The Empire State Strikes Back

New York Federal Court Strikes Down Certain FFCRA Paid Leave Provisions

The Families First Coronavirus Response Act (FFCRA) became law on March 18, 2020. Among many other provisions, FFCRA created a pair of COVID-19-related paid leaves effective beginning April 1, 2020 through December 31, 2020:

1. Emergency paid sick leave (EPSL); and
2. Public health emergency leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA).

The United States Department of Labor (DOL) issued EPSL and EFMLEA regulations in April with an effective date of April 1, 2020. The DOL continues to issue additional EPSL and EMFLEA guidance, usually in the form of frequently asked questions (FAQs).

The State of New York sued the DOL in United States District Court for the Southern District of New York (the "court") on behalf of its residents on April 14, 2020, claiming certain provisions of the DOL's regulations limiting access to paid leave benefits exceeded the DOL's authority under FFCRA. The court agreed on August 3, 2020 (State of New York v. United States Department of Labor).

When Does This Affect Me?

We are going to address timing before we address the court's decision and its effects. The court issued its order on August 3, 2020, but it applies retroactively to **April 1, 2020**. It is possible the DOL revises its regulations and guidance in reaction to the court's decision, although it seems more likely the DOL will first appeal to the United States Court of Appeals for the Second Circuit (the "2nd Circuit").

Assuming the DOL appeals to the 2nd Circuit, it will almost certainly file a motion asking the district court to stay (or "delay") its order pending the outcome of the appeal. If the district court denies this motion, the DOL can request this relief from the 2nd Circuit. A stay pending appeal seems likely and may have already occurred by the time you read this alert. This case might ultimately wind up at the Supreme Court, which means final resolution may not occur before 2021. That is after the December 31, 2020 end date for EPSL and EFMLEA, but remember the existing court order applies retroactively to April 1, 2020.

Note: Who this actually affects is also an open question. Please see *Unanswered Questions*.

EPSL/EFMLEA Quick Summary

We discuss the EPSL and EMFLEA leaves in detail in our Coronavirus Update for Employers compliance guide. We will refer to employers subject to the EPSL and EFMLEA as "covered employers" in this alert. A quick summary of the circumstances that can qualify an employee for EPSL and EMFLEA (a "Qualifying Purpose") appears below, and we will refer back to these later in this alert.

Qualifying Purpose for Paid FFCRA Leave	
EPSL	**EFMLEA**
(1) The employee is subject to a federal, state, or local government or agency quarantine or isolation order	
(2) A health care provider has specifically advised the employee to self-quarantine	
(3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis	
(4) The employee is caring for an immediate family member, a person who regularly resides in the employee's home, or a roommate who is subject to (1) or (2)	
(5) The employee is caring for a son or daughter under age 18 (or a disabled adult child) due to a school or day care provider closure or the unavailability of a child care provider	
(6) The employee is experiencing any other substantially similar condition specified in regulations issued by HHS (no guidance has been released for this)	

The Court's Decision

The court ruled on four separate provisions under the DOL's regulations.

1. Work Availability Requirement – FFCRA states that employees may qualify for EPSL/EFMLEA if they are unable to work or telework due to COVID-19. Under the DOL's regulations, an employee is not eligible for EPSL/EFMLEA leave under Qualifying Purposes (1), (4), or (5) unless the employee actually misses paid work time during the leave.

   The court held that the FFCRA's language does not support the regulations' requirement that employees must miss paid work time to satisfy some Qualifying Purposes but not others and struck the requirement down in its entirety. The DOL asked the court to apply the paid work time requirement to all six Qualifying Purposes consistent with the DOL's FAQs. The court rejected this approach, because the DOL's own regulations did not support it.

Effect: Under the court's ruling, more employees are eligible for EPSL and/or EFMLEA. For example, a shelter in place order now satisfies Qualifying Purpose (1) whether or not the employer has work for the employees to perform, and this applies retroactively to April 1, 2020. Before the ruling, EPSL was not available if the employer did not have work for employees to perform due to a lack of customers or other business.

2. Definition of Health Care Provider – FFCRA permits covered employers to exclude some or all of their health care providers from the EPSL and/or EFMLEA. The FFCRA borrows the definition of health care provider from the Family and Medical Leave Act (FMLA), which is generally limited to traditional health care workers. The regulations and FAQs expanded the definition of health care provider to include all non-medical staff in addition to health care workers.

