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DOL Provides Additional Guidance on Families First Coronavirus Response Act

Human Resources & Employment

The U.S. Department of Labor (DOL) has updated its FAQ page on the Families First Coronavirus Response Act (FFCRA), explaining how employers should calculate employee leave and addressing the confusion over what a “quarantine or isolation order” means for purposes of emergency paid sick leave. As we [previously wrote](#), the DOL provides guidance via these FAQs, which continue to increase in number as employers try to navigate the obligations and entitlements of the act, which went into effect on April 1, 2020.

Computing Hours for Employees With Irregular Schedules

Emergency Paid Sick Leave

The FFCRA provides both emergency paid sick leave (EPSL) and expanded family medical leave (EFMLA) to eligible employees. An employee can receive EPSL equal to the number of hours the employee is scheduled to work, on average, over a two-week period. The maximum leave granted is 80 hours. For an employee with an irregular schedule, an employer should estimate hours they would have worked “based on the average number of hours your employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave.”

This average must include all scheduled hours, including both the hours actually worked and the hours for which the employee took leave. As an example, the DOL states that an employee who worked 1,150 hours over a six-month period spanning Oct. 14, 2019 – April 13, 2020, who also took a total of 50 hours of personal and medical leave during that time, would be counted as having worked 1,200 hours. This number should be divided by 183, the total number of calendar days, providing an average of 3.55 hours per workday. An employer would then multiply 3.55 by 14 days to arrive at 49.7 hours of eligible EPSL for the employee at his/her regular rate, subject to the caps.

Expanded Family Medical Leave

Employees who take EFMLA are generally paid based on what they would have made each day worked. For employees with irregular schedules, employers must determine the average number of hours an employee would have worked “based on the number of hours the employee was scheduled to work per workday (not calendar day), divided by the number of workdays over the six-month period ending on the first day of your employee’s paid expanded family and medical leave.” Note that unlike EPSL, workdays, not calendar days, are used to calculate the average number of hours. This is because EFMLA is based on a daily average, while EPSL is paid based on average compensation over a two-week period.

Like EPSL, the EFMLA average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave. In another example, the DOL states that an employee who worked 1,150 hours over a 6-month period spanning October 14, 2019 – April 13, 2020, who also took a total of 50 hours of personal and medical leave during that time, would be counted as having worked 1,200 hours. If that employee worked 130 days, the EFMLA average would be 9.2 hour per day. An employer would pay the employee for 9.2 hours per day at two-thirds their regular rate of pay, subject to the caps.

In the event of employees stopping and restarting FFCRA leave, perhaps due to taking both EPSL and EFMLA at different times, or using leave intermittently, an employer does not have to recalculate the average hours worked. The calculation used for the first

instance of leave will continue to apply.

Computing “Regular Rate” for Employees With Irregular Rates

To establish a regular rate for purposes of FFCRA, employers may generally use an employee’s fixed hourly wage or salary equivalent. However, for employees with irregular rates, employers must look to the employee’s average regular rate over all full workweeks during the six-month period ending on the first day that paid sick leave or expanded family and medical leave is taken. For each full workweek during the six-month period, employers should count wages, commissions and piece-rate pay. For tipped employees, tips will be included where employers take the tip credit. This calculation should not include overtime or wages provided during paid leave. To arrive at an hourly average, employers will add all compensation and divide the sum by the total number of hours worked.

Warning! Exempt Employees Might Be Considered Irregular

Notably, the DOL states that some salaried employees will be deemed to have an irregular rate. Where employees are paid a fixed salary that is “understood to be compensation for a specific number of hours of work in each workweek, the employee’s average regular rate would simply be the hourly equivalent of that salary.”

However, where the fixed salary is “understood to compensate the employee regardless of the number of hours of work in each workweek,” then the employer is expected to proceed with the calculation described above – dividing the sum of compensation by the hours worked. Employers who don’t track exempt employee hours are directed to “use a reasonable estimate.”

For both types of leave, where employees have worked less than six months, employers may compute the average regular rate of their entire period of employment. Employers may also “round to the nearest time increment” so long as they customarily use the same rounding principle, and so long as they apply the same formula to all employees.

More Information on When Isolation Orders Are Reasons for Leave

In FAQ No. 60, the DOL stated that EPSL under the first qualifying reason (i.e., a quarantine or isolation order) did not apply where employees could not work because a government order shut down the workplace. This begged the question: *when would an employee be eligible to assert factor No. 1 as a reason for leave?* In updated guidance, the DOL provides some examples of where an employee may be subject to a quarantine or isolation order (which, it confirms, includes shelter-in-place and stay-at-home orders). If an employee is “prohibited from leaving a containment zone” and the employer remains open outside the containment zone and has work the employee cannot perform because they cannot leave the containment zone, they may take paid leave under the FFCRA. Similarly, if an employee is “ordered to stay at home by a government official for fourteen days because they were on a cruise ship where other passengers tested positive for COVID-19,” and the employer has work for them, they may take paid leave under FFCRA.

The guidance reiterates that an employer must have work for the employee to perform in order for the employee to be eligible. In other words, paid leave is unavailable for an employee where the employer has ceased operations.