

# PUBLICATION

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## DOL Regulations Address Potentially Overlooked Employee Protections Against Discrimination and Retaliation Contained in the EPSLA and the EFMLEA

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By now, most employers are hopefully aware of the new employee leave requirements of the Families First Coronavirus Response Act (FFCRA), which became effective on April 1, 2020 and will last through December 31, 2020. More specifically, Division E of the FFCRA, the Emergency Paid Sick Leave Act (EPSLA), entitles certain employees to take up to two weeks of paid sick leave for qualifying absences related to the COVID-19 pandemic while Division C, the Emergency Family and Medical Leave Expansion Act (EFMLEA), permits certain employees to take up to 12 weeks of expanded family and medical leave, ten of which must sometimes be paid, for specific reasons related to the pandemic. Considering the widespread discussion of the major provisions of the FFCRA, it would be hard for an employer to have missed these leave requirements. Not as widely reported, however, are the non-discrimination and anti-retaliation provisions contained in the same legislation.

Non-discrimination and anti-retaliation are certainly not unfamiliar concepts given their common inclusion in other federal and state employment laws. However, specific protections may differ based on the particular language of any respective statute. This is true even when considering the specific employee protections afforded under the closely related EPSLA and EFMLEA. In its very highly anticipated regulations implementing the two laws, which were published in final form on April 6, 2020, as well as in other guidance, the Department of Labor (DOL) offers clarification and instruction related to the application of the specific employee protections provided under each of these laws. These new regulations, which can be found at 29 CFR Section 826.150 *et seq.*, are discussed below.

### Employee Protections Under the EPSLA

Section 826.150(a) of the DOL's new regulations explains that, under the EPSLA, employers are prohibited from discharging, disciplining, or discriminating against any employee *because* the employee (1) took paid sick leave, (2) initiated a proceeding under or related to paid sick leave, or (3) testified or is about to testify in such a proceeding. Of course, the operative language here is "*because*." In other words, under a strict application of this regulation, an employer would not be prohibited from taking action against an employee who had not actually taken leave under the statute, started legal action against the employer related to the EPSLA, or testified (or is about to testify) in a legal action related to the EPSLA.

Even with this fairly restrictive language, however, questions may arise regarding employer actions implemented while an employee is taking EPSLA. For instance, what if an employer is forced to close its facility while an employee is actively using paid leave under the EPSLA, or after the employee had initiated or testified in a legal proceeding against the employer related to the EPSLA? Could that be considered a violation of Section 826.150(a)? Or, what if an employer has already begun a disciplinary process with an employee who takes leave before the employer implements whatever consequences were to be imposed as a result of the ongoing process?

The DOL's "Questions and Answers" guidance regarding the EPSLA and EFMLEA speaks directly to the first question above, stating: "If [an] employer closes while [an employee is] on paid sick leave or expanded family and medical leave, [the] employer must pay for any paid sick leave or expanded family and medical leave [the employee] used before the employer closed." However, the DOL's guidance goes on to state that "[a]s of the

date [the] employer closes [the] worksite, [the employee is] no longer entitled to paid sick leave or expanded family and medical leave. . ." The key here is that the employee would not have been targeted *because* of the employee's use of paid sick leave, but simply caught up in an action that affected all employees at the site equally. This same analysis is applicable to the second question above related to disciplinary actions that begin before an employee takes paid sick leave. However, this situation is likely much more delicate. In such a case, it would be imperative for the employer to maintain clear documentation and proof that the decision to take whatever action was implemented while the employee is on leave was made *before* the employee went on leave. If so, then the action would not have been taken *because* of the leave and should not constitute a violation of Section 826.150(a). If, however, that is less than absolutely clear, a much safer approach would be to wait until the employee returns to implement the disciplinary action.

### **Employee Protections Under the EFMLEA**

Notably, the EFMLEA constitutes an amendment to the already existing Family and Medical Leave Act (FMLA). Accordingly, Section 826.151(a) explains that employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under the FMLA, including the EFMLEA; discriminating against an employee for opposing any practice made unlawful by the FMLA, including the EFMLEA; or interfering with proceedings initiated under the FMLA, including the EFMLEA.

The major difference between Section 826.151 and Section 826.150 related to the EPSLA, which is discussed above, is that under the non-discrimination/anti-retaliation provisions of the FMLA, which are made specifically applicable to the EFMLEA, there is no requirement that an employee actually take leave or become involved in a legal proceeding. Instead, an employer can be held liable for "interfering with, restraining, or denying" the exercise, or "attempt to exercise" rights under the law. This is clearly much broader in scope and application than the language contained in Section 826.150 related to the EPSLA.

Additionally, in most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave. See the FMLA "job restoration provisions" at 29 CFR 825.214 and the FMLA "equivalent position provisions" at 29 CFR 825.215. *However*, as discussed above with regard to the EPSLA, the EFMLEA does not protect an employee from employment actions that would have affected the employee regardless of whether the leave was taken. This tracks the existing provision under the FMLA in 29 CFR 825.216. The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

### **Enforcement Mechanisms Under the EPSLA and the EFMLEA**

Section 826.150(b) of the new regulations explains that an employer who violates the EPSLA is considered to have failed to pay the minimum wage required by section 6 of the FLSA, and an employer who violates the prohibition on discharge, discipline, or discrimination described in section 826.150(a), discussed above, is considered to have violated section 15(a)(3) of the FLSA. See 29 U.S.C. 206, 215(a)(3). With respect to such violations, the relevant enforcement provisions of sections 16 and 17 of the FLSA apply.

Based on the above, an employee may maintain, on behalf of the employee and any other similarly-situated employees, an action in any federal or state court of competent jurisdiction to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees. Moreover, the DOL may bring an action against an employer to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer. Finally, in the case of a repeated or willful violation, the employer shall also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.

Section 826.151(b) explains that, for purposes of the EFMLEA, employers are subject to the enforcement provisions set forth in section 107 of the FMLA, *with one important exception*: an employee *may not* bring a private action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not *otherwise subject* to the FMLA. See 29 U.S.C. 2617; 29 CFR 825.400. In other words, an employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, as required by section 101(4)(A)(i) of the FMLA.

### **DOL Investigation Authority Under the EPSLA and the EFMLEA**

Finally, Section 826.153 of the new regulations sets out the DOL's investigative authority under the EPSLA and the EFMLEA. Under the EPSLA, the DOL may investigate and gather data in the same manner as authorized by sections 9 and 11 of the FLSA. See 29 U.S.C. 209, 211. Under the EFMLEA, the DOL may investigate and gather data in the same manner as authorized by sections 106(a) and (d) of the FMLA. See 29 U.S.C. 2616(a), (d). These provisions are extremely broad, authorizing, among other things, the DOL to enter a workplace and have access to, inspect, and copy documents, and/or require witness attendance and testimony, relating to any matter under investigation, from any person or entity being investigated or proceeded against, at any stage of any proceeding or investigation, at any place in the United States. They also give the DOL the power to subpoena relevant documents or testimony. In the event of any failure or refusal to comply with such a subpoena, the DOL may obtain from any district court in the United States an order to compel production and/or testimony. Failure to obey such an order may be enforced through contempt proceedings.

With so many new requirements facing employers in the wake of the COVID-19 pandemic, it can be easy to overlook the finer points of new legislation that could have a major impact on a business if not known or if misunderstood. The non-discrimination and anti-retaliation provisions of the EPSLA and the EFMLEA are good examples. However, careful consideration of and adherence to the DOL's new regulations as discussed above can help to avoid costly missteps.