   The court rejected the DOL's expanded definition as inconsistent with FFCRA, limiting the exclusion to actual health care workers.

   Effect: Non-medical staff employees, such as administrative staff, earlier denied paid FFCRA leave under the health care provider exclusion are now eligible, and this applies retroactively to April 1, 2020.

3. Consent Required for Intermittent Leave – FFCRA did not address intermittent leave. However, the regulations and FAQs require an employer's prior consent before an employee may take intermittent leave for any Qualifying Purpose. Additionally, if an employee must work onsite, intermittent leave is only available for Qualifying Purpose (5). While the court agreed with the DOL's reasoning that intermittent leave should be limited to situations where there is little or no risk of spreading COVID, it held the DOL failed to justify why this should require an employer's prior consent and struck the requirement down in its entirety.

   Effect: An employer's prior consent is not required before an eligible employee who teleworks can take EPSL/EFMLEA on an intermittent basis for any Qualifying Purpose or for an employee who must work onsite for Qualifying Purpose (5).

4. Prior Notice Requirement – FFCRA allows covered employers to require employees to provide notice of a continuing need for EPSL after the first paid sick day. FFCRA generally follows the FMLA's standard employee notification rules for EFMLEA, including allowing employers to require notice of the need for leave as soon as it is practical to do so if the EFMLEA leave is foreseeable. By contrast, the regulations and FAQs generally require the employee to apply for and substantiate the need for EPSL and/or EFMLEA leave before it begins.

   The court struck down the regulations' prior notice requirement as inconsistent with FFCRA and not feasible in the event of a COVID-19-related health emergency.

Effect: An employer can only require prior notice and substantiation for reasonably foreseeable EFMLEA leave under Qualifying Purpose (5). In all other situations, the employer can only require notice and substantiation after the leave begins. Substantiation is ultimately necessary for an employer to claim reimbursement through payroll tax credits.

Unanswered Questions…

The court's decision leaves several unanswered questions, and some of them are major.

- **Nationwide or just New York? –** The State of New York did not seek a nationwide remedy, and the court did not address it either. It is possible the court's decision only applies to New York employees, even for multistate employers. The district court may clarify this issue, or it might be addressed on appeal.

Note: Employers should consult with legal counsel before deciding whether to limit the application of the court's ruling to its New York employee workforce. There is less urgency to act if the court grants a stay. The DOL could also take the position that the decision applies nationwide.

- **Did we open Pandora's Box? –** If an individual received unemployment benefits or paid leave benefits and is now retroactively eligible for EPSL and/or EFMLEA, does the state or other third party now have a right to recover some or all of the benefits it paid that were applicable to the same timeframe? How would this work given the potential scale?

- **Is it a wash? –** If an employee is now retroactively eligible for a paid FFCRA leave that was not provided, we assume an employer will not need to take any action if the employee has already received 80 hours of EPSL and/or 12 weeks of EFMLEA for other reasons.

- **Are some employees out of luck? –** If an employee is now retroactively eligible for paid FFCRA leave but the employer has gone out of business, is the employee out of luck?

- **What if FMLA leave was exhausted? –** What happens if an employee is now retroactively eligible for an EFMLEA leave that was not provided, but the employee subsequently exhausted his or her 12 weeks of FMLA during the 12-month FMLA determination period? We assume the employee will be eligible for the retroactive EFMLEA, but it is not clear what happens to the subsequent FMLA leave.

Note: An employer is generally free to change its 12-month FMLA determination period, but this is not a solution to increase the amount of available EFMLEA benefits. There is a dollar limit on the benefits available during the April 1, 2020 – December 31, 2020 EFMLEA period. An employer can provide greater benefits, but it will be ineligible for reimbursement for any excess.

- **Other state/local COVID-related leave laws –** A number of state and local governments have implemented their own COVID-19 related public health emergency leave laws, and some of these laws incorporated provisions from the DOL regulations and guidance that were affected by the court's decision. It is not clear how the affected state and local governments may respond.

About the Author

Christopher Beinecke, J.D., LL.M. *is the Employee Health & Benefits National Compliance Leader for Marsh & McLennan Agency.*