

Can Employers Use Existing Paid Leave Benefits to Offset Emergency Paid Sick Leave under the FFCRA?

Labor & Employment Law Update

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On March 18, President Trump signed into law the Families First Coronavirus Response Act (FFCRA). A component of the FFCRA is the Emergency Paid Sick Leave Act (EPSLA), which requires covered employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to the COVID-19 corona virus starting April 1.

Generally, EPSLA requires covered employers to provide all employees with two weeks (up to 80-hours) of paid sick leave at the regular rate of pay when the employee is unable to work because he/she is quarantined pursuant with governmental or doctor's orders and/or experiencing COVID-19 symptoms and seeking a medical diagnosis. Additionally, if the employee is unable to work due to a bona fide need to care for someone else under quarantine, or a child whose school is closed for COVID-19 related reasons, then the employer is required to provide two weeks of paid sick leave at the rate of two-third (2/3) the employee's regular rate of pay.

The question, however, for many employers is whether any employer provided, or local/state government mandated, paid sick leave policy or other paid time off (PTO) benefits can be used to meet the EPSLA mandate and if not, whether an employer can require employees to first use previously earned/accrued sick leave prior to availing themselves of this new ESPLA benefit.

The answer to both questions is NO. The EPSLA states that an employer "may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time." The EPSLA does not expressly state paid sick leave in this limitation, but newly published guidance from the DOL clarifies that paid sick leave and expanded family medical leave under the FFCRA is *in addition to* employees' preexisting leave entitlements. Accordingly, earned/accrued sick leave or other paid leave existing prior to April 1, 2020 cannot be used to offset or substitute for the mandates under the FFCRA.

Of course, existing employer provided, or local/state government mandated, paid sick leave or other PTO benefits can be used to cover absences that occur *prior to* April 1st or to extend the period of paid leave beyond FFCRA mandates. Employers may also choose to allow (but cannot require) employees receiving 2/3 pay under FFCRA's paid sick leave or paid family and medical leave provisions to use existing paid leave to supplement the 2/3 pay up to the amount of the employee's normal earnings.

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