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Insights: Alerts

Department of Labor Releases Updated FFCRA Regulations Applicable Nationwide

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

On Friday, September 11, 2020, the Department of Labor ("DOL") issued a revised rule related to the Families First Coronavirus Response Act ("FFCRA"), which was published and became effective today, September 16, 2020. The revised rule states it is being promulgated by the DOL to address the uncertainty created by the decision of U.S. District Court Judge Paul Oetken issued on August 3, 2020, in the case of *New York v. U.S. Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020). Since Judge Oetken's ruling, employers have faced uncertainty when interpreting their obligations and implementing compliant leave policies. While the Opinion was certainly applicable for employers operating in the Southern District of New York, the impact on employers nationwide had been left largely in limbo. However, contemporaneously with releasing the revised rule, the DOL interpreted the Order to apply nationwide in FAQs 101-103. Specifically, the DOL said that "[b]ased on the specific circumstances in the case and language of the District Court's [O]rder, the [DOL] considers the invalidated provision of the FFCRA paid leave regulations [to be] vacated nationwide, not just as to the parties in the case."

As we have discussed at length in previous posts, the FFCRA created two separate paid leave provisions through the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). Although the DOL issued its initial temporary rule implementing provisions related to FFCRA earlier this year on April 1 (which we discussed here), just over four months later, four provisions of that initial rule were invalidated by the District Court (which we discussed here). As a brief refresher, the August 3 Order invalidated the following provisions of the DOL's relevant regulations: the "so called 'work-availability' requirement; its definition of 'health care provider'; its provisions relating to intermittent leave; and[,] its documentation requirements."

In invalidating those provisions, the Court acknowledged that the DOL labored "under considerable pressure" when it promulgated its first version of the rule, saying: "[t]his extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails

of our government. Here, DOL jumped the rail." The DOL response disagrees with at least some of the Court's reasoning because the Department declined to update all four provisions in the rules to conform to the recommendations of the District Court. Rather, and as was made clear in its press release on the revised rule, the DOL doubled down on two of the four provisions, by reaffirming and providing additional explanations regarding its position on the "work availability" requirement and the intermittent leave employer-approval requirement. Regarding the remaining two provisions invalidated by the Order, the DOL clarified the leave notice requirements and revised the definition of "health care provider" to drastically narrow the scope of its exclusionary reach (changes which largely conform to the Court's Order).

According to the DOL, the revisions accomplish the following:

- "reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave and explains further why this requirement is appropriate…";
- "reaffirms that, where intermittent FFCRA leave is permitted by the [DOL's] regulations, an employee must obtain his or her employer's approval to take [such leave] intermittently…";
- "revises the definition of "healthcare provider" … to mean employees who are health care providers under [the traditional FMLA regulations], and other employees who are employed to provide diagnostic services, preventative services, or other services that are integrated with and necessary to the provision of patient care";
- "revises [the regulations] to clarify that the information the employee must give the employer to support the need for his or her leave should be provided to the employer as soon as practicable"; and,
- "revises [one section] to correct an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to his or her employer."

The DOL's Wage and Hour Division, which is tasked with enforcing the leave provisions created under the FFCRA, expects the updates to respond to the "evolving situation," and "address some of the challenges [facing] the American workforce…" However, given the still existing conflict between the S.D.N.Y. decision and at least two of the revised regulations, it is likely that employers will still have questions about their obligations under the FFCRA. The DOL acknowledged this apparent conflict in its revised rule, saying that it was issuing "this temporary rule, effective immediately, to reaffirm its regulations in part, revise its regulations in part, and further explain its positions," and was relying, in part, on the "the time-limited nature of the FFCRA leave benefits, the urgency of the COVID-19 pandemic and the associated need for FFCRA leave, and the pressing need for clarity in light of the District Court's decision…" in issuing the revisions now.

In greater detail, we outline the DOL's changes related to the two provisions for which the DOL reaffirmed its previous positions below, and the two revised provisions as they now exist.

The Reaffirmed Work-Availability Requirement

In its original rule, the work-availability requirement excluded employers who do not have work for their

employees as covered entities. In the August 3 Order, the Court noted that this "limitation is hugely consequential for the employers and employees covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed." The Court held that the DOL failed to meet its burden for two reasons, but "more fundamentally" because "the agency's barebones explanation for the work-availability requirement is patently deficient." Elaborating, the Court found that the DOL's minimal support for such an "enormously consequential determination" was unproven and insufficient.

Although it declined to change its interpretation in the revised rule, the DOL provided significant additional context regarding its interpretation. The Department stated that, at least regarding the work-availability prong of the rule, "[t]o the extent that the District Court required addition[al] or further explanation of the [DOL's] final action in promulgating this rule, the additional explanation [in the revised rule] should be read as a supplement to—and not a replacement of—the discussion of causation included in the April 1 temporary rule." Specifically the DOL noted that "removing the work-availability requirement would not serve one of the FFCRA's purposes: discouraging employees who may be infected with COVID-19 from going to work," because "[i]f there is no work to perform, there would be no need to discourage potentially infected employees from coming to work through the provision of paid FFCRA leave."

Further, the DOL said that removing the work-availability requirement would lead to "perverse results" because it would alter the typical reality that when an employer closes its business and furloughs its employees—and there is no paid work for the employees to do—it is typical that the employees do not receive paychecks. However, if the work-availability requirement were to be removed, then an employee with a FFCRA qualifying reason for leave would receive compensation while employees without a qualifying reason for leave would not.

