DOL: FFCRA Leave Can Be Taken Intermittently By Agreement Of The Employee And Employer (In Some Circumstances)

Labor & Employment Law Update

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The Department of Labor has issued Temporary Regulations on the Families First Coronavirus Response Act (FFCRA) to address an issue already causing employers fits – namely, can employees use paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) intermittently?

According to the DOL: it depends.

The employer and employee must agree to intermittent leave.

First and foremost, the regulations are clear that "one basic condition" applies to all employees who seek to take leave under the FFRCA: "***they and their employer must agree***." Without such an agreement, leave ***cannot*** be taken intermittently. While there is no requirement of a written agreement, it is advisable to have one. Because the DOL has said that in the absence of a written agreement to intermittent leave, "there must be a clear and mutual understanding between the parties." In addition, the agreement must also be certain as to the increments of time in which the leave is taken intermittently.

If the employer and employee agree to intermittent leave, when is it permissible under the FFCRA?

Intermittent leave is not permissible in all situations.

If the employer and employee agree that the employee may telework (e.g., working from home), the employee is permitted to take intermittent leave (paid leave and/or expanded family or medical leave) in any agreed increment of time. This regulation is drafted intentionally broad to give employers flexibility to balance the needs of the teleworking employee and the "needs of the employer's business."

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However, if an employee is still working at the employer's jobsite, intermittent leave can only be taken "in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite." Therefore, the regulations allow an employer and employee reporting to a worksite to "agree that the employee may take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19."

However, intermittent leave is prohibited for employees who report to an employer's worksite – even if the employee and employer agree – if the leave it being taken for any of the following reasons:

- because the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- because the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- because the employee is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;
- because the employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

According to the Regulations, in these situations, intermittent leave is prohibited due to the "unacceptably high risk that the employee might spread COVID-19 to other employees when reporting to the employer's worksite." So once an employee starts taking leave for any of these reasons, she must continue to take it until either the entire amount of provided leave is taken or until she no longer has a qualifying reason to taken leave.

Finally, the Regulations clarified that when permissible intermittent leave is agreed to by the employer and employee, "only the amount of leave actually taken may be counted towards the employees leave entitlements." This means that if an employee returns from leave prior to expiration of their leave entitlement under the FFCRA, they are still entitled to use the remaining leave entitlement for a separate qualifying reason and are not otherwise prohibited from doing so by the Intermittent Leave regulations.

Prior to the issuing the regulations, the DOL issued guidance on these issues, which is consistent with the regulations, which can be found on the DOL website.