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IRS AND DOL ISSUE ADDITIONAL GUIDANCE ON EMERGENCY LEAVE

The IRS and the Department of Labor both provided additional guidance on the application of the new emergency leave laws. The IRS significantly limited the circumstances in which childcare leave can be taken and explained what documentation will be required to substantiate the various emergency leaves. You can find the IRS guidance [here](#). For its part, DOL defined when a stay-at-home or shelter-in-place order would trigger emergency leave and laid out how the small employer exception must be documented. DOL's temporary rule is available [here](#).

Limits on and Documentation for Child Care Leave

As we've explained in earlier alerts, both emergency leave laws – Emergency FMLA and the Emergency Sick Pay Leave Act – allow employees paid time off to care for children whose school, childcare or childcare provider is unavailable because of a COVID-19 closure order. This sounds pretty broad. The IRS, however, takes the narrower view that the leave is only available if no one else caring for the child. It also requires substantiation of special circumstances for the need to care for a child who is 15 or older.

What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

The employee's name;

The date or dates for which leave is requested;

A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and

A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The IRS guidance also sets out the records you must maintain (for four years) to substantiate the tax credits you take for the leave. This includes documentation to support your calculation of the amount of sick leave wages and health plan expenses and copies of Form 7200 (applications for the advances on the tax credit) and Form 941 (quarterly payroll tax returns).

We are providing updated leave request forms which follow this guidance.

What is a Quarantine Order?

As you know, one of the possible reasons for Emergency Sick Pay Leave is when the employee is "subject to a Federal, State, or local quarantine or isolation order related to COVID-19". The first and most frequent question about this provision has been whether a general state or city-wide stay-at-home order would be considered a "quarantine order" under this provision. On Wednesday, DOL answered in its Temporary Rule:

A quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order.

Thus, a general stay at home order can qualify as a quarantine order, but only if the employer still has work available for the employee. If the employer is shut down too, then Emergency sick leave is not available.

Who is an individual?

Another reason for Emergency Sick Pay is when the employee is "caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or

has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.” Again, this sounds pretty broad. DOL’s Temporary Rule, however, explained that this does not apply to care for just any individual, but has to be someone special:

[An] “individual” means an Employee’s immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, “individual” does not include person with whom the Employee has no personal relationship.

The Temporary Rule again points out that an employee cannot take paid sick leave if the employer does not have work available.

How do I elect the small employer exemption?

As we’ve covered in earlier alerts, the emergency leave requirements apply to all employers with fewer than 500 employees, but small employers (those with fewer than 50 employees) may be exempt from providing the childcare leave under both laws if doing so would jeopardize the viability of the business as a going concern. To elect this exemption, an authorized officer of the business must determine:

1. The childcare leave would result in business expenses exceeding available business revenues and cause it to cease operating at a minimal capacity;
2. The absence of the employee requesting childcare leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business or responsibilities; or
3. There are not sufficient workers who are able, willing and qualified and who will be available at the time and place needed to perform the work of the employee requesting childcare leave and this work is necessary for the business to operate at minimal capacity.

So, there are three possible reasons: it’s too expensive, the employee is too important, or we can’t cover the work.

Here’s the critical part: you have to document the reason for denying the leave based on one of these three factors at the time you make the determination. Don’t send it to DOL but put it in the file.

Also, even if you conclude that you qualify for the small business exception for one or more employees, you are still required to post the DOL notice of leave rights.

Concurrent Use of Employer-Provided Leave with Emergency FMLA

DOL's Temporary Rule also provides that an employee has the option, and the employer may require the employee, to use only leave that would be available for child care under the employer's existing policies, such as personal leave or PTO. This leave would run concurrently with Emergency FMLA.

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