Salient Points from the DOL's Temporary Rule on the Families First Coronavirus Response Act

On April 2, 2020, the U.S. Department of Labor ("DOL") issued a new rule to regulate the FFCRA and the paid leave programs that just became effective on April 1, 2020. We reviewed the 124-page Rule and provide employers with information they need to know about the most common issues that are affecting their day-to-day operations at this time.

The following key points supplement the other fact sheets we provided over the past two weeks regarding the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family Medical Leave Extension Act (E-FMLA) based on the new Rule.

EPSLA

- Employers who fail to provide EPSLA leave as required by the act are considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act (FLSA), and such employers are subject to enforcement proceedings described in sections 16 and 17 of the FLSA.

- EPSLA prohibits employers from discharging, disciplining, or in any other manner discriminating against an employee who takes EPSLA leave, files any complaint under or relating to the EPSLA, institutes any proceeding under or relating to the EPSLA, or testifies in any such proceeding.

- For purposes of EPSLA, quarantine and isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.

- An employee may take EPSLA leave only if being subject to a quarantine order prevents him or her from working or teleworking.

- An employee subject to a quarantine or isolation order may not take EPSLA leave where the employer does not have work for the employee. For example, if an employer is closed because customers are required to stay home or because the employer is forced to close because of a governmental order, employees who are unable to work as a result do not qualify for EPSLA leave.

- An employee subject to a quarantine or isolation order is able to telework, and therefore may not take EPSLA leave, if

    - his or her employer has work for the employee to perform;
    - the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and
    - there are no extenuating circumstances that prevent the employee from performing that work.

The foregoing is true even if the employee is required to use his or her personal computer to telework instead of the employer's computer. A power outage or internet outage would qualify as an extenuating circumstance preventing an employee from teleworking, and an employee would be eligible for EPSLA leave during the period of the power outage or internet outage.

- To qualify for EPSLA leave, advice to self-quarantine from a health care provider, must be based on the health care provider's belief that:

    - the employee has Covid-19;
    - may have Covid-19;
    - or is particularly vulnerable to Covid-19; and
    - self-quarantining prevents the employee from working.

  An employee who is self-quarantining but able to telework may not take EPSLA leave if the employer has work; the employer permits the employee to work from the location where the employee is self-quarantining; and there are no extenuating circumstances, such as serious Covid-19 symptoms.

- Symptoms that qualify an employee for EPSLA leave are fever, dry cough, shortness of breath, and other Covid-19 symptoms identified by the CDC.

- EPSLA leave taken to obtain a medical diagnosis is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis, *e.g.* time spent making, waiting for, or attending an appointment for a test for Covid-19.

- An employee may not take EPSLA leave to self-quarantine without seeking a medical diagnosis.

- An employee waiting for Covid-19 test results who is able to telework may not take EPSLA leave if his or her employer has work for the employee; the employer permits the employee to work from the employee's location; and there are no extenuating circumstances, such as serious Covid-19 symptoms, that prevent the employee from working.

- An employee unable to telework may take sick leave while awaiting Covid-19 test results regardless of the severity of the Covid-19 symptoms.

- An employee who exhibits Covid-19 symptoms and seeks medical advice but does not meet the criteria for Covid-19 testing and is advised to self-quarantine, is eligible for EPSLA leave if he or she is unable to telework.

- An employee may take EPSLA leave (i) while experiencing any of the symptoms specified at 29 CFR § 826.20(a)(4) or (ii) after testing positive for Covid-19, regardless of symptoms, provided a health care provider advises the employee to self-quarantine.

- In order to qualify for EPSLA leave to care for an individual who is either subject to a governmental quarantine or isolation order or has been advised by a health care provider

to self-quarantine due to concerns related to Covid-19, the following conditions must be satisfied:

  - There must be a genuine need to care for the individual.
  - The person being cared for must have a personal relationship with the employee, *e.g.* an immediate family member, roommate, or a person with whom the employee has a relationship that creates an expectation that the employee would care for the person.
  - The person cared for must be subject to a federal, state, or local quarantine or isolation order or been advised by a health care provider to self-quarantine based on a belief that the individual has or may have Covid-19 or is particularly vulnerable to Covid-19.
  - But for the need to care for the individual, the employee would be able to perform work for his or her employer, either at the employee's normal workplace or by telework.

- An employee can take EPSLA leave to care for a son or daughter if the child's school or daycare has closed or the child care provider is unavailable due to Covid-19 related reasons, subject to the following:

  - The employee cannot take EPSLA leave if the employer does not have work for employee.
  - EPSLA leave is available only if the employee needs to care for employee's child and is actually caring for the child.
  - If another suitable individual is available to care for the child, EPSLA leave is not available.

- A full-time employee is one who is normally scheduled to work at least 40 hours each workweek. If the employee does not have a normal weekly schedule, the employee is full-time if he or she is scheduled to work, on average, at least 40 hours each workweek, including hours for which the employee took leave of any type. The weekly average should be computed over the six months preceding the request for leave. If an employee has been employed less than six months, the average is computed over the employee's entire period of employment.

