

DOL Regulations on Requirements for Childcare Leave May Be a Trap for the Unwary

By Dent Morton and Emily Killion

April 2020

The U. S. Department of Labor issued its temporary regulations on the Families First Coronavirus Response Act (“FFCRA”) on April 2, 2020. The regulations provide some important (and surprising) information regarding paid leave for childcare purposes, some of which can serve as a trap for the unwary.

First, the regulations purport to change the scope of the requirement that an employer provide paid leave to an employee under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) to care for a son or daughter because of a school closing or the unavailability of childcare. The text of the EMFLEA specifically limits leave for childcare purposes to the need to care for a “son or daughter **under 18 years of age.**” The Emergency Paid Sick Leave Act (“EPSLA”), however, states that leave for childcare is to be provided to care for a “son or daughter,” as that term is defined in the FMLA itself, **which includes children 18 or older who are incapable of self-care because of a mental or physical disability.** In the regulations, the DOL has taken the position that it “would create needless confusion and complication to have different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for his son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons.” It therefore has decreed that employers must provide paid leave to employees to care for a son or daughter 18 or older, who is incapable of self-care because of a mental or physical disability, under the EMFLEA as well as under the EPSLA. The DOL was granted broad authority to issue regulations “to carry out the purposes of [the FFCRA], including to ensure consistency between” the EFMLEA and the EPLSA. While its authority to expand the scope of the EFMLEA in this manner, despite the express language of the statute, may be questionable, under the circumstances employers probably are best served by complying with the regulations on this point.

- Second, the regulations set forth the information an employer may require from an employee who is seeking leave for childcare purposes. Specifically, the employer may require the employee to provide a certification containing the following information:
- the employee’s name;
- the dates for which leave is requested;
- a statement that the employee is unable to work because of the need to provide childcare;
- the names and ages of the children to be cared for;

- the name of the school, place of care, or child care provider that has closed or become unavailable; and
- a representation that no other suitable person will be caring for the children during the period for which the employee is taking leave.

The regulations further provide that if the employer will be eligible for tax credits in connection with the requested leave, the employer may require the employee to provide additional information and documentation needed to support a request for the tax credits, and is not required to provide leave if that information has not been provided. According to the IRS FAQs on that subject, which the DOL specifically referenced in the temporary regulations, the employer should obtain and maintain the following to support such a request, in addition to the above-listed information:

- written support for the reason for leave, such as a notice of school or daycare closing or documentary evidence of the unavailability of the normal childcare provider;
- with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen (14) years of age during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

An employer may not require information beyond what is set forth above.

While we recommend that employers eligible for the tax credits obtain the additional information, we advise caution in denying leave requested to care for a child older than fourteen (14). Neither the IRS nor the Department of Labor has defined the term "special circumstances" or otherwise shed light on what circumstances would warrant denial of leave to care for an older child. If that question arises with respect to one of your employees, or you have any other questions about COVID-19 issues, please contact the Burr & Forman attorney with whom you work for guidance.

Stay up to date by monitoring the latest COVID-19 resources on our [CORONAVIRUS RESOURCE CENTER](#).

To discuss this further, please contact:

[Dent Morton](#) at (205) 458-5208 or dmorton@burr.com

[Emily Killion](#) at (251) 345-8222 or ekillion@burr.com

or the Burr & Forman attorney with whom you normally consult.

Burr & Forman publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm. If legal advice is sought, no representation is made about the quality of the legal services to be performed or the expertise of the lawyers performing such service.