Coates' Canons Blog: Highlights of the U.S. Department of Labor's FFCRA Regulations

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THIS BLOG POST HAS BEEN UPDATED ON SEPTEMBER 30, 2020

On Monday morning, April, 6, 2020, the U.S. Department of Labor ("DOL") issued regulations implementing the Emergency Family and Medical Leave Expansion Act (the Emergency FMLA Act") and the Emergency Paid Sick Leave Act (the "Sick Leave Act"), both part of the Families First Coronavirus Response Act (FFCRA). This blog posts highlights the provisions of these new regulations likely to be of greatest interest to North Carolina government employers. It supplements and is intended to be used in conjunction with the Coates' Canons blog posts *How the Paid Sick Leave Provisions of the Families First Coronavirus Response Act Affect Government Employers* and *Which Tax and Retirement Deductions Must Be Taken from FFCRA Emergency Paid Leave?*, both of which have been updated to take account of the final regulations.

BACKGROUND

The emergency paid leave provisions of the FFCRA are found in two separate sections of the Act. The first section, the Emergency FMLA Act, adds a new category of leave eligibility to the original Family and Medical Leave Act. It applies to times when an employee is unable to work because of school closures or the unavailability of childcare due to the COVID-19 crisis. The Emergency FMLA Act mandates that this new form of leave ("childcare FMLA") be paid leave after the first 10 days. The Emergency FMLA Act says that the rate of pay should be calculated by multiplying the number of hours the employee would normally be scheduled to work each week by an amount that is "*not less than two-thirds* of an employee's regular rate of pay." An employer will not be required to pay an employee more than $200 per day or $10,000 total.

The second section, the Sick Leave Act, requires employers to provide 80 hours of paid sick leave ('emergency paid sick leave") to employees who are unable to work 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 their healthcare provider to self-quarantine because they are infected with or have been exposed to COVID-19 or because they are at high risk of complications from COVID-19;
3. The employee is showing symptoms of COVID-19 and is seeking but has not yet received a medical diagnosis;
4. The employee is caring for someone subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by their healthcare provider to self-quarantine for COVID-19 related reasons; or
5. The employee is caring for their son or daughter because the child's school or childcare facility has been closed or the childcare provider is no longer available because of a COVID-19 related reason.

The last reason, of course, is similar to the qualifying reason for emergency FMLA leave.

The amount of emergency paid sick leave taken for reasons 1, 2 and 3 is calculated by multiplying the number of hours an employee would normally be scheduled to work by the employee's regular rate of pay. An employer will be required to pay an employee a maximum of $511 per day or $5,110 total. The amount of emergency paid sick leave taken for reasons 4 and 5 is calculated by multiplying the number of hours an employee would normally be scheduled to work by two-thirds of the employee's regular rate of pay. An employer will be required to pay an employee a maximum of $200 per day or $2,000 total.

Both the Emergency FMLA Act and the Sick Leave Act permit employers to exclude health care providers and emergency responders from the requirements to provide paid emergency FMLA leave and emergency paid sick leave.

Both acts apply to all government employers. To be eligible for emergency FMLA leave, an employee must have worked for the employer for a minimum of 30 days. There are no eligibility requirements for emergency paid sick leave. Both full-time and part-time employees, as well as temporary employees, are entitled to take emergency paid FMLA leave and emergency paid sick leave.

An overview of the Emergency FMLA Act and the Sick Leave Act can be found here.

THE FINAL FFCRA REGULATIONS

While the new final regulations are broadly consistent with guidance DOL originally gave on its FFCRA Frequently Asked Questions webpage (since updated to reflect the new regulations), the regulations diverge from the guidance in significant ways. In addition, the regulations occasionally depart from the text of the Emergency FMLA Act or the Sick Leave Act. In most instances, the differences have come about because DOL has chosen to use its rule-making authority to ensure that the Sick Leave Act and the Emergency FMLA Act are implemented consistently with each other. The ability to make these two acts work together is part of the authority the FFCRA has granted DOL to ensure that the purposes of the FFCRA are carried out. *See* FFCRA section 3102(b) (Emergency FMLA Act), as amended by section 36117(7) of the CARES Act, and section 5113(3) (Sick Leave Act).

Yet that DOL has not always made provisions that differ consistent. To be eligible for emergency FMLA leave, for example, an employee must have been employed by their employer for at least 30 days. There is no minimum service requirement for an employee to be eligible for emergency paid sick leave. DOL has not changed those eligibility requirements in the new regulations. They remain different.

