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DOL Reaffirms, Revises, and/or Clarifies the FFCRA Rule Provisions Invalidated by Federal Court

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The U.S. Department of Labor ("DOL") has responded to last month's court decision striking down several significant provisions of its temporary rule ("Rule") interpreting the paid sick and expanded family and medical leave benefits available to employees under the Families First Coronavirus Response Act ("FFCRA") by issuing "revisions and clarifications" ("Revisions") to the Rule. As we previously reported, following the Rule's publication on April 1, 2020, New York's Attorney General ("AG") filed suit against the DOL, challenging the legality of some of its provisions. On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated those sections of the Rule that (i) broadly defined "health care provider" for purposes of the optional exemption for such workers, (ii) conditioned leave eligibility on the employer having work available for the employee seeking an FFCRA leave (the "work availability" requirement), (iii) mandated that employees obtain their employer's consent before taking intermittent family leave, and (iv) required employees to provide documentation in advance of taking FFCRA leave.

Highlights of the DOL's Response to the Court Decision

In the Revisions, the DOL narrowed its definition of "health care provider" for purposes of who may be excluded from FFCRA's leave benefits to "employees capable of providing health care services, meaning those who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care." The DOL stood firm on the "work availability" requirement by reaffirming that paid emergency sick leave and paid expanded family and medical leave under the FFCRA may be taken only if the employer has work available for the employee from which to take leave. The agency also reaffirmed that employees must obtain their employers' approval to take FFCRA leave intermittently. Finally, the agency revised and clarified its requirements concerning notice and documentation, replacing the Rule's mandate to provide notice before taking FFCRA leave with the more employee-friendly requirement that employees taking leave provide notice and specified documentation "as soon as practicable."

The revised Rule becomes effective on September 16, 2020.

Details of the DOL's Reaffirmations, Revisions, and Clarifications

Revisions to Definition of "Health Care Provider"

Under the FFCRA, employers may choose to exclude employees who are "health care providers" from taking paid sick and/or expanded family and medical leave. The Revisions adopt the Family and Medical Leave Act's ("FMLA's") definition of heath care provider to include (i) licensed doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, certain chiropractors, nurse practitioners, nurse-midwives, clinical social workers, and physician assistants and (ii) "any other person determined by the Secretary [of Labor] to be capable of providing health care services."

The Rule originally defined "health care provider" to include "***anyone employed at*** any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, 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 institution, Employer, or entity" (emphasis added).

The court invalidated the DOL's employer-based definition, finding that the DOL was required to determine that an employee is "capable of providing health care services" as set forth in the FMLA regulations in order to be considered a health care provider. In response, the Revisions provide a definition of "health care provider" that focuses on the role and duties of employees rather than their employers. The definition includes only those (i) who are included in the FMLA's definition (discussed above), and (ii) who are capable of providing health care services, meaning the individual is "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 Revisions define health care services as follows:

- **Diagnostic:** Includes 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.

- **Preventive:** Includes screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

- **Treatment:** Includes performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

- **Integrated:** Includes bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

The Revisions also identify specific types of employees who are included within the definition of "health care provider":

- nurses, nurse assistants, medical technicians, and any other persons who directly provide diagnostic, preventive, treatment, or integrated services;

- employees providing such services "under the supervision, order, or direction of, or providing direct assistance to" a health care provider; and

- employees who are "otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment."

On the other hand, the Revisions provide an illustrative list of employees who are **not** "health care providers" for purposes of the optional exemption, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers, because the services provided by these employees are "too attenuated to be integrated and necessary components of patient care."

Finally, the Revisions explain that employees covered by this definition of "health care provider" may "work at, for example, 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." The DOL stresses, however, that an employee's location is not determinative of the employee's status as a "health care provider"—some employees who work at such facilities may **not** be covered "health care providers," and some who do not work at such facilities may be "health care providers."

Reaffirmation of the "Work Availability" Requirement

The "work availability" requirement provided that an employee is entitled to FFCRA leave only if the employee would otherwise be scheduled to work but for the FFCRA reason for leave. In other words, an employee would not be entitled to FFCRA leave for any period when work was unavailable due a reduction in hours, layoff, temporary business closure, or any other reason. The district court had rejected the Rule's "work availability" requirement on two grounds. First, the court found that the provision was "entirely unreasoned" because the DOL applied it only to leaves taken for certain purposes and not to other allowable uses. Second, the court held that the DOL's proffered explanation of the statutory basis for the "work availability" requirement did not meet the standard of "reasoned decision-making" necessary to justify the provision, especially because the requirement had the potential to substantially restrict the group of employees eligible for FFCRA leave, and because other reasonable interpretations of the statute existed.

In the Revisions, the DOL clarified that the "work availability" requirement applies to all FFCRA qualifying reasons for leave and reaffirmed its position that employees are not eligible for FFCRA leave when their employers have no work available for them. As to the court's criticism that "the agency's barebones explanation for the work-availability requirement is patently deficient," the DOL offers a fuller justification for the requirement

that “an employee is entitled to FFCRA leave [only] if the qualifying reason is a but-for cause of the employee’s inability to work.” The agency asserts that the statutory language setting forth the conditions under which FFCRA leave may be taken, i.e., “because” of or “due to” a qualifying reason, such as a quarantine order or school closing, “have been repeatedly interpreted by the Supreme Court to require ‘but-for’ causation.” In addition, the DOL explained that the “work availability” requirement is further supported by the fact that “leave” is commonly understood as “an authorized absence from work; if an employee is not expected to work, he or she is not taking leave.”