- A part-time employee is one who is normally scheduled to work fewer than 40 hours each workweek or, if the employee works an irregular schedule, is scheduled to work, on average, fewer than 40 hours each workweek.

- A part-time employee who works a normal schedule is entitled to EPSLA leave equal to the number of hours the employee is normally scheduled to work over a two week period.

- A part-time employee whose weekly work schedule varies is entitled to EPSLA leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over a six month period ending on the date the employee takes EPSLA leave, including hours for which the employee took leave of any type.

- EPSLA leave for a part-time employee with a varying weekly schedule who has been employed for fewer than six months is equal to fourteen times the reasonable expectation of the employee at the time of hiring of the average number of hours per day that employee

would normally be scheduled to work. The "reasonable expectation" is best evidenced by an agreement between the employer and employee at the time of hire. Such an agreement could use any time period to express the average number of hours the employee was expected to work, so long as the daily average can be extrapolated from it. In the absence of an agreement, the actual average number of hours the employee was scheduled to work, including leave of any type, demonstrates the "reasonable expectation." An employer can also use twice the number of hours the employee was scheduled to work per workweek, on average, over the six month period.

- An employee may choose to use EPSLA leave prior to using any other type of paid leave available to the employee (*e.g.* other leave under any other federal, state, or local law, a collective bargaining agreement, or any employer policy in existence prior to April 1, 2020).

- Any given employee is entitled to a maximum of 80 hours of EPSLA leave regardless of whether the employee changes jobs. A new job does not entitle an employee to an additional 80 hours of EPSLA leave.

E-FMLA

- E-FMLA applies to employees of covered employers if such employees have been employed by the employer for at least 30 calendar days, including employees who (i) were laid off or otherwise terminated on or after March 1, 2020, (ii) had worked for the employer for at least thirty of the prior 60 calendar days, and (iii) were subsequently rehired or otherwise reemployed by the same employer.

- An eligible employee may elect to use, or an employer may require that an employee use, E-FMLA leave concurrently with any leave offered under the employer's policies that would be available for the employee to take care of his or her child (e.g. vacation or personal time or paid time off).

- As a general matter, FMLA definitions apply to E-FMLA except for specific definitions that are included in the E-FMLA.

- The definition of "son or daughter" includes children 18 years of age or older and incapable of self-care because of a mental or physical disability (the FMLA definition) and E-FMLA leave is available to care for such children regardless of E-FMLA language limiting qualifying leave to children under 18 years of age.

- Any time taken by an eligible employee as E-FMLA leave counts towards the twelve workweeks of FMLA leave (non-expanded) to which the employee is entitled.

- Notwithstanding the language of the act, the unpaid leave period for E-FMLA leave lasts for two weeks rather than ten days.

- In calculating an employee's regular rate, employers should use an average of the employee's regular rate over the six month period preceding the date leave is taken, weighted by the number of hours worked each workweek. If the employee has worked less than six months, the average should be computed over the employee's entire term of employment.

- Employees are limited to twelve weeks of E-FMLA even if the time period during which E-FMLA is available (April 1 to December 31, 2020) spans two twelve-month leave periods under FMLA.

- Any E-FMLA leave is reduced by FMLA leave taken in the current twelve month leave year.

- During the paid leave portion of E-FMLA leave, neither the employer nor employee may require the substitution of paid leave available from the employer. However, the employer and employee can agree to have accrued paid leave supplement the two-thirds pay under the E-FMLA so that the employee receives the full amount of their compensation.

- FFCRA regulations do not require employers to respond to employees who request E-FMLA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against FMLA leave allowances. Employers may, however, do so.

- Normal FMLA certification requirements apply for FMLA leave taken for an employee's own serious health condition related to Covid-19 or to care for a spouse, son, daughter, or parent with a serious health condition related to Covid-19.

- Job restoration does not apply under the E-FMLA to an employer who has fewer than twenty-five employees if all four of the following conditions are satisfied:

    - The employee took leave to care for a son or daughter whose school or place of care was closed or whose child care provider was unavailable because of Covid-19;
    - The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by Covid-19 during the period of the employee's leave;
    - The employer made reasonable efforts to restore the employee to the same or equivalent position; and
    - If reasonable efforts to restore the employee's job fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year, beginning either on the date employee's leave concludes or the date twelve weeks after the employee's leave began (whichever is later).

- "Key employees" are subject to existing job restoration limitations in 29 CFR 825.217.

- An employer cannot coerce an employee to use other paid leave before taking E-FMLA leave; however, an employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation, personal leave, or paid time off, concurrently with E-FMLA leave.

MISCELLANEOUS PROVISIONS UNDER THE FFCRA

- For purposes of the FLSA, Employers shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for Covid-19, where the employer is allowing the employee to work flexible hours. For

example, an employee may agree with an employer to perform telework for Covid-19 related reasons on the following schedule: 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays. An employer allowing such flexibility during the Covid-19 pandemic shall not be required to count as hours worked all time between the first and last principal activity performed by the employee. The employer must pay only for actual hours worked.

- Nothing in the FFCRA should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either EPSLA leave or E-FMLA leave should not be construed as undermining the employee's exempt status.

