

# Accommodating working parents during COVID-19

Accommodating working parents can be very challenging for employers as we all react to the COVID-19 pandemic. Employers have several options to allow working parents to do their job while taking care of their kids. The options depend on several factors including:

- Is the employment location or the employee's residence under a "shelter in place" or similar order?
- Does the employer still need the employee's job to be done?
- If so, can all or part of the employee's job be performed remotely?
- Is the employee the sole person available to care for the children?

Each of these factors impacts the employer's options under the Families First Coronavirus Response Act (FFCRA). The FFCRA provides two types of paid leave to working parents, emergency paid sick leave (EPSL) and paid leave under the Family and Medical Leave Act (FMLA). Up to certain limits, employers may use the amount distributed to employees for paid leave as a refundable tax credit. Of course, that tax credit comes with some strings attached. Consequently, employers have to meet Internal Revenue Service (IRS) guidelines when paying working parents.

## Employees sheltering in place?

Employers must first determine whether they are under a "shelter in place" or similar order. If the employees cannot access the workplace, then employers must determine what jobs can be done remotely. Many employers may already have had a telecommuting policy in place which designated which jobs could be done remotely. It may be time to revisit those designations in light of COVID-19. Both jobs and the technology available to perform them remotely may have changed since the policy was last drafted.

Jobs such as cashiers and retail clerks cannot be done under a "shelter in place" order. In most cases, if the employer has no work for the employee, the employee has no job. The employee may be laid off.

If the employer has work to do, but the employee cannot work because of a COVID-19 related reason, the situation may change. Employers must first determine whether the FFCRA covers them.

The FFCRA covers employers with fewer than 500 employees. However, employers with fewer than 50 employees may seek a waiver if providing paid leave would "jeopardize the viability of their business as a going concern." The employee count is made as of the date the employee starts taking leave. Once leave is granted, the leave is grandfathered in even if the FFCRA ceases to cover the employer during the leave period.

Employers must count:

- Full-time and part-time employees (not independent contractors);
- Only employees within the United States;
- Employees on leave;

- Temporary employees jointly employed by the employer; and
- Day laborers supplied by a temporary agency.

## Emergency Paid Sick Leave regulations

The FFCRA guarantees emergency paid sick leave (EPSL) to all a covered employer's employees. EPSL is capped at two weeks and is only available under specific conditions such as:

- **The employee is subject to a quarantine or isolation order.** The employer must have work for the employee to perform. An employee who can telework, similarly, is not eligible for EPSL because the employee can work from home and still be paid normal pay.
- **The Employee is advised by a health care provider to self-quarantine.** The employee is eligible for EPSL under this provision if a health care provider has advised the employee to self-quarantine because:
  1. The employee has COVID-19; or
  2. The employee may have COVID-19; or
  3. The employee is particularly vulnerable to COVID-19.
- **The employee is experiencing symptoms and seeking a medical diagnosis for COVID-19.** Employees are eligible for paid leave for time spent making, waiting for, or attending an appointment for a test for COVID-19.
- **The employee is caring for an individual who has been quarantined or been advised to self-quarantine.** Individual, in this sense, is defined more broadly than the FMLA's immediate family member. Sick children definitely qualify.
- **The employee is experiencing any other substantially similar condition that may arise as designated by the Secretary of Health and Human Services (HHS).** The DOL regulations offer no explanation and HHS has provided no guidance.

## Emergency Paid Sick Leave for Parents

EPSL is also available for an employee caring for a child because of school, childcare closures. The employee is eligible for this leave only if no other person is available to care for the child. How this plays out when both parents work is not clear. The DOL regulations refer to IRS guidance on this, so providing leave to parents that have someone available may mean the employer is unable to take the refundable tax credit for the paid leave.

## Paid FMLA leave

Any full-time or part-time employee that has been on the employer's payroll for 30 calendar days is eligible for paid FMLA leave. Employees are considered to be on the payroll for 30 calendar days if the employee was on the employer's payroll for the 30 calendar days immediately prior to the date on which the employee's leave would begin; or the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated.

Paid FMLA leave is only available to employees who cannot work or telework because they must care for a minor child because of a school or daycare facility COVID-19 related closure. The regulations permit intermittent paid FMLA leave arrangements if both the employer and employee agree on them.

## Working through the issues

Although the DOL and IRS regulations try to paint bright lines, they can still be pretty hazy in the COVID-19 world. A few keys are clear though. First, employees must get their jobs done to get paid. Secondly, employers

must organize their work among a totally or partially remote workforce. Some of those remote workers will have children at home.

Based on the workflow, employers can establish core hours of work for each job. This can be written into the job description. While employers should be as flexible as possible, production schedules can bend, but not break. If the employee cannot perform the job when it is needed, the employee can be laid off or have hours cut.

As mentioned above, intermittent FMLA may be an option also. Regulations require that both the employee and employer must agree on the arrangement. Employers must be careful not to create an employment contract in the process. Consult with counsel when making intermittent FMLA agreements.

## **Discrimination**

If job cuts must be made, employers may not discriminate. For example, employers may not assume that female workers have greater childcare responsibilities than males. Each situation must be evaluated without regard to gender, race, or any other protected characteristic.

Employers may lay off workers because the job no longer exists. Employees who cannot meet the job's minimum production requirements may also be terminated. Consult with counsel to determine if any Americans With Disabilities Act (ADA) or FMLA issues apply. Some states have laws barring discrimination based on familial status. Consult with counsel to determine if these confer protections on working parents that federal laws don't.

## **Changing Circumstances**

This won't last forever, so employers have to monitor the situation. After the end of the scheduled school year, working parents can no longer rely on school closure to justify EPSL, paid or intermittent FMLA, or an altered work schedule. They will have to show that no childcare arrangements are available because of COVID-19.

Similarly, the economic picture is likely to change. In turn, employers may have to revamp work schedules. This may mean some employees have to go or some may be called back. If you do terminate a working parent, document the reasons thoroughly. If work changes resolve the conflict, you can recall an already trained worker.