March 20, 2020

Re: COVID-19 Update – Updated Federal and Oregon Leave Laws

FEDERAL LEAVE: FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law in response to the growing COVID-19 pandemic which includes important paid sick leave and paid family and medical leave provisions. Effective April 2, 2020, full-time employees may access up to ten (10) days paid sick leave for COVID-19-related health and caregiving reasons, and up to twelve (12) weeks of paid family and medical leave if an employee’s child’s school or place of care is closed and the employee is unable to work or telework.

As noted, the FFCRA provides for two (2) types of paid leave for workers impacted by the COVID-19 pandemic:

1. Emergency expansion of the Family Medical Leave Act (FMLA); and

Both types of leave apply to private employers with fewer than 500 employees and public employers (federal, state and local). If your employer has 500 or more workers, you can still rely on state law benefits, which are expanding and evolving rapidly in Oregon and Washington during this pandemic. These provisions go into effect on April 2, 2020, and sunset December 31, 2020. Private employers can receive tax credits for the amount they pay to employees under these emergency leave provisions.

1. Emergency Family and Medical Leave Expansion Act

This provision expands eligibility and usage for FMLA (“emergency FMLA leave”). It also requires pay for emergency FMLA leave after ten (10) days (FMLA typically does not require leave to be paid). Unfortunately, this provision was significantly reduced from the version that originally passed the House and is now only available for an employee whose child’s school or childcare is curtailed due to COVID-19. Additional legislation may expand on this emergency FMLA leave in future relief packages.

- Eligibility
  - Workers are eligible for the emergency FMLA leave if they are employed by an employer with fewer than 500 employees or a public agency (federal, state or local) and have been employed for at least thirty (30) calendar days. More employees will be eligible for this leave than would have been prior to FFCRA under FMLA.
  - An employer of health care providers and/or emergency responders may elect to exclude those workers from the emergency FMLA leave.
• **Reasons for Leave**
  o Workers can access up to twelve (12) weeks of job-protected emergency FMLA leave only if they are unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed or the child care provider is unavailable due to a public health emergency related to coronavirus (declared by a federal, state or local authority). The FMLA’s “son or daughter” definition would apply, which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis (in loco parentis refers to one who is acting and intending to act as a parent, with no requirement of a legal or biological relationship).

• **Duration and Pay**
  o *The first ten (10) days* of emergency FMLA leave may be *unpaid* or an employee can elect to substitute any accrued vacation, personal, medical or sick leave.
  o An employer must provide *paid* leave for each day of emergency FMLA leave after the first ten (10) days. Emergency FMLA leave must be paid at an amount of not less than two-thirds (2/3) of the employee’s regular rate of pay based on the number of hours the employee would otherwise normally be scheduled to work. However, paid emergency leave may not exceed $200 per day and $10,000 in the aggregate.
  o Employees who work part-time or irregular schedules are entitled to paid leave for the average number of hours the employee worked for the six (6) months prior to taking emergency leave. If an employee has worked less than six (6) months (but more than thirty (30) days), they are entitled to the reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

• **Job Protection and Restoration:**
  o Employees who take this leave are entitled to be restored to their position or an equivalent position with equivalent pay, benefits and other terms/conditions of employment.
  o Employers with fewer than twenty-five (25) employees do not have to restore a worker to their former position if all of the following apply:
    ● The position held by the worker when the leave began no longer exists due to economic conditions or other changes to operating conditions that affect employment and were caused by the public health emergency during the period of leave;
    ● The employer made a reasonable effort to restore the employee to an equivalent position with equivalent benefits, pay and employment terms/conditions; *and*
    ● If the reasonable effort to restore the worker fails, the employer makes reasonable efforts for a period of one (1) year to contact the individual if an equivalent position becomes available.

*The Oregon School Employees Association (OSEA) is an affiliate of the AFL-CIO, the American Federation of Teachers (AFT) and the American Association of Classified School Employees (AACSE).*
Possible Rulemaking may Expand Exemptions
- The Secretary of Labor is granted authority to issue regulations to: (1) exempt “certain health care providers and emergency responders” from the emergency FMLA leave provisions and (2) exempt small business with fewer than fifty (50) employees if paying for leave would jeopardize the business’ viability. (Note: For health care and emergency workers, even absent rulemaking employers may opt-out of coverage.) This is only for private sector employers (i.e. public employers of all sizes are covered).

2. Emergency Paid Sick Leave Act

This provision creates a new form of Emergency Paid Sick Leave (EPSL) for COVID-19 related needs. Similar to the emergency FMLA leave, EPSL applies to employers with fewer than 500 employees. This portion of the new FFCRA also significantly changed from the original House version, including a reduction in the duration of EPSL to ten (10) days.

- Eligibility
  - A worker is eligible for EPSL if they are employed by an employer with fewer than 500 employees or a public agency (federal, state or local). There is no requirement that the employee have worked a certain number of days to be eligible.
  - Again, an employer of health care providers and/or emergency responders may elect to exclude those workers from the EPSL.

- Reasons for Leave:
  - An eligible employee may take EPSL because the employee is:
    1. Subject to a federal, state or local quarantine or isolation order;
    2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
    3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
    4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns; (*Note: This is not limited to just family members.)
    5. Caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency; or
    6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- Duration and Pay
  - Full-time employees (regardless of duration of employment) are eligible for two (2) weeks (ten (10) workdays or eighty (80) hours) of EPSL. Part-time or irregular
employees are entitled to be paid for the average number of hours the employee worked for the six (6) months prior to taking EPSL. If an employee has worked less than six (6) months, they are entitled to the reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

- EPSL hours are paid at different rates based on the categories listed under “Reasons for Leave” above: Categories 1, 2, and 3 are paid at the employee’s regular rate of pay (capped at $511/day); Categories 4, 5 and 6 are paid at 2/3 the employee’s regular rate of pay (capped at $200/day).
- Employees cannot be required to use other accrued leave before EPSL.
- Covered employers (fewer than 500 employees and public agencies) are required, at the request of the employee, to pay a full-time employee for eighty (80) hours of EPSL instead of the initial ten (10) days of unpaid leave permitted by the Emergency FMLA (summarized above).

OREGON FAMILY LEAVE ACT (OFLA) TEMPORARY RULE

Oregon Labor Commissioner Val Hoyle announced a temporary rule to ensure that employees can utilize OFLA during this global public health pandemic and allow for an employee to care for their child whose school or place of care has been closed in conjunction with a statewide public health emergency declared by a public health official. The temporary rule allows eligible employees to take protected leave if their child’s school or place of care is closed due to the COVID-19 pandemic.

Under OFLA, employers with more than twenty-five (25) employees must allow up to twelve (12) weeks of protected leave per year for eligible employees, including to “care for a child of the employee who is suffering from an illness, injury or condition that is not a serious health condition but that requires home care.” ORS 659A.159(1)(d). The new, temporary rule clarifies that sick child leave includes absences from work “to care for an employee’s child whose school or place of care has been closed in conjunction with a statewide public health emergency declared by a public health official.” OAR 839-009-0320(4)(a).

Employees are eligible for OFLA if they have worked at least 180 days before the date on which leave would begin and average at least twenty-five (25) hours per week during those 180 days.

The rule is effective from March 18, 2020, through September 13, 2020.