- 29 CFR § 826.40(a) discusses the category of workers who do not count toward the 500 employee threshold applicable to ESPLA and E-FMLA.

- For-profit and non-profit entities are both subject to the FFCRA.

- Employers with fewer than 50 employees can deny EPSLA and E-FMLA leave when:

    - such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
    - the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
    - the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity; *but*
    - the employer may deny EPSLA and E-FMLA leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk to the financial health or operational capacity of the employer, or prevent the small employer from operating at a minimum capacity, respectively.

- There can be no intermittent leave under E-FMLA or EPSLA without the agreement of both employer and employee. A written agreement is not required, but is the better practice. Employer and employee must agree on the increments of time in which leave may be taken. Subject to an agreement between employer and employee:

    - Intermittent leave may be taken in any increment of time while an employee is teleworking.
    - An employee who reports to employer's worksite can take intermittent leave in any increment only to care for a son or daughter whose school or day care is closed or whose child care provider is unavailable because of Covid-19.
    - Intermittent leave is not available for an employee who reports to the employer's worksite, if the leave is taken because the employee is subject to a governmental quarantine or isolation order; has been advised by a health care provider to self-quarantine due to COVID-10; is experiencing Covid-19 symptoms and seeking a

medical diagnosis; is caring for an individual subject to quarantine or self-quarantine; or is experiencing any other substantially similar condition.

- When an employee qualifies for leave under both EPSLA and E-FMLA, the employee may first use two weeks of EPSLA paid leave, which runs concurrently with the first two weeks of unpaid E-FMLA leave. Any remaining leave will be paid under E-FMLA.

- If an employee exhausts EPSLA leave for qualifying reasons other than to care for a child whose school, day care, or child care provider is unavailable because of Covid-19, if the employee later needs to take leave under E-FMLA, the first ten days of E-FMLA may be unpaid, unless the employee chooses to substitute earned or accrued paid leave provided by the employer.

- FFCRA notice requirements can be satisfied by distributing notice to employees by email or mail or by posting the required notice electronically on an employee information website, in addition to posting the notice in a conspicuous place at the worksite.

- Employers may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives EPSLA leave or expanded FMLA leave in order to continue to receive such leave.

- Documentation to support E-FMLA or EPSLA leave includes a signed statement containing (1) the employee's name; (2) the date(s) for which leave is requested; (3) the Covid-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the Covid-19 qualifying reason.

    - In addition, an employee requesting EPSLA leave because of a quarantine order must provide the name of the government entity that issued the order.
    - An employee requesting EPSLA leave because a health care provider advised self-quarantine must provide the name of the health care provider.
    - An employee requesting EPSLA leave to care for an individual must provide (as applicable)
        - The name of the government issuing the quarantine order to which the individual is subject; or
        - The name of the health care provider who advised the individual to self-quarantine.
    - An employee requesting EPSLA leave or expanded FMLA leave to care for a child must provide
        - The name of the child;
        - The name of the school, day care, or child care that is unavailable due to Covid-19; and
        - A statement representing that no other suitable person is available to care for the child during the period of requested leave.

- An employee who takes E-FMLA or EPSLA leave is entitled to continuing coverage under their employer's group health plan on the same terms as if the employee did not take leave.

    - The employee remains responsible for the portion of the plan premium that the employee paid prior to taking leave.

  - If premiums are adjusted, the employee on leave is required to pay premiums on the same terms as other employees.
  - The employee's share of premiums must be paid by the method normally used during any paid leave.
  - For unpaid leave, or where paid leave is insufficient to cover the premiums, 29 CFR 825.210(c) specifies how employers can obtain payment.
  - If an employee chooses not to retain group health coverage while on EPSLA leave or expanded FMLA leave, the employee is entitled to reinstatement upon returning from leave on the same terms as prior to taking leave.

- In most instances, employees are entitled to be restored to the same or equivalent position upon returning from EPSLA or E-FMLA leave.

- Employees on E-FMLA or EPSLA leave are not protected from employment actions, such as layoffs and furloughs, that would have affected the employee regardless of whether leave was taken.

- In general, employers must maintain leave documentation for four years.

- An employee's entitlement to or use of leave under EPSLA or E-FMLA is not grounds for diminishment, reduction, or elimination of any other right or benefit to which the employee is entitled under any employer policy in existence prior to April 1, 2020 or any other federal, state, or local law or collective bargaining agreement.

- Employer's cannot deny EPSLA or E-FMLA leave on grounds that the employee has taken another type of leave, including leave taken for reasons related to Covid-19.

- Employees are not entitled to financial compensation for unused EPSLA or E-FMLA leave upon expiration of the FFCRA or if their employment terminates before December 31, 2020.

This summary is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

C. Keith Lea	713.337.3765	klea@stuartpc.com
Elise Miller	713.337.3758	emiller@stuartpc.com
R. Glen Rigby	713.337.3757	grigby@stuartpc.com
Christine Parker Stuart	713.337.3750	cstuart@stuartpc.com
Laurence E. Stuart	713.337.3755	lstuart@stuartpc.com