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Federal Court's Rejection of Some DOL FFCRA Rules May Affect Your Pandemic Leave Policies

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In response to a lawsuit brought by New York State ("State"), the U.S. District Court for the Southern District of New York has invalidated four provisions of the U.S. Department of Labor's ("DOL") Final Rule ("Rule") interpreting the COVID-19-related temporary paid sick and family leave benefits available to eligible employees under the Families First Coronavirus Response Act ("FFCRA"). Specifically, the court rejected provisions: (i) conditioning leave eligibility on the employer having work available for the employee seeking an FFCRA leave; (ii) broadly defining "health care provider" for purposes of the optional exemption for such workers; (iii) mandating that employees obtain their employer's consent before taking intermittent family leave; and (iv) requiring employees to provide documentation in advance of taking FFCRA leave.

Background on the FFCRA and DOL Rule

As we previously reported, the FFCRA, which applies to private employers with fewer than 500 employees, contains two paid leave provisions—the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), which amends the FMLA to provide eligible employees up to 12 weeks of family leave because of a qualifying need related to a public health emergency and child care coverage, and the Emergency Paid Sick Leave Act ("EPSLA"), which grants eligible employees up to two weeks of paid leave for certain purposes related to the pandemic. Both leave programs are set to expire on December 31, 2020.

On April 1, 2020, the date the FFCRA went into effect, the DOL's Wage and Hour Division issued the Rule, consisting of over 100 pages of regulations concerning the law's paid sick and family leave provisions. Soon thereafter, the State filed a lawsuit under the Administrative Procedure Act, claiming that four provisions of the DOL's Rule exceeded the agency's authority under the FFCRA and improperly restricted an otherwise eligible employee's access to paid FFCRA leave.

The Rule's "Work-Availability" Condition

The FFCRA authorizes EPSLA benefits for employees of covered employers who are "unable to work (or telework) due to a need for leave because of" any of the specified COVID-19-related reasons. The DOL Rule, however, required that employees who take leave for certain qualifying reasons (e.g., they, or someone they cared for, were subject to a quarantine/isolation order, or

they needed to care for a child whose school was closed or whose caretaker was unavailable due to the pandemic) were eligible for EPSLA or EFMLEA leave only if their employer had work available for them to perform.[1]

The court analyzed the validity of the Rule's "work-availability" provision under what is known as the *Chevron* two-step test.[2] *Chevron* mandates that "if the statute [e.g., the FFCRA] is silent or ambiguous with respect to the specific issue," the court should defer to the agency's interpretation "as long as it is reasonable." Thus, a court must first decide if the statute is ambiguous. If it is ambiguous, the court must then determine "whether the agency's interpretation of the ambiguous statute is reasonable."

The DOL asserted that the "work-availability" provision was a reasonable interpretation of the FFCRA. The agency argued that if, for example, the employer's business had been closed due to a shutdown order, the employee would not have been able to work, even in the absence of one of the qualifying reasons. In other words, the employee had no job from which to take leave. Unpersuaded, the court declared that the DOL's argument did not "unambiguously foreclose an interpretation entitling employees whose inability to work has multiple sufficient causes—some qualifying and some not—to paid leave." In short, the court was not convinced that "the term 'leave' requires that the inability to work be caused solely by a qualifying condition." The court, however, also was not persuaded by the State's position that the statutory language "unambiguously forecloses [the] DOL's argument."

Accordingly, the court moved to step two of the *Chevron* test, i.e., "whether the agency's answer [to the interpretive question] is based on a permissible construction." On this point, the court held that the "work-availability" provision was unreasonable and thus invalid, on two bases. First, the court rejected outright the DOL's about-face that the "work-availability" mandate actually should apply to all the qualifying reasons for leave, and instead held the DOL accountable for the text of its Rule, which plainly limited the requirement to only certain kinds of leave. The court then found that by so restricting the "work-availability" mandate, the provision was "entirely unreasoned" and that such "differential treatment" was "manifestly contrary to the statute's language." The court further instructed:

> Second, and more fundamentally, the agency's barebones explanation for the work-availability requirement is patently deficient. The requirement, as an exercise of the agency's delegated authority, is an enormously consequential determination that may considerably narrow the statute's potential scope. In support of that monumental policy decision, however, the … [DOJ claims] that the work-availability requirement is justified 'because the employee would be unable to work even if he or she' did not have a qualifying condition. ... That terse, circular regurgitation of the requirement does not pass Chevron's minimal requirement of reasoned decision-making. The work-availability requirement therefore fails Chevron's second step.

[1] The other qualifying reasons for leave under the EPSLA are the employee: (i) "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;" (ii) "is experiencing symptoms of COVID-19 and seeking a medical diagnosis;" and (iii) "is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor." The EFMLEA allows family leave for employees "unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency."