HIGHLIGHTS OF THE FINAL FFCRA REGULATIONS

A. Exclusion of Emergency Responders

The FFCRA final regulations makes only a small substantive change to the definition of emergency responders for the purpose of excluding these positions from the provisions of the Sick Leave Act and the Emergency FMLA Act. It adds to the list of employees who may be excluded “child welfare workers and service providers.” The full explanation of who qualifies as an emergency responder is as follows:

> . . . an emergency responder is anyone necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or 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 that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19 [emphasis added].

See 29 CFR § 826.30(c)(2).

Government employers should be aware that the definition of emergency responders includes “individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.” This phrase allows local governments to exclude from FFCRA coverage any employee working in a department that provides the types of essential services listed above where the local government employers considers that employee needed to support the substantive work of the department. For example, an administrative assistant working in a police department could be considered to fall within the exclusion for law enforcement officers if the city manager and chief of police consider

that position essential for carrying out the law enforcement mission in the COVID-19 crisis. Similarly, any employee that a county social services or consolidated human services department considers essential to providing services may be excluded from the provisions of the FFCRA, whether that employee works as a social services caseworker or intake worker or as support staff.

B. Emergency FMLA Leave and Emergency Paid Sick Leave to Care for a Child

Under both the Emergency FMLA Act and the Sick Leave Act, paid child care leave is available only when the employer has work for the employee and the employee is unable to perform that work due the need to care for a child due to a school closure or because the employee's regular child care provider is unavailable due to COVID-19 related reasons. The new final regulations make two additional and important points. First, employees for whom there is no work (either because the workplace is closed and they cannot work remotely or despite the fact that they could work remotely, the employer has no work to assign) are not eligible for either emergency FMLA leave or emergency paid sick leave. Second, employees may take emergency leave on this basis "only if no suitable person is available to care for" their child. *See* 29 CFR §§ 826.20(a)(8) and (9).

Who is a Child (Son or Daughter) for the Purposes of Emergency FMLA and Emergency Paid Sick Leave?

Employers should use the same definition of "son or daughter" as applies to regular FMLA. This 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." *See* 29 CFR § 825.10(a).

Childcare Providers under the Sick Leave Act and the Emergency FMLA Act

The Emergency FMLA Act defines "child care provider" as one who provides child care services on a regular basis and receives compensation for those services. It excludes the situation where a family member has been providing child care and is no longer available. See section 3102(b) of the Families First Act. The Sick Leave Act, on the other hand, provides emergency paid sick leave for an employee who cannot work because schools are closed or their regular childcare provider is unavailable regardless of whether that provider is paid to look after the children or not.

But under its authority to issues regulations that make the rules governing emergency FMLA leave and emergency paid sick leave consistent with one another, DOL has defined "child care provider" for the purposes of both Acts to include family members and friends who provide child care without being paid:

> The term ''Child Care Provider'' means a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law as described in section 9858c(c)(2)(E) of Title 42; and satisfies the State and local requirements, including those referred to in section 9858c(c)(2)(F) of Title 42. Under the Families First Coronavirus Response Act (FFCRA), the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee's child.

See 29 CFR 826.10(a).

School Closures

The definition of "school" does not include home schooling. It is unclear whether the unavailability of the person who normally home schools an employee's child triggers eligibility for either emergency FMLA or emergency paid sick leave. *See* 29 CFR § 825.10(a).

Summer Camps and Enrichment Programs

Although it is only early April on the date of publication of this blog post, a number of summer camps and summer enrichment programs around the state have already announced cancellations of their entire summer offerings. Under the FFCRA regulations, the closing of summer camps and summer enrichment programs for COVID-19 related reasons

qualify employees for emergency FMLA leave and emergency sick leave, just like school closures. *See* 29 CFR § 825.10(a).

C. Employees Who Are Able to Work Remotely (Telework)

DOL uses the term “telework” to describe a situation in which an employee works from home or from a location other than the employee’s regular worksite. For the purposes of the FFCRA, DOL consider an employee as able to telework if:

- the employer has work for the employee;
- the employer permits the employee to work remotely; and
- there are no extenuating circumstances such has serious COVID-19 symptoms that prevent the employee from performing the work.

Telework does not have to performed during an employee’s regularly scheduled hours but may be performed at other times or even intermittently, but only if both the employer and the employee agree. In the case of nonexempt employees who are teleworking outside their regular working hours or intermittently during the day, the FLSA regulations relating to the continuous workday will not apply. *See* 29 CFR § 826.10(a) and 29 CFR § 790.6.

