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US COVID-19: DOL ISSUES REVISED FFCRA REGULATIONS IN RESPONSE TO NY DECISION

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In August, we informed you of a decision by a federal district court in New York (the "Court") that invalidated four key provisions of the federal Department of Labor's ("DOL") regulations interpreting the Families First Coronavirus Response Act ("FFCRA"). On September 11, 2020, the DOL acknowledged the nationwide impact of the Court's ruling, and issued much-anticipated revised regulations addressing the four provisions. The new regulations will be formally published, and become effective, on September 16, 2020.

As described in detail below, in the new regulations, the DOL: (a) affirmed the "work-availability" requirement; (b) affirmed the "employer consent" requirement for intermittent leave; (c) narrowed the scope of the "health care provider" definition for purposes of the available exemption from the leave entitlement; and (d) clarified the timing of notice and documentation requirements. The DOL also provided new and revised Q&As on these subjects (see Q&A #s 16, 21, 22, 56, and 98-103).

WORK-AVAILABILITY

In the revised regulations, the DOL held firm to the requirement that **employees are only entitled to leave if they are unable to work "because of" a COVID-19 qualifying reason**. The DOL addressed the Court's concerns with consistency by clarifying that this work-availability requirement applies to all qualifying reasons for FFCRA leave. Thus, according to the DOL:

- FFCRA leave (both Paid Sick Leave for any qualifying reason and Expanded FMLA leave) may only be taken if the employee has work from which to take leave. In other words, an employee cannot take FFCRA leave if the employer would not otherwise have had work for the employee to perform.
- Furloughed employees are not entitled to FFCRA leave during their furlough.
- Employers may not avoid granting FFCRA leave by purporting to lack work for an employee. For example, removing an employee from the work schedule in order to avoid providing FFCRA leave, or altering an employee's schedule in an adverse manner because the employee requests or takes FFCRA leave, may constitute impermissible retaliation.

INTERMITTENT LEAVE

The DOL similarly held firm to the requirement that, to the extent the regulations permit FFCRA leave to be taken on an intermittent basis, **employer approval (consent) is required to take leave intermittently.** The DOL addressed the Court's concerns by supplementing its discussion of the reasons for this requirement, which essentially amounts to encouraging flexibility with respect to employee use of FFCRA leave while balancing: (a) a desire to not exacerbate the risk of COVID-19 contagion; and (b) a desire to not unduly disrupt an employer's operations. Thus, according to the DOL:

- An employee who is **teleworking** (and not reporting to the worksite) may take intermittent FFCRA leave for any qualifying reason, **but only with employer consent.**
- An employee **who must report to the worksite** (i.e., an employee who is not permitted by the employer to telework):
- May take intermittent FFCRA leave for the qualifying reason of caring for a child whose school or day care is closed, **but only with employer consent**.
- May *not* take FFCRA leave intermittently for any other qualifying reason for leave, due to the higher risk of exposure in the workplace and therefore the potential to undermine the statutory purpose of combating the COVID-19 public health emergency.

In articulating the above requirements, the DOL clarified two situations in which use of FFCRA leave is **not considered to be "intermittent" and, therefore, is permitted without employer consent**.

First, the DOL clarified that **employees are not required to "use up" their entire FFCRA leave entitlements the first time they have a qualifying reason for leave**. Rather, they may use a portion of their entitlement and then if they no longer have a qualifying reason for leave, the unused portion of leave remains available for future use (up until December 31, 2020) if the employee has another qualifying reason for leave. For example, if any employee needs FFCRA leave due to having COVID-19 symptoms and seeking a diagnosis, but the COVID-19 test comes back negative and the employee is otherwise cleared to return to work before using a full two weeks of FFCRA leave, the employee retains the ability to use the remaining portion of FFCRA leave at a later date.

Second, **the DOL stated that FFCRA leave to care for a child whose school or day care is closed during certain periods – such as where the school is operating on a hybrid basis or on longer or shorter alternating schedules of in-person and virtual attendance – is not considered intermittent leave, and therefore leave may be taken during the periods of school "closure" without employer consent**.

- Thus, for example, employees are permitted to take leave in full-day increments without employer consent when needed to care for a child whose school is operating on an alternate

day basis (in school some days and virtual learning on other days).

- Similarly, employees are permitted to take leave in half-day increments without employer consent where the school is only "open" for a half-day, such that the employee's child attend in-person classes for half of each school day while learning virtually during the other half of the school day.

However, if the school is closed for some period, and the employee only wishes to take leave for **certain portions of that period**, then the leave is considered "intermittent" and employer consent is required. For example, if the school is closed for a full week, and the employee only wants to take leave on Monday, Wednesday and Friday, then such leave would be "intermittent" and employer consent would be required.

HEALTH CARE PROVIDER

The DOL essentially accepted the Court's conclusion that the original regulatory definition of "health care provider" for purposes of determining which employees could be denied the right to take FFCRA leave was too broad. Accordingly, the DOL revised the FFCRA regulations to narrow the definition, while still providing employers the option to exclude from leave eligibility those employees whose absence from work would be particularly disruptive.

Under the revised regulations, for purposes of this exemption, a health care provider is:

1. Any employee who meets the definition of "health care provider" under the Family and Medical Leave Act ("FMLA") regulations (this definition basically covers physicians and others who make medical diagnoses); or

2. Any other employee who "is capable of providing health care services," which means that the employee "is employed to provide" either:
    1. Diagnostic services (including taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results);

    2. Preventive services (including screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems);

    3. Treatment services (including performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments); or

    4. Other services that are "integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care" (including bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples).

In regards to #2, while the four referenced categories remain relatively broad, the DOL noted that the determination of whether an employee provides the necessary types of services to be covered will be **role-specific**. For example, "lab technicians" who process test results necessary for diagnoses and treatment would be covered, but other "lab technicians" whose services are not necessary to the provision of patient care would not be covered. That said, nurses, nurse assistants, and medical technicians typically will be covered, as will other employees who directly provide the described services or who do so under the supervision of such employees.

On the hand, employees such as "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers" do not provide health services and therefore are not health care providers, even if they work for a "health care" employer.

DOCUMENTATION

The DOL acknowledged the internal inconsistency within the FFCRA regulations relating to when employees must provide notice of the need for leave versus when employees must provide supporting documentation. Accordingly, in the revised regulations, the DOL clarified the permissible notice and documentation requirements as follows:

- Notice:
  - Paid Sick Leave: Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an employee takes leave.
  - Expanded FMLA Leave: Notice must be given as soon as practicable; if the need for leave is foreseeable, then advance notice before taking leave generally may be required.
- Documentation: Employees may be required to provide supporting documentation as soon as practicable, which in most cases will be when notice is provided. Such documentation includes:
  - The employee's name, dates for which leave is requested, the qualifying reason for leave, and an oral or written statement that the employee is unable to work; and
  - The additional materials necessary to support the existence of the qualifying reason and, thus, the employer's request for tax credits.

Employers should review both their FFCRA policies and practices with respect to the foregoing subjects to ensure compliance with the revised regulations.

RELATED PRACTICE AREAS

- Employment & Labor

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