[2] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The Rule's Broad Definition of "Health Care Provider"

Under the FFCRA, employers may choose to exclude employees who are "health care providers" from taking EPSL and/or EFMLEA paid leave. The Rule defined "health care providers" 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 State argued that this provision of the Rule was overly broad and that it excluded employees that Congress intended to be eligible to receive EPSLA and EFMLEA benefits. The court afforded no *Chevron* deference to the DOL's definition. Rather, it determined that the DOL exceeded its authority in defining the term, finding that the FMLA, which the FFCRA amends in part, "supplies the relevant statutory definition" of health care provider as: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices; or (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services."

The FMLA, however, defines "health care provider" for the limited purpose of identifying who may certify an employee's serious health condition to support a request for FMLA leave. Notwithstanding that the term "health care provider" served a very different purpose under the FFCRA, the court looked to the FMLA's definition and found that the DOL was required to determine that an *employee* be "capable of providing health care services" to be considered a "health care provider." Accordingly, the court invalidated the DOL's employer-based definition as it included not only employees who furnish health care services but anyone who works for an employer, including "employees whose roles bear *no nexus whatsoever* to the provision of healthcare services."

Notably, the court did not offer an alternative definition for "health care provider" to take the place of the one in the Rule. As a result of the court's decision to strike the DOL's definition, the only definition of "health care provider" consists of the FMLA's definition and the existing FMLA regulations, which, taken together, define "health care provider" to include: doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, and physician assistants. Significantly, among others, the definition of "health care provider" for FMLA certification purposes does not include nurses, LPNs, or various medical tech employees whose workplace presence is likely critical to providing health care services in any COVID-19 diagnostic or treatment setting.

The Rule's Restriction on Intermittent Leave

The third provision of the Rule challenged by the State allowed employees to take EPSLA or EFMLEA leave intermittently (that is, in discrete periods of time, rather than one continuous period) *only if the employer agreed,* 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 issue. Again applying the *Chevron* test, the court agreed with the DOL's

rationale that it was necessary to prohibit employees who work onsite from taking intermittent leave for any qualifying reason other than child care due to the risk that an employee working intermittently based on the other qualifying reasons (e.g., caring for someone who is quarantined or personally experiencing COVID-19 symptoms) could spread the virus to others in the workplace.

The State also claimed that the Rule appeared to require employees "to take *any* qualifying leave in a single block" and to forfeit any unused sick time for use at a later date. Based on concerns about spreading the virus at the workplace, the Court also accepted as reasonable the DOL's explanation that "[a]n employee taking leave for an intermittent-leave-restricted reason must take his or her leave consecutively until his or her need for leave abates. But once the need for leave abates, the employee retains any remaining paid leave, and may resume leave if and when another qualifying condition arises." Thus, an employee may take intermittent-restricted leave "incrementally" "as long as each increment is attributable to a different instance of qualifying conditions."

While holding that the intermittent leave constraints were mostly reasonable, the court found no rational basis for the requirement that employees obtain their employer's consent before taking permissible intermittent leave. Accordingly, the court invalidated that provision of the Rule in total, even though the FMLA's intermittent leave rules, which the court references, allow employees to take intermittent leave without their employer's consent only when the leave is for health reasons, and not when, for example, the leave is for baby bonding purposes.

The Rule's Documentation Requirements

The Rule requires that—before taking either EPSLA or EFMLEA leave—employees must submit documentation to their employer, indicating, among other things, "their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave." The FFCRA, however, provides specific notice obligations, which are different for each type of leave, and do not contain a pre-leave documentation mandate. Under the FFCRA, employees taking EPSLA leave must follow the employer's "reasonable notice procedures" *after* the first workday an employee receives paid sick time, in order to continue to receive the benefit. Employees taking EFMLEA leave must provide notice of leave "as is practicable" when the necessity for the leave is foreseeable.

The court therefore found that the FFCRA's clear notice requirements and the Rule's documentation mandate "are in unambiguous conflict," and thus, to the extent that the Rule's mandate is a "precondition to leave," the documentation requirement fails the first step of the *Chevron* test and is invalid. Notably, the ruling does not prohibit employers from requiring documentation post-leave.

What Employers Should Do Now

It is unclear whether the district court's decision applies nationwide or is limited to the State of New York—or indeed only applicable to employers in the Southern District of New York—as the order is silent as to its reach and the court did not issue an injunction, nationwide or otherwise.[3] The impact on employers outside of New York (or, indeed, outside the Southern District of New York) depends in large part on the DOL's response. The DOL may decide to appeal the decision to the U.S. Court of Appeals for the Second Circuit and seek a stay pending the

[3] The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters within the Eastern District.

appeal. It may take a non-acquiescence stance and announce its disagreement with, and refusal to follow, the order. Finally, it may issue new rules addressing the provisions invalidated by the court. As we await the DOL's response and/or further guidance from the courts, covered employers should consult with counsel to determine how the district court's decision impacts their current FFCRA leave policies and practices.

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