D. Employees for Whom There is No Work or Who Are Furloughed during the COVID-19 Crisis

There will be numerous employees for whom there is no work during the course of the COVID-19 emergency. In some cases, it will be because employees perform work that must be done at the employer’s worksite and cannot be done remotely. These employees may or may not be told by their employers that they are furloughed. Whether furloughed or simply unable to leave the house, these employees may not take emergency paid sick leave because their employer does not have work for them. Emergency paid sick leave is only available where an employee would otherwise be working but for one of the five qualifying reasons set out in the Sick Leave Act. *See* 29 CFR § 826.20(a)(2).

This also true where an employee has been advised by their health care provider to self-quarantine because the provider believe that the employee has or may have COVID-19 or has a medical condition that makes the employee particularly vulnerable to COVID-19 and its complications. If the employer has no work for the employee anyway, notwithstanding the advice to self-quarantine the employee is not eligible for paid sick leave. *See* 29 CFR § 825.826.20(a)(3).

E. Sick Leave Act Qualifying Reasons #1 and 4: Subject to a Quarantine or Isolation Order

The Sick Leave Act lists five currently effective reasons for which an employee is entitled to emergency paid sick leave. Reason #1 is because the employee himself or herself is subject to a federal, state or local quarantine or isolation order related to COVID-19. Reason #4 includes the situation where an employee is caring for someone else subject to a federal, state or local quarantine or isolation order related to COVID-19. One of the most surprising definitions in the final FFCRA regulations is that of “subject to a quarantine or isolation order,” which is significantly broader than might appear from the language of the Sick Leave Act.

The final regulations define “subject to a quarantine or isolation order” to include:

> 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 his or her 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. (emphasis added).

See 29 CFR §825.10(a).

This expansive definition has the greatest effect on employees whose job duties require them to travel to the employer’s worksite as they are the only employees who would be unable to work (if the employer has work for them to do) because they have been ordered not to leave their residence. Employees who are able to work remotely (or telework, as DOL refers to it) would not be unable to work because of a quarantine or isolation order or a stay-at-home order.

Under Governor Cooper's stay-at-home order for all of North Carolina, and under the policies of most local governments, only those employees whose services are essential may now report to work. The positions identified as emergency responders by the new FFCRA regulations are covered by Governor Cooper's definition of employees providing essential services and may therefore report to work.

Some Hypothetical Situations Involving Employees Subject to a Quarantine or Isolation Order

To better understand the regulations' definition of "subject to a quarantine or isolation order," compare the following hypothetical situations:

> **1. Mary is a paramedic for Paradise County**. Her work can only be performed at the EMS station and out in the field. Paradise County has exempted its emergency responders from the emergency paid sick leave provisions of the FFCRA, with the exceptions of emergency sick leave qualifying reasons #1, 2 and 3 (which have to do with the employee's own health). If Mary were to get sick with COVID-19, be advised to stay at home by her health care provider or be seeking a diagnosis of COVID-19, she would be able to use 80 hours of emergency paid sick leave for those reasons.
>
> The county has much work for Mary to do. Although it has exempted emergency responders from eligibility for emergency paid sick leave for reason #1, Mary may not use emergency paid sick leave for 80 hours on the basis of the Governor's and the county's stay-at-home orders because they expressly exclude essential personnel like emergency medical services workers from the stay-at-home order.
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> **2. Randy is a recreation assistant in Paradise County's parks and recreation department.** Neither Governor Cooper nor Paradise County consider parks and recreation is an essential service and parks and recreation employees are not emergency responders within meaning of the FFCRA. There is no work for Randy, who supervises youth sports leagues, to do. As a result, the county has directed Randy not to come to work. Randy is not eligible for emergency paid sick leave because the county does not have work that Randy could do even if the Governor and the county had not issued stay-at-home orders.
>
> **3. Larry is a planner for Paradise County.** He does not fall within the FFCRA's definition of emergency responder nor does his position fall within the Governor's definition of essential services. Larry is currently analyzing the county's planning and zoning regulations and procedures for conformity with the North Carolina General Assembly's recent changes to the statutes governing local government planning. This is work that he can do at home. The Governor's and county's stay-at-home orders do not make him unable to work, so Larry is not eligible to take emergency paid sick leave because is subject to a quarantine or isolation order as those terms are defined in the final regulations.

What If an Employee Needs to Care for Someone Who is Subject to a Stay-at-Home Order (Reason #4)?

