to choose it.

Where concurrent use of company leave is required by the employer or elected by the employee, the employer must pay an employee full pay (not two-thirds) under company policies providing for vacation and/or personal time (not sick or medical time) during the expanded family and medical leave (i.e., while the EFMLEA “clock” is ticking) until such time is exhausted. While the employer is providing full pay, it is only entitled to FFCRA tax credits equivalent to wages paid at two-thirds of the employee's regular rate of pay, up to the daily limit of \$200 per day or \$10,000 in total. Once the employee's PTO is exhausted, and if an employee has more EFMLEA leave time remaining, the employee would receive pay for the remainder of the leave at the two-thirds rate, subject to the daily (\$200) and aggregate (\$10,000) limits.

In addition, employers and employees may agree to other alternative arrangements. For instance, instead of requiring concurrent use as described above, which reduces employees' PTO bank in full-day increments, an employer could agree to pay EPSLA and/or EFMLEA leave at the two-thirds statutory rate, and provide company PTO on top, in increments that would supplement the employee's lost one-third pay.

In summary, EPSLA leave is on top of and in addition to any other leave available to an employee; it cannot legally be used instead of or concurrent with employer-provided leave. Supplementing EPSLA with accrued PTO to allow an employee to receive full pay (instead of two-thirds) would be

permissible but only with agreement of both employee and employer. In the case of an extended school or daycare closure leave, if an employee has used any or all of his or her EPSLA leave for non-childcare reasons, he or she may choose to use employer-provided PTO for the first two unpaid weeks of expanded family and medical leave. For the remaining 10 weeks, employers may choose to implement a policy of mandatory concurrent use of employer-provided leave with EFMLEA leave, or they may choose to implement more generous policies in order to make employees whole. As always, employers should be careful to craft clear policies and apply procedures in a consistent, non-discriminatory manner.

Contact us

If you have further questions or require more information regarding this update, please contact Stacey Bowman, Kate Leveque or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.