Notably, the DOL seeks to bolster its rationales for the disputed Rule provisions and counter criticism that its interpretation of the FFCRA leave benefits unfairly excludes employees Congress intended to cover. The agency emphasizes that (i) employees are protected under the FFCRA’s anti-retaliation provision against an employer’s attempt to deny FFCRA leave to an eligible employee “by purporting to lack work” for the employee, and (ii) various provisions of the CARES Act and other legislation incentivize employers to keep employees on the payroll during the pandemic.

Reaffirmation of the Intermittent Leave Provision Requiring Employer Approval

The Rule allows employees to take paid sick or expanded family and medical leave intermittently *only if the employer agrees*, and, even then, only for the following limited reasons:

- To care for the employee’s child whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19.

- If an employee teleworks, “for any qualifying reason intermittently, and in any agreed increment of time,” but only when the employee is unavailable to telework because of a COVID-19-related reason.

As the FFCRA is silent on intermittent leave, the court concluded that the DOL had a legitimate basis to address the topic and, for health and safety reasons, to prohibit employees who work onsite from taking intermittent leave for any qualifying reason other than child care needs related to the COVID-19 pandemic (i.e., the child’s school is closed or his or her child care provider is unavailable). The court, however, found no rational basis for the requirement that employees obtain their employer’s consent before taking permissible intermittent leave.

Again, the DOL reaffirms its Rule provision. And, again, the agency relies on the FMLA, this time citing the rationale for the FMLA’s intermittent leave restrictions, stating that “such leave should, where foreseeable, avoid ‘unduly disrupting the employer’s operations.’” As the Revisions explain, “when intermittent leave is not required for medical reasons, the FMLA balances the employee’s need for leave with the employer’s interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave.” Since the Rule does not allow intermittent FFCRA leave to be taken for medical reasons unless the employee is teleworking, and because the Rule requires employees to obtain their employers’ consent to telework, the DOL

contends that it is appropriate to "align[] the employer-agreement requirements to apply to both telework and intermittent leave from telework." With respect to requiring employer consent to intermittent child care leave for employees who work onsite, the agency leans on the FMLA's mandate that employees must obtain their employers' agreement to take intermittent FMLA leave to care for their healthy newborn or adopted child.

Intermittent Leave and Hybrid School Schedules

Notably, the preamble to the Revisions provides specific guidance concerning the use of intermittent leave when an employee's child is on a hybrid school schedule, i.e., the child attends in-school classes on certain days or partial days and receives remote instruction for the remainder of the time. The DOL instructs that the "employer-approval condition would not apply to employees who take FFCRA leave in full- or half-day increments to care for their children whose schools are operating on an alternate or reduced day (or other hybrid-attendance) basis because such leave would not be intermittent" under the Rule. Instead, "each day [or period] of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day." Thus, "intermittent leave is not needed because the school literally closes … and opens repeatedly."

Revised Provisions on Employee Notice and Documentation of Need for Leave

The FFCRA contains specific notice obligations, which are different for each type of leave. The Rule added a requirement not included in the statute that employees must provide their employers with documentation of the need for leave *prior to* taking leave. The court found that the FFCRA's clear notice requirements and the Rule's documentation mandate were "in unambiguous conflict," and thus, to the extent that the obligation to provide pre-leave documentation was a "precondition to leave," that provision of the Rule was invalid.

The Revisions appear to amend the Rule consistent with the court's determination. Accordingly, documentation no longer needs to be given prior to taking paid sick leave or expanded family and medical leave, "but rather may be given as soon as practicable, which in most cases will be when the employee provides notice." The DOL also reiterates the FFCRA's requirement that notice of the need for paid sick leave "may be required after the first workday (or portion thereof)" for which an employee takes such leave. Finally, the Revisions clarify that notice of the need to take expanded family and medical leave should be provided "as soon as practicable"; however, if the need for such leave is foreseeable, it should be given in advance of the leave.

What Employers Should Do Now

The amended Rule provisions—the notice/documentation sections and the definition of "health care provider"—arguably address the court's concerns, although the court could decide that the definition of "health care provider" is still too broad. The status of the provisions reaffirmed by the DOL—the "work availability" requirement and the requirement to obtain the employer's consent for intermittent leave—is less clear. If the New York AG challenges the Revisions as failing to comply with the court's decision,

the court could accept or reject either or both revised provisions, as well as the DOL's more detailed justifications for either or both of the reaffirmed provisions. Due to the continuing uncertainty, particularly with respect to the reaffirmed provisions, employers should consult with counsel regarding their obligations under any of these four provisions of the Rule. (It should be noted here that the DOL has taken the position that the Revisions apply nationwide, and not just in New York, where the court that made the decision sits.)

In particular, health care employers should consult with counsel to determine the scope of employees who may be excluded from FFCRA leave given the much narrower definition of "heath care provider" and, if necessary, revise any existing policies to comply with the new definition.

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