Every child in North Carolina is now subject to a quarantine or isolation order in the form of a stay-at-home order. So employees with children that must be cared for or supervised in the home will be able to avail themselves of emergency FMLA leave or emergency paid sick leave (under reason #5) if no one else is available to care for them. But what if the employee must care for someone who is not a child, such as a spouse or parent, solely because that person is subject to a stay-at-home order? The only situation that the author can envision in which an employee would have to care for an adult member of their household because of a stay-at-home order would be if that adult were disabled in some way and that person's regular adult daycare or in-home care provider were unable to provide care because of a COVID-19 related reason. In such a situation,

- employees who are able to telework would be entitled to 80 hours of emergency paid sick leave in those circumstances where their employers have work for them;
- employees who are not emergency responders or otherwise essential employees still expected to report to the worksite will also be able to use emergency paid sick leave in those circumstances where their employers have work for them;
- employees who cannot come into the workplace but who have been directed to stay home because their employers have no work for them to do (furlough) will not be entitled to emergency paid sick leave because one

element of eligibility under reason #4 (as it is in reason #1) is that the employer would have work for the employee to do if they were able to come to work but for the stay-at-home order.

F. Treatment of Other Qualifying Reasons for Emergency Paid Sick Leave under the Final Regulations

Employee Seeking a Diagnosis of COVID-19

Employers have wondered how to apply the third reason for which emergency paid sick leave may be granted: when the employee is showing symptoms of COVID-19 and is seeking but has not yet received a medical diagnosis. Under new 29 CFR § 826.20(a)(4), an employee qualifies for leave for this reason if the employer has work for the employee *and* the employee

- has any *one* of fever, dry cough, shortness of breath, or any other symptom subsequently identified at https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html; and
- the employee is taking "affirmative steps" to get a diagnosis.

Examples of an affirmative step to obtain a medical diagnosis include making, waiting for or attending an appointment for a test for COVID-19. Use of emergency paid sick leave under this qualifying reason is limited to the actual time an employee is unable to work because he or she is making an appointment, waiting to be called for an appointment or at an appointment. An employee is not entitled to use emergency paid sick leave during the period between when an appointment is made and the actual appointment or while waiting for a test result if the employee is otherwise able to work or telework. *See* 29 CFR § 826.20(a)(4).

Employee is Caring for Another

The Sick Leave Act says that the fourth reason for which an employee may take emergency paid sick leave is because the employee is caring for someone who is subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by their healthcare provider to self-quarantine for COVID-19 related reasons. The new final regulations make clear that to be eligible for emergency paid sick leave on this basis, the employer must have work for the employee and the employee must be needed to care for

> an immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, "individual" does not include persons with whom the Employee has no personal relationship."

See 29 CFR §§ 826.20(5) and (6). It will be hard, if not impossible, for an employer to judge whether an employee has a relationship with a particular person that creates an expectation the employee would care for this person for COVID-19 related reasons. The practical effect of this definition appears to be that it does not allow an employee to use emergency paid sick leave to engage in the care of strangers for either paid or humanitarian purposes.

G. Calculating the Rate of Pay for Emergency FMLA Leave and Emergency Paid Sick Leave

Full Time versus Part Time Employees

For the purposes of the FFCRA, a full-time employee is one who is normally scheduled to work at least 40 hours each workweek. A full-time employee is entitled to 80 hours of emergency paid sick leave for qualifying reasons. An employee who normally works fewer than 40 hours each workweek is a part-time employee. Part-time employees are entitled to the number of hours of paid emergency paid sick leave equal to the number of hours that the employee is normally scheduled to work across two workweeks.

There are special rules for determining the amount of emergency paid sick leave full- and part-time employees get when they do not work a regular schedule. *See* 29 CFR §§ 826.21(a)(3) and (b)(2).

Although the Emergency FMLA Act does not categorize employees as full-time or part-time, the amount of compensation that an employee taking emergency paid FMLA leave will receive will depend, in part, on the number of hours that the

employee regularly works. *See* 29 CFR §§ 826.23 and 826.24.

The Amount of Pay

The new final regulations make no fundamental changes to the way the calculation of pay for emergency paid sick leave and emergency FMLA leave is set forth in the Sick Leave Act. See the discussion on calculating emergency sick leave pay in my earlier blog post, *How the Paid Sick Leave Provisions of the Families First Coronavirus Response Act Affect Government Employers*. The regulations do provide that the term "regular rate" as it is used in the FFCRA means *the average regular rate*. Employers are instructed to calculate an employee's regular rate in accordance with the Fair Labor Standards Act regulations for each full workweek that the employee has been employed over:

- the six-month period prior to the date on which the employee begins emergency paid sick leave or emergency FMLA leave, or
- the employee's entire period of employment where the employee has been employed for fewer than six months.