The DOL stated that nothing in its interpretation should be read to "permit an employer to avoid granting FFCRA leave by purporting to lack work for an employee." Rather, the DOL was clear that if an employer purposefully made work unavailable in an effort to deny an eligible employee FFCRA leave, such actions may be a violation of the FFCRA's anti-retaliation provisions.

The Reaffirmed Employer Consent Requirement for Intermittent Leave

Because Congress did not address intermittent leave at all in drafting the FFCRA, the District Court reasoned this provision was "precisely the sort of statutory gap … that the DOL's broad regulatory authority empowers it to fill." However, the Court also found that the DOL's regulations concerning intermittent leave faltered at the reasonableness prong of judicial review. The Court found the DOL's regulations reasonable regarding why intermittent leave was not available where the qualifying reason for leave "logically correlate[s] with a higher risk of viral infection." The impacted leave requests under the regulation were those where the individual had symptoms of COVID personally and/or was providing care for an individual with symptoms, both of which imply the individual's exposure to someone possibly infected. In such circumstances, the District Court agreed that

the public health concerns about limiting exposure justified the prohibition on intermittent leave. However, the Court was not equally persuaded by the DOL's promulgated requirement that an employer agree to the intermittent leave in the other instances, "which concededly do not implicate the same public-health considerations." The Court held that the DOL's employer consent requirement for intermittent leave was allowed "[i]nsofar as it ban[ned] intermittent leave based on qualifying conditions," but that it was "entirely unreasoned and fails" insofar "as it requires employer consent for intermittent leave" in other situations.

Rather than changing its interpretation, the DOL added additional reasoning to its view that intermittent leave required employer consent when it was related to working intermittently at home and providing care for a minor child whose school or place of care was closed for COVID-19 related reasons. The DOL again confirmed that the supplemental explanation offered in the revised rule should be read in addition to and not in replacement of the reasoning provided in the initial April 1 rule.

In revising its interpretation to add additional context, the DOL stated that its interpretation was "consistent with long standing FMLA principles governing intermittent leave." Specifically, the DOL noted that this interpretation supported the "longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid "unduly disrupting the employer's operations." The DOL reasoned that in the traditional FMLA statute, which includes the definition of intermittent leave as "leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks," Congress "expressly authorized" employees taking FMLA leave intermittently "only under certain circumstances." In contrast, when drafting the FFCRA, Congress was silent on whether leave could be taken intermittently, which granted the DOL "broad regulatory authority to effectuate" the paid leave provisions. Accordingly, the DOL reasoned, that this interpretation was well within its authority to ensure consistency in the application of and implementation of the EPSLA and the EFMLEA. The DOL reasoned that the FMLA has long recognized that, where possible, intermittent leave should "avoid 'unduly disrupting the employers operations'," and that this goal would be best achieved by requiring employer approval for such leave. The DOL explained that this requirement would help balance "the employee's need for leave with the employer's interest in avoiding disruptions…" In support of its reasoning, the DOL noted that the FFCRA included employer permission as a prerequisite for teleworking, and that requiring employer approval before allowing intermittent leave for teleworking was a practical addition. Additionally, to the extent an employee requested the ability to take intermittent leave from work occurring at the worksite (only available in limited circumstances), that addition—with employer consent—was in-line with long standing FMLA provisions related to caring for a child and was an appropriate condition to ensure balance between the competing interests of employees and employers in this unprecedented time.

The Revised Definition of Health Care Provider

The impacted portions of the DOL rule regarding the definition of "health care provider" are particularly relevant because employers may exclude employees who are health care providers from the EPSLA and EFMLEA. In its

original rule, the DOL's definition of this term focused on the identity of the employer. The District Court noted that even the DOL conceded that "an English professor, librarian, or cafeteria manager at a university with a medical school would all be 'health care providers' under the [DOL's initial] Rule." Finding that the DOL's focus on the identity of the employer and not the employee was improper, the Court held that the DOL's definition "cannot stand."

On this point, the DOL appeared to concede the Court's position. In its revised rule, the DOL noted that is revisions were "consistent with the District Court's order," and shifted the definition to focus on "the role and duties of those [health care provider] employees rather than their employers." The revised rule states that an employee is a health care provider if he or she is "capable of providing health care services." Additionally, the Department "further limits the universe of relevant 'health care services" that an employee "must be capable of providing to qualify as a 'health care provider…" Specifically, the revised rule requires that "a health care provider must be 'employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care." The DOL offered additional reasoning, with the resulting definition being far more narrow (and excluding fewer employees from FFCRA eligibility) than the original definition promulgated by the agency.

The Revised Notice and Documentation Requirements

Finally, the DOL revised the portions of the initial rule to clarify that employers may require employees to follow reasonable notice procedures, and that especially for employees utilizing the EFMLEA leave provisions, they should provide notice to their employers as practicable when such need for leave is foreseeable.

Conclusion

Although the DOL certainly added additional reasoning to both the reaffirmed and revised provisions of its FFCRA rule, it is too soon to tell how heavily weighted those revisions will be in future legal challenges. As with all things COVID-19 related, the situation is rapidly evolving with near constant changes and updates. Employers with questions about how this decision impacts their obligations related to prior, existing, or future requests for leave under the FFCRA should contact legal counsel. We will continue to monitor the situation and update as necessary.

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