As Businesses Reopen, the DOL Continues to Update FFCRA Q&As

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On July 17, the Department of Labor (DOL) issued additional Q&As related to COVID-19. Though employers are probably exhausted by these updates, the Q&As provide guidance that will help businesses stay compliant during the pandemic. This blog summarizes the new Q&As, which are numbered 94 through 97, but we recommend that employers and their human resources teams review the FAQs in their entirety.

Can an employer require an employee who was on FFCRA leave to care for a self-quarantined parent with symptoms of COVID-19 to telework or take leave until the employee tests negative for COVID-19?

An employee returning from FFCRA leave typically has a right to be restored to the same or an equivalent position. Because of the public health emergency and the employee's potential exposure to an individual with COVID-19, the employer may require the employee to telework or opt to temporarily reinstate the employee to an equivalent position that requires less interaction with other employees. If an employee has interacted with a COVID-infected person, his or her employer may require the employee to telework or take leave until the employee has tested negative for COVID-19 infection pursuant to a policy applicable to all employees who have had contact with an infected person.

However, an employer may not require an employee to telework or be tested for COVID-19 simply because the employee took FFCRA leave.

Can an employee who used two weeks (80 hours) of paid sick leave under the FFCRA, before the employee was furloughed, use paid sick leave under the FFCRA again after the employee returns to work?

Employees are entitled to only 80 hours of paid sick leave under the FFCRA. If the employee has used less than 80 hours before being furloughed, the employee would be entitled to use any remaining hours after the employee returns to work if the leave is for a qualifying reason.

What happens when a furloughed employee who previously used emergency family and medical leave under the FFCRA returns to work but needs additional leave to care for his or her child because childcare is unavailable due to COVID-19?

The employee is entitled to up to 12 weeks of emergency family and medical leave under the FFCRA. Any qualifying leave used before the furlough would be deducted from that balance and the employee would be entitled to utilize any unused portion of the 12-week allotment. Of course, the weeks the employee was furloughed would not count against the leave balance. Employers should treat post-furlough requests for emergency family and medical leave as a new leave request. For example, before the furlough, the employee may have needed leave because the child's school was closed but may now need leave because the child's summer camp is closed due to COVID-19-related reasons.

Can an employer extend a former employee's furlough because the employee would need to take FFCRA leave to care for a child when the business reopens?

This is a definite no. This would expose the employer to potential liability for discrimination and retaliation because the furlough decision would be based upon the employee's exercise of his or her right to utilize leave under FFCRA. If the employee's leave request qualifies under FFCRA, the employee has a right to utilize that leave and an employer may not use the leave request (or an assumption that an employee needs leave) as a basis for a negative employment action.

Additional Resources

As a best practice, employers should continue to monitor the COVID-19 related guidance being issued by the DOL. Employers may seek additional answers to frequently asked questions regarding the use of emergency paid sick leave (EPSL) and emergency family and medical leave (EFMLA) on the DOL's FFCRA website. In addition, be sure to follow our blog and review our ReedGroup Coronavirus Resource Center which includes FAQs, links to compliance webinars, and other COVID-19 related materials.

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