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DOL revises FFCRA paid leave regulations

On September 11, the DOL's Wage and Hour Division posted revisions to regulations that implemented the paid leave provisions of the Families First Coronavirus Response Act. The revisions clarify workers' rights and employers' responsibilities in light of a Manhattan federal judge's recent decision invalidating certain portions of those regulations.

Background

On March 18, the Families First Coronavirus Response Act (FFCRA) was enacted in response to the spread of the coronavirus across the country. Among other things, the FFCRA requires private employers with fewer than 500 employees and governmental employers of any size to allow eligible employees to take up to 80 hours of paid sick leave and up to 10 weeks of partially paid family leave for a number of qualifying reasons. (See our March 18, 2020 *FYI*.) On March 24, the DOL's Wage and Hour Division (WHD) published its first round of guidance on the new law's paid sick leave and paid family and medical leave provisions and issued temporary regulations implementing them on April 1. The leave requirements will expire on December 31, 2020. (See our March 26, 2020 *FYI*.)

On August 3, Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York vacated four provisions of the FFCRA regulations, finding that they exceeded the WHD's statutory authority. The ruling invalidated the regulations' "work-availability" requirement, definition of "health care provider," limitations on intermittent leave, and certain notice and documentation requirements. The remainder of the regulations were unaffected.

Revised regulations

On September 16, the WHD issued a revised set of FFCRA paid leave regulations that address each of the provisions struck down by the court. The revisions are effective immediately.

Health care exemption

The FFCRA allows employers to exclude employees who are “health care providers” or who are “emergency responders” from the FFCRA’s paid leave entitlement to prevent disruptions to critical health and safety services during the COVID-19 public health emergency. The original regulations defined “health care provider” to include anyone employed at a health care facility, including hospitals, medical schools, and a range of other places where medical services are provided. The broad exemption extended to both those who treated patients and those who did not, such as cafeteria workers and janitors.

Under the Family and Medical Leave Act (FMLA) regulations, a health care provider is “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices, or any other person determined by the Secretary to be capable of providing health care services.” The revised FFCRA regulations narrow the health care exclusion, limiting its applicability to employees who meet the FMLA definition of health care provider or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care (e.g., nurses, nurse assistants, medical and lab technicians). By contrast, some previously excludable workers in the health care industry who are not *directly* involved in patient care — such as IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers — will now be eligible for FFCRA leave.

Work-availability

Under the FFCRA, eligible employees may take emergency leave if they have a “qualifying need” for leave — defined as the inability of an employee to work (or telework) due to one of six specified “qualifying reasons” including the need for leave to care for their child whose childcare or school is closed due to COVID. However, leave would not be available for other non-COVID related reasons.

The revised regulations reaffirm that FFCRA leave is available “only if the employee has work from which to take leave,” is unable to telework, and the “qualifying reason” for leave is the actual reason they are unable to work. For example, leave would not be available to an employee who has no work because the employer closed the worksite, conducted layoffs or furloughs, or temporarily suspended operations. The WHD also clarified that the work availability requirement applies to all six categories of FFCRA leave.

Intermittent leave

The WHD’s original regulations permit an employee who is reporting to a worksite to take FFCRA leave on an intermittent basis only when taking such leave to care for their child whose school, place of care, or child care provider is closed or unavailable due to COVID-19. They also permit an employee who is teleworking (and not reporting to the worksite) to take intermittent leave for any of the FFCRA’s qualifying reasons. In both circumstances, leave is contingent on the employer’s consent.

The revised regulations reaffirm that employer approval is needed to take FFCRA leave intermittently in all situations in which intermittent leave is permitted and provide a fuller explanation to supplement the agency's earlier position. Citing the FMLA's longstanding principle that intermittent leave should, where foreseeable, avoid undue disruption to employer operations, the WHD concluded that it "best meets the needs of businesses that this general principle is carried through to the COVID-19 context, by requiring employer approval for such leave."

Importantly, the WHD confirmed that "the employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis." As the WHD explains, leave being used in single, full-day increments would not be intermittent because each remote-learning day would create a separate reason for FFCRA leave that ends when the child is permitted to resume in-person classes. If, however, school was closed for an entire week due to COVID-19 related reasons, the employee would need employer approval to take expanded family leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday while another family member watches their child.

Notice and documentation requirements

The WHD revised the documentation requirement in accordance with the court ruling, clarifying the timing for employees to provide information to their employers. While the original regulations required documentation as a precondition to providing FFCRA leave, the revised regulations only require workers taking FFCRA paid sick and family leave to provide supporting documentation "as soon as practicable" rather than prior to taking leave.

The WHD also corrected an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to their employer. The original regulations stated that employers could not require employees to provide advance notice of the need for emergency paid sick or expanded family and medical leave. Rather, notice could be required only on or after the first day of leave. The final revisions clarify that the "only after" language applies exclusively to paid sick leave. Thus, notice of family and medical leave must be provided as soon as practicable — generally before taking leave if the need for it is foreseeable.

Updated Q&As

The WHD updated several FFCRA Q&As to reflect its revised regulations and added three new ones that address the effect of the recent court ruling. Q&A 101 confirmed that the four provisions of the FFCRA paid leave regulations discussed above were vacated on August 3 but the remainder of the regulations were unaffected. Resolving much uncertainty about the application of that ruling, Q&A 102 clarifies the WHD's position that the invalidated provisions were vacated nationwide — not just in New York. Finally, Q&A 103 confirms that the revised FFCRA regulations are effective from September 16 through their expiration on December 31, 2020.

In closing

The revised regulations clarify workers' rights and employers' responsibilities under the FFCRA's paid leave provisions in light of the recent court ruling that found portions of the original regulations invalid. Employers subject to the FFCRA, particularly those in the health care industry, should review and, as necessary, update their leave policies and protocols to ensure compliance.

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