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U.S. COVID-19: NEW YORK FEDERAL COURT INVALIDATES SEVERAL PROVISIONS OF FFCRA REGULATIONS

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Employers' efforts to comply with the Families First Coronavirus Response Act ("FFCRA") were further complicated on Monday when the United States District Court for the Southern District of New York invalidated several key provisions of the Department of Labor's ("DOL") Final Rule (or regulations) interpreting the law. Unfortunately, the Court's holding creates a number of questions on key issues, including retroactivity and the applicability of the decision on a nationwide basis in light of the court's failure to issue a nationwide injunction. Further, the holding may not be final, because the DOL may appeal the ruling to the Court of Appeals for the Second Circuit. At minimum, it appears likely that the DOL will issue revised Questions & Answers, and potentially revised regulations, in light of Monday's ruling.

As we await further guidance from the DOL and/or the courts, employers should become familiar with the changed FFCRA landscape and consider how Monday's ruling may impact their FFCRA policy and practices. Below is a discussion of the four provisions that have been struck down, at least within the Southern District of New York.

WORK-AVAILABILITY

The FFCRA statutory language provides that employees are only entitled to leave if they are unable to work "because of" a COVID-19 qualifying reason. The DOL interpreted this language to mean that employees are not entitled to FFCRA leave if their employer has no work available for them, even if the lack of work is the result of a government directive such as a closure or "stay-at-home" order. Noting that this "work-availability requirement" is "enormously consequential" in that it may considerably narrow the scope of individuals entitled to leave, the Court invalidated the requirement, finding that the DOL's interpretation did not reflect reasoned decision-making.

With the work-availability requirement no longer in place, it is unclear how FFCRA leave will apply going forward with respect to various employer responses to work slowdowns or closure orders. For example, will furloughed employees – who currently do not even count as "employees" under the DOL's FFCRA regulations – be eligible for FFCRA leave if the decision to furlough them is based on a closure order? As COVID-19 cases increase, creating the potential for new or renewed

government directives concerning the workplace, additional guidance from the DOL on this point is imperative.

HEALTH CARE PROVIDER

The FFRCA statutory language permits employers to exclude health care providers from taking FFCRA leave. Although the statute references the definition of "health care provider" set forth under the Family and Medical Leave Act ("FMLA"), the DOL adopted a much broader definition of "health care provider" in the FFCRA regulations, stating that employers could choose to deny leave to, among others, essentially anyone employed by a hospital, doctor's office, health care center, clinic, etc. ("Medical Institution") or anyone employed by an entity that contracts with a Medical Institution to provide services or maintain facility operations.

Again, recognizing that the DOL's interpretation could significantly restrict the scope of employees entitled to take FFCRA leave, the Court agreed with the State of New York that the DOL's definition of "health care provider" was far too broad, especially since it would cover employees whose roles bear "no nexus whatsoever" to the provision of healthcare services and thus are not relevant to the healthcare system's vitality during the pandemic. After Monday's ruling, the question remains as to whether a "health care provider" for purposes of exclusion from FFCRA leave is limited to those individuals who satisfy the FMLA's limited definition, or if the DOL may identify a new, albeit more limited, definition of this phrase.

INTERMITTENT LEAVE

The FFCRA statutory language is silent as to whether employees may use FFCRA leave intermittently. In the regulations, the DOL provided for intermittent use of leave, but only: (1) in certain situations where the use of leave intermittently would not create a risk of exposure in the workplace (such as when an employee taking FFCRA Paid Sick Leave due to COVID-19 illness could telework rather than come in to the workplace, or when the employee's need for leave is based on the need to provide care to a child whose school is closed); and (2) with employer consent. In Monday's ruling, the Court upheld the regulation as it relates to the types of leave that may be used intermittently, but struck down the requirement of employer consent.

As such, it appears that, in those situations where intermittent FFCRA leave is generally permitted under the regulations, employers must permit employees to take such leave intermittently.

DOCUMENTATION

The FFCRA statutory language provides that employees must provide notice of the need for leave either "as soon as practicable" or no later than the first day after such leave is taken. In contrast, the DOL's regulations required not only that employees request leave ahead of time, but also that employees submit supporting documentation ahead of the leave. Given the regulations' conflict with the text of the statute, the Court struck down the advanced documentation requirement. As a

result, employers should not require the submission of documentation as a precondition to taking FFCRA leave. Revised DOL guidance as to the timing of such documentation hopefully will be forthcoming.

While the full extent of Monday's ruling – and its geographic reach – are as yet unknown, employers can expect to see an increase in demand for FFCRA leave as the number of COVID-19 cases continues to rise. As such, employers should work with legal counsel to determine how, if at all, their FFCRA policies must be revised in light of Monday's decision and any revised DOL guidance.

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- Employment & Labor

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