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IRS Releases Guidance on SECURE 2.0's Expansion of Employee Plans Compliance Resolution System (EPCRS)

The Internal Revenue Service ("IRS") recently published guidance addressing changes made by the SECURE 2.0 Act of 2022 ("SECURE 2.0") to the IRS's Employee Plans Compliance Resolution System ("EPCRS"), which generally allows plans sponsors to correct certain plan-qualification errors. According to the guidance, plan sponsors may self-correct certain errors under SECURE 2.0's new rules without waiting for the IRS to formally update EPCRS to reflect those new rules.

Background

EPCRS is a program maintained by the IRS that allows plan sponsors to correct certain plan-qualification errors. One component of EPCRS is the Self-Correction Program ("SCP"), which permits the correction of plan errors without making a submission to the IRS or paying fees. SCP generally requires corrections to be completed within three years of the failure occurring in certain circumstances.

Section 305 of SECURE 2.0 expanded EPCRS so that so-called "eligible inadvertent failures" may be self-corrected using the SCP, with an indefinite correction period. An eligible inadvertent failure generally means a plan failure that occurs despite the existence of certain required practices and procedures; the failure may not be egregious, relate to the misuse of plan assets, or be related to an abusive tax avoidance transaction.

Section 305, which became effective on the day of enactment of SECURE 2.0 (December 29, 2022), requires the Treasury Department, within two years, to revise the Revenue Procedure containing EPCRS to take into account the new changes. The Treasury Department has not yet updated EPCRS to reflect section 305, which has led to questions regarding whether plan sponsors can take advantage of the expansion prior to the IRS's update, or whether they need to wait.

New IRS Guidance

On May 25, 2023, the IRS issued Notice 2023-43, which provides interim guidance on SECURE 2.0's expansion of EPCRS. The guidance states that, subject to certain restrictions, plan sponsors generally may self-correct an eligible inadvertent failure *before* the IRS officially updates EPCRS to reflect the changes made by section 305 of SECURE 2.0. (Note that this rule does not apply to IRA custodians.)

Certain eligible inadvertent failures, however, cannot be self-corrected prior to the IRS updating EPCRS – the nine listed failures include a failure to initially adopt a written plan and a significant failure in a terminated plan. In addition, the IRS lists several provisions of EPCRS relating to self-correction that, prior to updating EPCRS, do not apply with respect to the self-correction of an eligible inadvertent failure (including, for example, EPCRS's prohibition on self-correcting certain loan failures). Plan sponsors correcting failures in reliance on section 305 must continue to follow the general principles that apply to corrections of failures under the Internal Revenue Code, regulations, and guidance (such as EPCRS).

The guidance also provides that plan sponsors are not prevented from self-correcting an eligible inadvertent failure merely because the failure occurred

prior to the date of enactment of SECURE 2.0. Plan sponsors can rely on Notice 2023-43 beginning on the date it was issued and ending on the date EPCRS is updated to reflect SECURE 2.0's changes.

DOL Provides Guidance on When Holidays Do and Don't Count as FMLA Leave

When an employee takes a full week of Family and Medical Leave Act (FMLA) leave during a week that includes a holiday, current regulations are clear that the employee's FMLA leave entitlement is nonetheless reduced by a full week. But what happens if an employee takes only 1 day of leave during a week that includes a holiday? A new Department of Labor (DOL) Opinion Letter (FMLA2023-2-A) offers guidance.

Overview

As a general rule, eligible employees may take up to 12-weeks of unpaid FMLA leave during a 12-month period for certain qualifying reasons. In some cases, FMLA leave can be taken intermittently – i.e., in increments of days or portions of days – instead of in weekly blocks.

When an employee takes FMLA leave for less than one full workweek, the amount of FMLA leave taken is the proportion of the employee's normal workweek. For example, if an employee who normally works 40 hours per week takes 1 full day (i.e., 8 hours) of FMLA leave, their 12-week FMLA entitlement is reduced by 1/5 of a week. If the same employee instead takes 4 hours of FMLA leave each day for 5 days, then their leave entitlement is reduced by ½ of a week.

What if FMLA leave is taken during a week that includes a holiday?

As noted, current regulations provide that if a holiday occurs during a week when someone is taking a full week of FMLA leave, the holiday counts as FMLA leave. For example, assume an employee who takes 12-consecutive weeks of FMLA leave due to the birth of a child. If one of the weeks in that 12-week period includes the July 4th holiday, that week still counts as a full week of FMLA leave.

