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DOL Issues New Rule to Address Recent Court Decision on Certain FFCRA Provisions

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On September 11, 2020, the U.S. Department of Labor (DOL) announced a new temporary rule revising the DOL's regulations on the Families First Coronavirus Response Act (FFCRA). This announcement follows the August 3, 2020 decision by a New York Federal District Court invalidating several provisions of the DOL's original rule. As reported in our previous Alert, the District Court held that four sections of the temporary rule were invalid:

1. the requirement that Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFML) are available only if an employee has work from which to take leave;
2. the requirement that an employee can take intermittent leave only with employer approval;
3. the definition of "health care providers" who can be excluded from coverage; and
4. the requirement that employees who take FFCRA leave must provide their employers certain documentation before taking leave.

The DOL's new temporary rule makes revisions to the four areas which were addressed by the District Court

FFCRA Only Available When Work is Available

The new rule reaffirms that FFCRA leave is only available to employees if work would otherwise be available to them. The DOL clarified it interprets the FFCRA to require that an employee may take FFCRA leave only if a qualifying reason for leave is the "but for" cause of the employee's inability to work. If there is no work to perform for reasons other than a qualifying reason for leave, such as a decline in business, the qualifying reason for leave could not be the "but for" cause of the

employee's inability to work. The DOL stressed, however, that an employer may not make work unavailable in order to avoid leave – the employer must have a legitimate, non-retaliatory reason why it does not have work for the employee to perform.

Intermittent Leave Available Only with Employer Approval

The new rule reaffirms that when intermittent leave is available to an employee under the FFCRA, the employee must obtain employer approval to take intermittent leave - for example when leave is needed because childcare is unavailable. It should be noted that the DOL regards various "hybrid-attendance" school situations as constituting individual, separate FFCRA-qualifying events. For example, a scenario in which an employee's child attends school in-person only on certain days of the week (or even on portions of certain days of the week) does **not** need intermittent leave because each of the days on which the school is closed are considered separate qualifying leaves. By contrast, if an employee whose child's school is closed indefinitely requests to take FFCRA leave for only a portion of that time, that would be a request for intermittent leave, requiring employer approval.

Documentation not Required "Prior To" Leave

Under the new rule, employees must provide notice and required documentation supporting their need for FFCRA leave to their employers as soon as practicable, rather than "prior to" taking leave. However, if the need for leave is foreseeable, then "as soon as practicable" is usually before leave is taken. For example, if an employee learns on Monday during work that their child's school will close on Tuesday due to COVID-19-related reasons, the employee should notify the employer on Monday of the need for leave. Accordingly, an employer may require an employee taking FFCRA leave to provide the following information as soon as practicable (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work. The employer may also require the employee to furnish the additional information for the different qualifying reasons as set forth in the temporary rule at the same time.

All New Definition of "Health Care Provider"

With respect to the definition of "health care provider," the DOL issued a rule that can be broken down into three parts:

1. First, the rule incorporates the definition of "health care provider" under pre-existing FMLA regulations (29 CFR 825.102). This includes (among others) doctors, clinical social workers, physician assistants, and nurse practitioners.

2. Second, the rule introduces a new definition of "health care provider," which now means any "employee who is capable of providing diagnostic, preventive, 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."

3. Third, the rule contains guidance to help employers determine who is included in and who is excluded from the new definition.

Among those explicitly included are "nurses, nurse assistants, and medical technicians." Moreover, employees who work "under the supervision, order, or direction of" or who provide "direct assistance to" the employees who "directly provide" the services mentioned above are included in the definition.

Among those explicitly **excluded** are "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

The rule contains a list of "typical work locations" where "health care providers" might work, though the fact that an employee does or does not work at such a location is not determinative of whether that employee is or is not a "health care provider." The list largely tracks the list of employers contained in the original rule.

Lastly, the rule gives examples of diagnostic services, preventive services, treatment services, and "services that are integrated with and necessary to" those three services. Home care providers should be relieved to see that such integrated and necessary services include "bathing, dressing, [and] hand feeding."

This revised rule will go into effect **September 16, 2020**, and will continue through **December 31, 2020**, when entitlement to FFCRA leave currently ends. Given that these revisions do not fully address the district court's concerns, these revisions may also be challenged in the courts. Employers are encouraged to consult legal counsel with any concerns. We will continue to keep you advised of any updates.

If you have any questions regarding the issues addressed in this Alert, please contact Ford Harrison on the link below.

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