See 29 CFR § 826.25.

Supplemental Pay

The FFCRA regulations address the issue of using supplemental pay to make whole an employee who is only receiving emergency FMLA leave at two-thirds of their average regular rate of pay. New section 826.160(c) provides that neither the employer nor the employee may require the substitution of accrued paid leave on a full or pro-rata basis to supplement the payment made as emergency paid FMLA leave. Employer and employee *may agree* to use accrued paid leave in this way, however.

Emergency paid sick leave taken for qualifying reasons #1 – 3 is paid at an employee's regular rate of pay and thus does not require supplementation. But emergency paid sick leave taken for qualifying reasons #4 and 5 are paid at two-thirds of an employee's regular rate of pay. The regulations do not address whether employer-provided accrued pay leave may be used to supplement these payments if both parties agree. Presumably it may since it is permissible to supplement emergency FMLA leave and DOL envisions that emergency paid sick leave will frequently run concurrently with the first unpaid 10 days of emergency FMLA leave to turn those days into paid leave. If supplementing the two-thirds payment with accrued paid leave is allowed for reason #5 (child care), it is hard to see why it would not be allowable for reason #4 (care of another person).

The regulations do not address the situation where an employer decides to provide employees receiving only two-thirds of their average regular rate payment with a cash supplement that does not draw on or reduce an employee's accrued paid leave. That is presumably permissible as an independent employer provided benefit.

For the relationship between the employer social security tax exclusion and supplemental payments, see my blog post, *Which Tax and Retirement Deductions Must Be Taken from FFCRA Emergency Paid Leave?*.

Substitution of Accrued Pay Leave for Emergency Paid Leave

The final regulations clarify another issue that has caused confusion among employers: when may an employee chose and when may an employer require the substitution of employer-provided accrued paid leave for emergency paid sick leave and/or for emergency FMLA leave. The rules turn out to be different depending on the type of leave the employee requests.

Emergency Paid Sick Leave

It is up to the employee to decide whether to use emergency paid sick leave before any other form of accrued paid leave the employee has. An employer may **not** require an employee to use accrued sick, vacation or personal leave or, for nonexempt employees only, accrued comp time before using emergency paid sick leave. Any accrued paid time off previously earned by an employee may not run concurrently with emergency paid sick leave. *See* 29 CFR § 826.160(b).

Emergency FMLA Leave

In contrast with emergency paid sick leave, an employee may choose or an employer may require that an employee use employer-provided accrued paid sick leave concurrently with emergency FMLA leave after the first 10 days. A full-day of employer-provided accrued paid leave almost always equals a regular day's pay. By applying accrued paid leave to emergency FMLA leave, an employer will be paying an employee more than 2/3rds of their regular pay and will be in compliance with the FFCRA. Note that an employer must pay the employee the full amount of accrued paid leave and not limit the employee to the equivalent of 2/3rds of their regular pay. Once the employee uses up any applicable accrued paid leave, the rest of the employee's emergency FMLA leave only needs to be paid at 2/3rds of their regular rate. *See* 29 CFR § 826.160(c); US DOL, The Families First Coronavirus Response Act: Questions and Answers at Question #86.

H. Using Employer-Provided Accrued Paid Leave for the First 10 Days of Emergency FMLA Leave

Under new 29 CFR § 825.60(b), employees who have already used their 80 hours of emergency paid sick leave for qualifying reasons other than child care are permitted to use any accrued paid leave that they have earned under their employer's regular leave policies concurrently with the first 10 (otherwise unpaid) days of emergency FMLA leave. An employer may not force an employee to use their accrued paid leave in this way, however. An employee may choose to have the first 10 days of emergency FMLA leave remain unpaid and to save their employer-provided accrued paid leave for use at another time.

I. Where Emergency Paid Sick Leave and Emergency FMLA Leave Overlap

The only situation in which an employee will be eligible for both emergency paid sick leave and emergency FMLA leave at the same time is where the employee needs leave to care for a child whose school has closed or day care provider is unavailable due to COVID-19 related reasons. In that case, *the 80 hours (two full-time workweeks) of emergency paid sick leave may run concurrently with the first two weeks of emergency FMLA leave*, which is unpaid for the first ten days, except in those cases where employees have already made use of their 80 hours of emergency paid sick leave. Emergency paid sick leave is a one-time entitlement to 80 hours of paid leave. *See* 29 CFR §§ 826.60(a)(1)-(2) and 826.150(f).

