Families First Coronavirus Response Act (FFCRA): A Deep Dive into "Unable to Work (or Telework)"

Part of the FFCRA, the Emergency Family and Medical Leave Expansion Act (EFMLEA) describes the reason or impetus for the "need for leave" in the first instance:

> (A) QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY.—The term "qualifying need related to a public health emergency", with respect to leave, means the employee is **unable to work (or telework)** due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. [Emphasis added.]

Likewise, under the new Emergency Paid Sick Leave Act (EPSLA), the prerequisite for availability of leave is:

> An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is **unable to work (or telework)** due to a need for leave because: [followed by the six statutory qualifying events.] [Emphasis added.]

On April 1, 2020, the same day the laws went into effect the U.S. Department of Labor (DOL) released a temporary rule and regulations interpreting this new law.

The statutes use identical language for determining the requisite need for leave. Paid leave or paid sick time is available if or to the extent that "the employee is unable to work (or telework)." This alert homes in on this one aspect of the laws and seeks to answer the questions: Who is "unable to work (or telework)" under the statutes? Is the requisite for leave met simply because the employee's minor child's school is closed? There certainly seems to be more to it. But, if more is required, what is it?

The rule, supplementary information and regulations issued have provided a measure of clarity about the application of the laws. The regulations define telework as follows:

> **Telework. The term "Telework" means work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace. An Employee is able to Telework if: (a) his or her Employer has work for the Employee; (b) the Employer permits the Employee to work from the Employee's location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the Employee from performing that work.** Telework may be performed during normal hours or at other times agreed by the Employer

> and Employee. Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the EPSLA or the EFMLEA. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the Employer knew or should have known were worked by the Employee. However, the provisions of § 790.6 shall not apply to Employees while they are teleworking for COVID-19 related reasons. [Emphasis added.]

The focus here is on the first part of the definition, emphasized above. (The entire definition has been included for completeness.)

First, the ability of an employee to telework depends on whether the employer "permits or allows" it. Second, the ability of an employee to telework depends on whether (a) the employer has work available for the employee to do; (b) the employer permits the employee to do the available work remotely; and (c) "there are no extenuating circumstances." In a nutshell, the ability of an employee to telework first turns on the circumstances and flexibility of the employer allowing it and having work available. If those criteria are met, the employee is able to work (even if it is "telework"), unless and until an employee is confronted by "extenuating circumstances."

As can be seen, the definition itself provides one example of "extenuating circumstances": serious COVID-19 symptoms. This clarifies that a positive test for, or diagnosis of COVID-19 does not automatically qualify an employee for paid sick leave at this stage of the analysis. The COVID-19 symptoms (or other "extenuating circumstances") have to "prevent the Employee from performing [the available] work."

Turning to the application of the definition of telework as it relates to paid sick leave (EPSLA) and specifically, to an employee who is subject to a COVID-19 quarantine or isolation order, the regulations state that sick leave is only available if the order "prevents [the employee] from working or teleworking." Put another way, "the [critical] question is whether the employee would be able to work or telework 'but for' being required to comply with a quarantine or isolation order."

Meaning, the quarantine or isolation order must be the reason the employee cannot work, as opposed to the employer's business being closed. Because if the business is closed, that is the reason the employee cannot work, not the order.

To help explain the practical operation of the law, the DOL provides two examples using the widely mandated "stay at home" orders. In the first,

> [I]f a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his

> inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.

The rule holds that this is true even if the coffee shop was closed as a result of the "stay at home order" reasoning that the shop closed either because its patrons were prohibited from patronizing it or by a closure order, but not, in either case, "because the cashier himself was subject to the order."

In the second example,

> [I]f a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

Similarly, in describing the availability of sick leave due to a "self-quarantine" on the advice of a health care provider, the guidance provides that an employee who is self-quarantining is able to telework, and is not eligible for paid sick leave if his employer has work available for the employee and permits remote work, in the absence of "extenuating circumstances."

Using the lawyer in the second hypothetical, even if the lawyer was self-quarantined, she would still be able to work at home, and therefore, would not be eligible for paid sick leave.

In another instance, an employee waiting for COVID-19 test results does not necessarily qualify for sick leave if telework is available to the employee, again, barring the introduction of "extenuating circumstances" like serious COVID-19 symptoms.

The regulations make clear that if an employer does not have work (or telework) for an employee, the employee is not eligible for sick leave. Because the reason for the leave is a lack of work, not any of the six qualifying criteria delineated in the EPSLA.

The DOL emphasizes that the rationale also holds true for leave under the EFMLEA. Leave is not available to care for a son or daughter "unless, but for a need to care for an individual," the employee would be able to work. An eligible employee caring for the employee's minor child may not take EFMLEA leave if the employer does not have work for the employee.

Regardless of the qualifying event (isolation order, childcare, COVID-19 diagnosis, etc.), employers must engage in an analysis to determine whether an absence qualifies for FFCRA leave. The touchstone for the

analysis is whether, but for the qualifying event, the employee could perform work or telework the employer has for the employee.

The availability of leave under either law is more circumscribed than many initially understood, and requires a nuanced analysis of both the employer's situation and the employee's circumstances. The regulations and previously issued Fact Sheets and Questions and Answers have provided crucial direction as to the interpretation and practical application of the new laws. For specific questions, be sure to review the regulations, particularly the supplementary information and preamble. We also recommend that you keep abreast of the Department of Labor's publications and contact legal counsel for questions about how these new laws impact your business.

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