MY BENEFIT ADVISOR

DOL Reaffirms and Revises FFCRA Leave Regulations, Updates FAQs

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Six weeks after a federal district court vacated four provisions in the Families First Coronavirus Response Act ("FFCRA") temporary regulations, the Department of Labor ("DOL") has responded by reaffirming two of those provisions (along with its detailed reasoning for doing so) and revising the other two provisions. The DOL also updated its FFCRA FAQs to reflect these clarifications.

Background

The FFCRA requires employers with fewer than 500 employees to provide emergency paid sick leave and paid expanded family and medical leave to eligible employees for certain reasons related to COVID-19. The FFCRA also provides tax credits to reimburse employers that provide paid leave to employees.

In response to the passage of the FFCRA, the DOL issued temporary regulations to implement the paid leave requirements. The temporary regulations provide guidance to employers on employee eligibility for paid leave, identify when paid leave can be intermittent, define eligible and excludable employees, clarify documentation and recordkeeping requirements, and address other issues under the FFCRA.

On August 3, 2020, the U.S. District Court for the Southern District of New York ("Court") invalidated four separate provisions of these temporary regulations:

1. the requirement that FFCRA paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave;
2. the requirement that an employee may take FFCRA leave intermittently only with employer approval;
3. the definition of an employee who is a "health care provider," whom an employer may exclude from being eligible for FFCRA leave; and
4. the statement that employees who take FFCRA leave must provide their employers with certain documentation before taking leave.

Modifications to FFCRA Temporary Regulations

On September 16, 2020, in response to this Court decision, the DOL published clarifications and revisions to its FFCRA temporary regulations. For the first two provisions that were invalidated by the Court, the DOL reaffirms its original

position and offers a fuller explanation of its approach. For the second two invalidated provisions, the DOL revises the text of its temporary regulations to address the Court's concerns.

In addition, the DOL updated several of the questions and answers in its published FFCRA FAQs and added three new ones to reflect these changes.

In the three new FAQs (101, 102 and 103), the DOL makes clear that it considers the Court decision to have vacated the four provisions on a nationwide basis (not just as to the parties or to certain New York counties). The DOL also states that its revised explanations and regulations are effective September 16, 2020 through December 31, 2020 (the expiration of the FFCRA's paid leave provisions).

Work Availability Requirement - Reaffirmed

The DOL reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave, and that the qualifying reason for taking FFCRA leave must be the sole ("but for") reason that the individual is not working. For example, if an employer closes an employee's worksite or the employee is furloughed, the individual is already not working; even if the individual experiences an otherwise qualifying FFCRA reason, it is not the sole reason the individual is not working.

The DOL cited multiple rationales for this rule, including that one of the FFCRA's purposes – discouraging employees from going to work if there is a possibility they could transmit COVID-19 to others – is not served if individuals receive pay to stay home despite there being no work to go to anyway. Additionally, the DOL pointed out there are other programs to assist individuals who are experiencing unemployment because there is no work available.

To counter concerns that an employer could feign a lack of work to avoid granting FFCRA leave, the DOL reiterates that the employer's determination as to "the availability or unavailability of work must be based on legitimate, non-discriminatory and non-retaliatory business reasons."

The DOL does modify the temporary rule slightly to clarify that the work availability requirement applies to all qualifying reasons to take paid sick leave and expanded family and medical leave, not just some of them.

Employer Approval Required for Intermittent Leave - Reaffirmed

The DOL reaffirms that, where intermittent FFCRA leave is permitted by the Department's regulations (while teleworking or for childcare-related reasons), an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently.

In the preamble to the revised temporary regulation, and in updated FAQs 21 and 22, the DOL clarifies the meaning of "intermittent" leave. For example, an employee does not need employer approval to take paid FFCRA leave only on the alternating days of the week when his or her child is not permitted to attend school in-person. This is not considered intermittent leave, because the alternating schedule is determined by the school, not the employee, and each day of school closure constitutes a separate reason for FFCRA leave that ends on the next day the school is open to the child.

This is in contrast to the situation where a child's school is closed for an entire week due to COVID-19 reasons, and an employee wishes to take paid FFCRA leave on Monday, Wednesday, and Friday, but work on Tuesday and Thursday, while another family member watches the child. This would be a request for intermittent leave, and therefore requires employer approval, because the employee is asking to take leave for only certain portions of the school closure.

Definition of Health Care Provider - Revised

Employers are allowed to exclude employees who are "health care providers" from eligibility for FFCRA leave, in order to prevent disruptions to the health care system's capacity to respond to the COVID-19 public health emergency that could result from these individuals being absent from work.

The Court objected that the original definition of "health care provider" was based on the identity of the employer, rather than the role of the employee, meaning an employer engaged in the health care field could exclude all of its employees from FFCRA leave eligibility, even those who had no role whatsoever in the provision of health care.

In response, the DOL significantly revised the definition of a "health care provider" in this context to focus on the skills, roles, duties and capabilities of the employees. The new basic definition of a "health care provider" is:

- an employee who falls under the FMLA's definition of "health care provider;" including physicians, nurse practitioners, and others who make medical diagnoses, and

- an individual who 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 and, if not provided, would adversely impact patient care."

FFCRA FAQ 56 was updated with this revised definition and illustrative examples. The new definition of "health care provider" includes:

- employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians

- employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services

- employees who do not provide direct heath care services to a patient but are otherwise integrated into and necessary to the provision those services – for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition

Furthermore, "a person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital of a similar health care facility."

Documentation and Notice Requirements - Revised

The DOL revised the temporary rule to clarify that the information an employee must give his or her employer to support the need for emergency paid sick leave or expanded family and medical leave does not have to be given prior to taking the leave, but rather can be provided to the employer "as soon as practicable, which in most cases will be when the [e]mployee provides notice" to the employer of the need for the FFCRA leave.

The DOL also made a revision to clarify that an employee taking expanded family and medical leave under FFCRA must give notice to his or her employer as soon as practicable, which generally will be prior to the need to take leave if the reason for the leave is foreseeable.

FFCRA FAQs 16, 21, and 22 were updated to reflect these clarifications.

Employer Action

Employers subject to the FFCRA should comply with these revised rules beginning September 16, 2020.

In particular, employers involved in the health care field who have exempted employees from FFCRA leave should review the new definition of "health care provider" with legal counsel and make adjustments to their policies and practices as necessary.

It is always possible another legal action may be filed to challenge the reaffirmed and/or new FFCRA temporary rules, although they are only scheduled to be in effect through the end of the year. We will continue to monitor and provide guidance on developments in this area.