In those cases where an employee has already used twelve weeks of FMLA leave in the current FMLA year, the employee will not be eligible for any emergency FMLA leave. The employee will, however, still be eligible for 80 hours of sick leave which can be used for COVID-19 related child care reasons. *See* 29 CFR § 826.60(a)(4).

J. Intermittent Leave

Intermittent leave refers to leave taken in several separate periods of time rather than in one long, continuous block. Emergency paid sick leave for any of qualifying reasons #1 – 4 may **not** be taken on an intermittent basis. It must be taken in full consecutive days of leave. Intermittent leave is not permitted for emergency paid sick leave taken for reasons #1 – 4, unless the employee is working remotely.

Emergency paid sick leave taken for child care and emergency FMLA leave may be taken on an intermittent basis provided that the employer and the employee agree that the employee will take intermittent leave and agree on the increments of time in which leave will be measured (an hour; a half-day; any increment is permissible so long as both parties agree). Intermittent leave for child care reasons is available for employees who are still reporting to the employer's workplace and to those who are working remotely. *See* 29 CFR § 826.50.

K. Notice, Documentation and Recordkeeping

Notice of Rights

As is typical of federal employment laws, DOL is requiring that an employer post information about the paid leave provisions of the FFCRA in conspicuous places in the employer's workplace and by posting information on an employee intranet or by e-mailing or direct mailing such information. A template of a notice may be found here.

Notice of the Need for Leave

Under the regulations, employees are encouraged to give their employers as much notice of the need for emergency paid sick leave and emergency FMLA leave as is practicable. Notice may be required after the first workday for which an employee takes emergency FFCRA leave. *See* 29 CFR § 826.90.

Documentation of the Need for Leave

The regulations *require* employees to provide their employers with certain information to support their request for emergency paid sick leave and emergency FMLA leave as soon as possible.

All employees must provide the following information regardless of which form of leave they are requesting:

1. employee's name;
2. the dates for which leave is requested;
3. the qualifying reason for the leave; and
4. an oral or written statement to the effect that the employee is unable to work because of the qualified reason for the leave.

See 29 CFR § 826.100(a).

In addition:

- For employees requesting emergency paid sick leave for ***qualifying reason #1*** (the employee is subject to a quarantine or isolation order), the employee must give the employer the name of the government entity that issued the quarantine, isolation, containment or stay-at-home order. *See* 29 CFR 826.100(b).
- For employees requesting emergency paid sick leave for ***qualifying reason #2*** (the employee has been advised to self-quarantine by a health care provider), the employee must provide the employer with the name of the health care provider that advised the employee to self-quarantine. *See* 29 CFR 826.100(c).
- For employees requesting emergency paid sick leave for ***qualifying reason #4*** (the employee is needed to care for another person subject to a quarantine or isolation order or who has been advised to self-quarantine), the employee must give the employer the name of the government entity that issued the quarantine, isolation, containment or stay-at-home order or the name of the health care provider that advised the person for whom the employee will be caring to self-quarantine. *See* 29 CFR 826.100(d).
- For employees requesting emergency paid sick for ***qualifying reason #5*** (the employee is needed to care for his or her child) leave or emergency FMLA leave, the employee must give the employer:
    1. the name of the child the employee will be caring for;
    2. the name of the school, child care facility or child care provider that has closed or become unavailable; and
    3. a representation that no other suitable person will be caring for the child during the period for which the employee is taking leave.

See 29 CFR § 826.100(e).

CONCLUSION

As a reminder, this blog post should be used in consultation with the Coates' Canons blog posts *How the Paid Sick Leave Provisions of the Families First Coronavirus Response Act Affect Government Employers* and *Which Tax and Retirement Deductions Must Be Taken from FFCRA Emergency Paid Leave?*.

Links

- www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf

- www.ecfr.gov/cgi-bin/text-idx?SID=95228a5a918abcba2b57e3401d6ac893&mc=true&node=pt29.3.826&rgn=div5#se29.3.826_110
- www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html
- www.ecfr.gov/cgi-bin/text-idx?SID=95228a5a918abcba2b57e3401d6ac893&mc=true&node=pt29.3.826&rgn=div5#se29.3.826_1160
- www.dol.gov/agencies/whd/pandemic/ffcra-questions
- www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf