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To: FCA International Members
From: FCA International Legal Counsel
Subject: **DOL Revises some FFCRA Regulations While Maintaining Others**
Date: Sept. 16, 2020

Overview

The Department of Labor (DOL) has now issued new regulations responding to a New York Federal Court decision invalidating four specific rules implementing the Families First Coronavirus Response Act (FFCRA).

These revised regulations, which become effective today (Sept. 16), provide new guidance on two of the issues that the federal court addressed. However, the DOL declined to back down on the other two issues, choosing instead to maintain their original interpretations and offer enhanced explanations for doing so.

The court in New York invalidated four specific DOL regulations relating to FFCRA leave:

1. The health care provider definition as it relates to exclusions from FFCRA leave;
2. The provision involving required documentation prior to taking FFCRA leave;
3. The "work availability" requirement; and
4. The provisions requiring employer approval before taking intermittent FFCRA leave.

DOL Revises "Health Care Provider" Definition

The most important change to the regulations is the revised definition of "health care provider" in the context of an employer's option to exclude such individuals from leave under the FFCRA. The New York court thought the DOL's original definition of health care provider was far too broad, and essentially allowed exemptions for all employees of health care providers, rather than assessing whether any individual seeking leave was actually a health care provider.

The revised regulations provide a new definition of health care provider that turns on the nature of the work performed by the employee. The new definition states that health care providers encompass:

- Health care providers as defined by the FMLA regulations; and
- Any employee who is ***capable of providing health care services***, meaning that the person is employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary for the provision of patient care, and, if not provided, would adversely impact patient care.

The DOL explains that this second group of employees includes ***only***:

- Nurses, nurse assistants, medical technicians, and any other person who directly provides the above definition of health care services;
- Employees who provide health care services at the direction of or under the supervision of a health care provider; and
- Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians to process test results necessary to diagnoses and treatment.

The new DOL health care provider definition ***excludes*** employees who do not provide health care services, even if the services they do provide affect the provision of health care services, such as "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

DOL Revises the Notice and Documentation Requirements

Originally, the DOL's FFCRA regulations required employees to provide documentation to their employers, prior to taking the FFCRA leave, indicating the reason for their leave, the duration of the leave and the authority underlying a quarantine or isolation order before taking leave under the FFCRA. The New York decision found this requirement to be too burdensome.

In response, the DOL's new regulations provide that any required documentation must be given to the employer "***as soon as practicable***, which in most cases will be when the employee provides notice [of the qualifying reason for FFCRA leave]." This means that employees no longer need to provide documentation prior to taking leave. Instead, these requests will essentially be treated as they are under the Family and Medical Leave Act (FMLA), where employees are permitted to submit explanatory documentation after the leave commences where circumstances require.

DOL Retains the "Work Availability" Requirement

The FFCRA provides that employees may take leave if they are unable to work due to one of the specific reasons enumerated in the law. The DOL's final rule then stated that that employees are not eligible for such leave if their employers "do not have work" for them. This essentially created a "but-for" testing requiring that the enumerated reason for the leave (e.g. school closure, quarantine order, etc.) be the sole reason for the leave. The employer has work the employee could perform "but for" that reason (i.e., if it weren't for that reason, the employee would still be working.)

The New York federal court decision maintained that an employee may need to be off work "due to" more than one reason. Thus, an employee who is absent "due to" the qualifying condition remains off work for that reason even though they may also be off work "due to" a second reason as well. The judge likened this to a teacher on paid parental leave who will still be considered on such leave even though the school is closed due to a snow day.

The DOL did not adopt this line of thinking. Instead, their revised regulation maintains the "but- for" standard and merely clarifies their position, namely that the FFCRA itself uses the "due to" terminology, and that this phrase has been interpreted by the Supreme Court as indicating "but for" causation. According to the revised rules:

> The Department interprets the FFCRA's paid sick leave and emergency family and medical leave provisions to grant relief to employers and employees where employees cannot work because of the enumerated reasons for leave, but not where employees cannot work for other reasons, in particular the unavailability of work from the employer.

DOL Retains the Employer-Consent Requirement for Intermittent Leave

Here, the DOL again reaffirmed its position of requiring employees to obtain the approval of their employers before qualifying for intermittent FFCRA leave, but shored up its underlying justification and analysis.

First, the DOL reaffirmed that intermittent leave is only available for employees when their reason for leave does not implicate risks of spreading COVID-19, such as school closures and other child care issues.

Intermittent leave is still unavailable for employees who need leave for medical reasons, such as possessing an elevated risk of being infected with COVID-19 or caring for someone who is sick with COVID-19. The DOL explains that "permitting [an employee taking leave for medical reasons] to return to work intermittently when he or she is at an elevated risk of transmitting the virus would be incompatible with Congress' goal to slow the spread of COVID-19."

Second, the DOL reasserted that employees must obtain employer approval for intermittent FFCRA leave. The DOL analogized that when an employee requests intermittent leave under the FMLA for non-medical reasons, the employee's need for leave is balanced against the employer's interest in avoiding disruptions, and this is accomplished by requiring employer approval for intermittent leave.

The DOL did specify that employer approval would not be required where an employee is taking FFCRA leave in full-day increments to care for children whose schools are operating on a hybrid attendance model. In this situation, each day that the school is closed or that the child is not attending is a separate FFCRA leave that ends when the school reopens or when the child returns to in-person attendance. In short, hybrid schooling does not pose the need for intermittent leave.

Bottom Line

This helps resolve some uncertainty caused by the New York federal court decision. However, more legal challenges, and more uncertainty, can be anticipated, since the DOL simply doubled down on two of the regulations for which they were previously faulted.