But what if an employee who normally works 40 hours per week takes one full 8-hour day of FMLA leave during the week that includes the July 4th holiday? Does that employee use 1/5 of a week of FMLA leave, or 1/4 of a week? In other words, is the employee using a fraction of their normal workweek (i.e., one that does not include a holiday) or a fraction of the holiday-reduced workweek?

According to the DOL's Opinion Letter, the rule in this situation is that the holiday does not count against the employee's FMLA leave entitlement unless the employee otherwise would be required to report to work on the holiday.

What does that mean? Continuing with the previous example, assume the employee uses 8 hours of FMLA leave on Thursday of the week in which the July 4th holiday falls on Friday. If the employee is not otherwise required to report to work on July 4th, the employee must be treated as having taken only 1/5 of a week of FMLA leave. But if the employee otherwise is required to report to work on July 4th, the employee is treated as having taken 2/5 of a week of FMLA leave (i.e., in this case, if the employee does not report to work on July 4th, they are taking a second day of FMLA leave).

As the Opinion Letter explains it, "… if the employee was not expected or scheduled to work on the holiday, the fraction of the workweek of leave used would be the amount of FMLA leave taken (which would not include the holiday) divided by the total workweek (which would include the holiday)."

The full text of the DOL's Opinion Letter, which includes additional information and examples, is available here.

Minnesota Enacts Paid Family and Medical Leave Law

In May, Minnesota joined a growing number of states enacting paid family and medical leave laws. Beginning in 2026, workers in the state will be entitled to up to 20 weeks of paid leave per year in certain circumstances.

Overview

On May 25, 2023, Minnesota Governor Tim Walz signed into law HF 2, which provides paid family and medical leave in the state for up to 20 weeks per year, depending on the circumstances. The law provides leave for two basic types of situations. First, employees are allowed to take up to 12 weeks of paid leave per year for a "serious health condition." This means a physical or mental illness, injury, condition, or substance use disorder that meets certain conditions, such as requiring inpatient care or continuing treatment by a health care provider. Second, employees can take up to 12 weeks of paid leave per year for "bonding, safety leave, family care, or qualifying exigency." These terms encompass time spent with a newborn child or newly adopted or fostered child; leave from work because of domestic abuse or stalking of the employee or the employee's family member; time off to allow an employee to care for a family member with a serious health condition; and time off arising out of a military member's active-duty service in the armed forces. If an employee takes both types of leave in a year, then their paid leave is capped at 20 weeks total.

The application of the law to employers and employees is fairly broad. The law generally applies to all employers – regardless of size – in the state. In addition, all employees that perform most of their work in Minnesota are eligible for leave under the law, with limited exceptions for self-employed individuals, independent contractors, and seasonal employees. (Self-employed individuals and independent contractors can purchase coverage on their own, however.) Employees that take advantage of the law will not receive their full wages while on leave – rather, payment is based on a calculation in the law that determines the maximum weekly benefit. Generally, employees must provide the employer

with at least 30 days' advance notice before the leave is set to begin. If 30 days' notice is not practicable – e.g., in the case of a medical emergency – notice must be given as soon as is practicable.

The new leave program will be funded by a 0.7% payroll tax, which will be split equally between employers and their employees. The rate will be adjusted in future years based on program usage.

The law is effective starting on January 1, 2026. Since the payroll tax and benefits will begin at the same time, initial funding will be provided by an appropriation from the state's general fund.

Separately, Minnesota also recently enacted an earned sick and safe leave law that will take effect on January 1, 2024. This law requires covered employees to accrue 1 hour of paid sick and safe leave for every 30 hours worked, up to a maximum of 48 hours of paid sick and safe leave per year. Employers can allow employees to accrue more than 48 hours per year if they choose.

Other Paid Leave News

Various forms of paid leave remain a legislative priority in many states. In April, for example, Virginia enacted a law (SB 1086) that provides for unpaid, job-protected leave for organ and bone marrow donation. Beginning July 1, 2023, Virginia employers with 50 or more employees must provide eligible employees with up to 60 days per year of unpaid organ donation leave and up to 30 days per year of unpaid bone marrow donation leave. This leave may not be taken concurrently with federal Family and Medical Leave Act leave.

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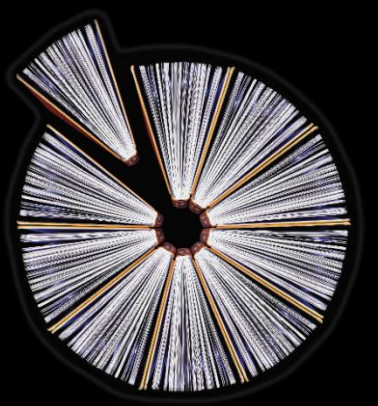

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