Paid leave rules have changed — will they affect your workforce?

By Kayla Webster September 21, 2020

Employers need to familiarize themselves with changes to the Families First Coronavirus Response Act — or risk financial consequences, labor attorneys say.

“Knowledge equals compliance,” says Scott Cruz, labor attorney and officer at Greensfelder, Hemker & Gale. “The changes are in effect now; you need to make sure you’re up to speed and consulting with competent counsel about how the revisions affect your business.”

The Department of Labor revised the paid sick and family leave act after a judge from the U.S. District Court for the Southern District of New York invalidated some of its stipulations — calling into question whether the rest of the country should follow suit.

Some of the judge's changes were upheld in the DOL's ruling, others were not. But the revisions, in effect as of Wednesday, address four key areas: laid off or furloughed employees, the healthcare industry, intermittent leave and timing of leave documentation.

When the FFCRA was first issued April 1, it specified that employees who were furloughed or laid off due to the economic consequences of the pandemic are not eligible for paid sick or family leave under the act. The New York judge ruled against that, saying the employer's inability to provide employees with work shouldn't exclude them from the benefits.

The DOL didn't agree, and reinstated that employers are not required to provide paid leave for employees no longer working at their company.

"I think that makes the most sense for employers at the end of the day," Cruz says. "The paid leave is meant for people who otherwise would be working if not for coronavirus-related problems."

Cruz also pointed out that in many states, like Illinois, furloughed and laid off employees automatically qualify for unemployment benefits if they were laid off because of the virus.

Before the New York ruling, the healthcare industry avoided paying FFCRA leave altogether because of vague wording, Cruz says. The first version of the act said healthcare workers are ineligible for any FFCRA leave because they're desperately needed to combat the virus. The healthcare industry interpreted this to mean none of their employees could receive FFCRA leave, including receptionists and janitors. But the new rule changes now specify that non-medical staff should be eligible for paid leave.

"Those providing healthcare services would include any worker necessary to provide patient care," says Chelsea Smith, labor and employment attorney at Hall Estill. "While the definition of healthcare provider is more limited, I think that it should be fairly easy for employers to follow by looking into the employee's specific duties and role."

Many employees have tried to take “intermittent,” or part-time, FFCRA leave in response to school scheduling during the pandemic. Now, they probably won’t need to, Cruz says.

Schools using a hybrid schedule typically operate in one of two ways: students attend in-person class a few days a week with remote learning for the remaining days, or they go to school in the morning and resume learning at home in the afternoon.

Employees sometimes try to file for “intermittent” leave to accommodate both types of school schedules; the revisions require parents to request to receive paid leave for individual days they need to be home with the kids. The DOL maintained that granting approval for leave is still at the employer’s discretion, but they can't deny it to parents who need time off because of hybrid school schedules. Employees are still only eligible for paid leave to take care of children if they can’t work from home, and there’s no other adult available to watch them.

“Employers need to keep up with what the local schools are doing — that’s going to inform their decision,” Cruz says. “They also need to decide if they’re going to grant leave to all employees who need it to take care of children because of school scheduling. If they aren’t consistent with their employees, they can get into trouble.”

The DOL also cleared up when employees need to provide documentation supporting their request to use FFCRA leave. Before the New York ruling, employers could deny workers leave if they didn’t immediately provide all the necessary documents, including the employee’s name, a statement on why they need to use paid leave and any relevant test results or doctor’s notes. The DOL agreed with the judge that the practice was unreasonable — since official COVID-19 test results can take a few days to materialize — and revised the act to provide more flexibility.

“Employers can ask employees for documentation ‘as soon as practicable’ for leave taken under FFCRA, but it isn’t required before the leave is taken,” Smith says.

This revision also protects employers by placing responsibility on employees to let their supervisors know as soon as possible when they’ll need to take paid leave. But the changes do recognize that emergencies happen.

“Employees will sometimes wait until the last minute to say when they need to take leave, which forces their employer to hustle to make arrangements for someone else to

cover their work," Cruz says. "But in a situation where a parent, for example, gets an email the night before from the school saying they're going to close because someone tested positive for COVID, then telling their boss the next day constitutes letting them know 'as soon as possible.'"

While much of the family leave act remains the same, Cruz and Smith urge employers to involve their legal team in any decisions over paid leave.

"There are real financial consequences of not complying with the new regulations," Cruz says. "I can't emphasize enough how important it is to consult with legal counsel who've spent a great deal of time reading over these changes."