The DOL Revises FFCRA Regulations: What Employers Should Know

The United States Department of Labor ("DOL") has issued revised regulations concerning paid leave under the Families First Coronavirus Response Act ("FFCRA"). The revisions, effective September 16, 2020, were made in response to an August 3, 2020, federal district court decision in New York invalidating various aspects of the original regulations promulgated on April 1, 2020. Key changes include:

- Narrowing the "health care provider" exemption;
- Reaffirming the requirement that employees may take FFCRA leave only if work would otherwise be available to them;
- Reaffirming that an employer must agree to allow an employee to take FFCRA leave intermittently for certain purposes; and
- Amending notice and documentation requirements for FFCRA leave.

Narrowed Definition of "Health Care Provider"

In light of the court's ruling that the DOL's initial regulations defined the FFCRA's "health care provider" exemption too broadly, the DOL has promulgated a new definition of "health care provider" that is substantially narrower.

By way of brief background, the FFCRA permits employers to exempt "health care providers" and "emergency responders" from the FFCRA's paid leave provisions. The DOL's initial FFCRA regulations expansively defined "health care provider" for purposes of the exemption, placing significant emphasis on the health care-related nature of the employer. For example, under the original regulations, "any employee" of a hospital, including administrative staff, development employees, and cafeteria workers, could have been exempted even though they themselves did not perform health services.

The court struck down the DOL's original health care provider exemption regulations on the grounds that they were overbroad and improperly focused on whether the employer was a health care provider, rather than on whether certain employees were health care providers.

The DOL's new definition of "health care provider," for purposes of the exemption, focuses on the work performed by certain employees and not the services provided by their employer. In essence, whether an employee may properly be deemed exempt as a "health care provider" will depend on whether an employee provides "health care services" under the regulations. Specifically, the new regulations provide that health care providers are:

- Physicians and others who make medical diagnoses, and
- **"Any other Employee who is capable of providing health services,"** meaning they 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."

The revised regulations endeavor to provide some clarification concerning the scope of "diagnostic services," "preventative services," and "treatment services," but it is not comprehensive.

So, who is an "employee who is capable of providing health services"? According to the regulation, such employees include only:

- Nurses, nurses assistants, medical technicians, and any other persons who directly provide health care services (i.e., diagnostic, preventive, treatment services, or other services that are integrated with and necessary to the provision of patient care);
- Employees who provide health care services under the supervision, order, or direction of, or provide direct assistance to physicians or other clinicians who make medical diagnoses; and
- Employees who are otherwise integrated into and necessary components to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

The revised regulations state that employees who do not provide health care services as outlined above are **not** health care providers, "even if their services could affect the provision of health care services." Thus, for example, IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers are "too attenuated to be integrated and necessary components of patient care" under the revised definition of "health care provider."

The regulations also state that "typical work locations" of health care providers "may include" a:

> doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar permanent or temporary institution, facility, location, or site where medical services are provided.

In short, the new regulations' focus on the specific services provided by an employee may require employers to revisit whether they can continue to invoke the health care provider exemption for their staff. Given the nuances of the new health care provider exemption regulations, we strongly urge employers who have previously claimed the health care provider exemption to consult with counsel.

The Work Availability Requirement

The DOL's revised regulations reiterate that an employee's qualifying reason for FFCRA leave must be the **actual** reason the employee is unable to work. In other words, FFCRA leave remains unavailable if an employee has been furloughed or the employer's business has closed because, in those circumstances, the employee has no work from which to take leave. The DOL explained that this interpretation, among other things, comports both with the plain language of the FFCRA (which specifically states that the need for leave must be "due to" or "because" of a FFCRA-qualifying reason), the underlying purposes of FFCRA leave (including the need to discourage potentially sick employees from coming to the workplace), and the DOL's interpretation of the term "leave" in other contexts.

Intermittent Leave

In its ruling, the court invalidated the FFCRA regulations to the extent that they required employer approval for intermittent leave on the grounds that the DOL had not adequately explained why employer approval was necessary. The revised regulations provide additional explanation for requiring employer approval, drawing significantly on the fact that the FMLA "balances the employee's need for leave with the

employer's interest in avoiding disruptions by requiring agreement by the employer to take intermittent leave" when such leave is not needed for medical reasons.

The DOL also clarified that when a child's school operates on a hybrid or an alternate day schedule, leave on the days the school is closed to an employee's child is not considered intermittent leave. For example, if an employee needs FFCRA leave on Monday, Wednesday, and Friday because their child is required to attend school remotely on those days, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day; intermittent leave is not needed because the school literally closes and opens repeatedly. However, if the child's school was closed Monday through Friday, but the employee only needed leave on Tuesday and Wednesday, such leave would be deemed to be intermittent and would require employer approval.

It is important to note that the DOL's revisions do not change its prior guidance stating that employees who **opt** for remote learning for their children are not eligible for FFCRA leave.

Revised Notice and Documentation Requirements

In light of the federal court's August 3, 2020 ruling, the DOL amended the FFCRA notification and documentation requirements to reflect, among other things, that:

- Employees need not furnish documentation concerning the need for leave **before** taking leave; however, they are required to give their employer such documentation as soon as practicable, which in most cases will be when the employee provides notice of the need for leave.
- Employers may only require employees who take emergency paid sick leave to provide notice "**after** the first workday (or portion thereof) for which an Employee takes Paid Sick Leave," and that "it will be reasonable for an employer to require notice as soon as practicable after the first workday of leave taking into account the circumstances of the particular employee's leave."
- Notice for Expanded Family and Medical Leave is required "as soon as practicable," and, if the need for leave is foreseeable, then "it will generally be practicable to provide notice prior to the need to take leave."

For Questions/More Information

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