

**USE OF EXISTING ACCRUED LEAVE IN CONJUNCTION WITH
EMERGENCY PAID SICK LEAVE AND EXPANDED FMLA**

To: ICRMT Members
From: O'Halloran Kosoff Geitner & Cook, LLC
Date: April 14, 2020
Re: Use of Accrued Leave in Conjunction with Emergency Sick Leave and Expanded FMLA

On April 6, 2020, the Department of Labor ("DOL") published regulations regarding the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and Emergency Paid Sick Leave Act ("EPSLA") mandated by the Families First Coronavirus Response Act ("FFCRA"). The regulations contained inconsistent provisions on whether employers could require employees to use existing leave benefits concurrently with EFML.

On April 10, 2020, the DOL issued a correction to clarify the circumstances under which employers can require employees to use existing paid leave concurrently with leave under the EFMLEA.

The following memo explains the current DOL guidance regarding an employee's use of existing leave benefits in conjunction with EPSL and EFML.

Emergency Paid Sick Leave and Existing Leave Benefits

As explained in earlier memos, the FFCRA allows eligible employees to take up to two weeks of emergency paid sick leave (EPSL) for six different reasons relating to COVID-19. They are as follows:

The employee is unable to work or telework because:

- (1) The employee is subject to a federal, state or local quarantine or isolation order relating to COVID-19;
- (2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

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- (4) The employee is caring for an individual who is subject to a quarantine or isolation order or who has been advised by a healthcare provider to self-isolate;
- (5) The employee is caring for a son or daughter whose school or daycare has been closed due to COVID-19 or the child care provider is unavailable for reasons related to COVID-19;
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

If an employee is taking EPSL for reasons (1) through (3), the employee is entitled to 100% of his or her wages or \$511 per day/\$5,110 in the aggregate (whichever is less). If the employee is taking EPSL for reasons (4) through (6), the employee is entitled to 2/3 of his or her wages or \$200 per day/\$2,000 in the aggregate (whichever is less).

DOL guidance explains that if an employee is not receiving 100% of his or her normal wages while taking EPSL, the employee can elect to supplement the EPSL wages with existing paid leave benefits to bring his or her gross wages up to 100%.

Expanded Family and Medical Leave and Existing Leave Benefits

Expanded Family and Medical Leave (EFML) is only available when the employee is unable to work or telework because the employee is needed to care for a son or daughter whose school or place of daycare is closed due to COVID-19, or whose child care provider is unavailable for reasons related to COVID-19.

The first two weeks of EFML are unpaid, but an employee can choose to substitute EPSL or other existing paid time off for the first two weeks of unpaid EFML.

Employees are entitled to 2/3 of their normal wages during weeks 3 through 12 of EFML, capped at \$200 per day or \$10,000 in the aggregate. Recent DOL guidance now makes clear that an employer may require employees to use existing paid time off or personal days concurrently with EFML during weeks 3 through 12. The employer, however, can only require employees to use existing paid leave benefits that normally would have been available to the employee under similar circumstances (like paid time off, vacation, or personal days). For example, if the employer's sick leave policy does not allow an employee to use sick days to care for an otherwise healthy child whose

school is closed, then the employer cannot require employees to use sick days concurrently with EFML.