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Employee Benefits – Question of the Month

May 2020

Q: We have an employee who has been off on regular FMLA since February 24th and is scheduled to return on May 18th. She has provided a note from her doctor stating she shouldn't return to work in the office because her health condition (lung issues) places her at heightened risk if she were to be exposed to COVID-19. Is she eligible for either Emergency Paid Sick Leave (EPSL) or the new Enhanced FMLA?

A: First, I'm going to assume the reason for the employee's leave (prior to May 18th) was not COVID-19-related. With that said, she would not be eligible for Enhanced FMLA at this time for two reasons:

1. It applies only to employees who need time off because of the closing of their child's school or daycare; and
2. It is limited to 12 weeks during the applicable FMLA leave year, including other (more traditional) types of FMLA leave.

So if the employee has used her 12 weeks of leave for the current leave year, then she isn't entitled to additional Enhanced FMLA (even if it were for a qualifying reason).

However, the Emergency Paid Sick Leave (EPSL) requirement took effect April 1st, and employers are not allowed to "take credit" for any paid leave (including sick leave or PTO) that may have been provided prior to that date. An employee's need to self-isolate because of an underlying health condition qualifies for EPSL. Therefore, the employee will likely be eligible for EPSL. The question is can EPSL overlap with the end of the employee's current period of FMLA (and be done around the time the employee's regular FMLA ends) or you should you wait until after FMLA ends for EPSL to start running (extending her leave by an additional two weeks)?

While employers can generally require EPSL to run concurrently with regular FMLA, DOL guidance refers to EPSL running concurrently with FMLA at the beginning of leave, not the end. See the [DOL's FAQs](#) on this subject (Questions 31-33 and 86). However, since EPSL didn't exist at the beginning of this employee's leave in February, it seems reasonable to have it run concurrently with the end of her leave, given the FMLA's long and well-established rules allowing employers to require paid leave to run concurrently with FMLA.

Unfortunately, this appears to be an unsettled question that you may want to run past your employment attorney before deciding how to proceed.

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