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Department of Labor Revises Families First Coronavirus Response Act Regulations Following New York Court Ruling

On September 11, 2020, the U.S. Department of Labor (DOL) issued revised Families First Coronavirus Response Act (FFCRA) regulations in response to Judge J. Paul Oetken's decision on August 3, 2020, in *State of New York v. United States Department of Labor*.

As described in more detail below, employers should take immediate note of two key changes that the DOL has made to its rules for enforcing the FFCRA. First, the DOL has tightened the definition of "health care provider" under the FFCRA. As a result, far more employees have the right to take leave and may not be exempted from coverage by their employers. Second, the DOL has eased employees' notice and documentation requirements prior to taking leave in some circumstances.

As Reinhart previously reported, Judge Oetken's decision vacated the following provisions of the DOL's initial FFCRA regulations:

- The limitation on the availability of leave under the FFCRA to circumstances when the employer otherwise had work for employees to perform;
- The requirement that employees must get their employer's consent before taking FFCRA leave intermittently;
- The requirement that employees must provide their employer with some notice and documentation before taking FFCRA leave; and
- The group of employees considered "health care providers" under the FFCRA, whom employers may exclude from taking FFCRA leave.

The DOL's revised regulations correct some, but not every, vacated provision. The regulations leave the rules for work availability and intermittent leave largely intact.

However, the two key changes under the revised regulations that employers should note are: (1) the revised definition of "health care provider"; and (2) the slightly relaxed documentation requirements. Reviewing and understanding the revised definition of "health care provider" is particularly important for employers

POSTED:

Sep 15, 2020

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in the health care sector. Such employers may now be required to administer FFCRA leave for employees who, up until now, were exempted from taking FFCRA leave.

We discuss each portion of the DOL's revised regulations below. Employers should review and revise their FFCRA policies to ensure compliance with the revised regulations.

DOL Revises the Definition of a "Health Care Provider" Employee Who May Be Excluded From Taking FFCRA Leave

The DOL's main revision to its rules under the FFCRA was the new restrictions on which employees can be exempted from taking FFCRA leave as "health care providers."

Originally, the definition of which employees could be exempted was broad. It included "anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary 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. . . ."

This definition effectively allowed employers in the health care industry to exempt any or all employees, including non-medical professionals, from taking FFCRA leave.

The revised regulation drastically limits which employees can be exempted. The new definition of "health care provider" now includes:

- Any employee who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the Family and Medical Leave Act as defined by 29 C.F.R. § 825.125; and
- Any employee 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, including:
    - 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; and
- Employees who do not provide direct heath care services to a patient but are otherwise integrated into and necessary to the provision those services.

Under the new definition, many employees whom employers could have previously excluded from taking FFCRA leave, such as IT professionals or building maintenance staff at a hospital, now have the right to take FFCRA leave.

DOL Clarifies the Notice and Documentation Requirements

The DOL clarified that, under the revised regulations, employees do not need to provide any required documentation prior to taking FFCRA leave. Instead, the employees must provide the documentation "as soon as practicable, which in most cases will be when the employee provides notice."

The DOL also explained that, as with documentation, notice must generally be provided as soon as practicable. However, an employee who requests leave under the Expanded Family and Medical Leave Act (EFMLA), must provide notice earlier if the leave is foreseeable. Otherwise, notice must be provided as soon as practicable.

For example, if an employee knows two weeks in advance that her child's school will be closed, the employee must provide notice before taking FFCRA leave. However, if the employee receives word that the employee's regular child care provider has COVID-19 30 minutes before taking her child to child care, prior notice would be impossible and the employee must provide notice as soon as practicable.

DOL Reaffirms its Work Requirement and Intermittent Leave Rules

Work Availability

Notwithstanding Judge Oetken's decision, the DOL's revised regulations reaffirm that leave under the FFCRA is only available to employees if the employer would otherwise have work for the employees to perform. This means employees who are furloughed cannot take FFCRA leave.

The DOL explained that removing the work availability requirement in accordance with the New York courts' decision would lead to "perverse" results that would drastically affect, in many instances, already struggling businesses by requiring

businesses to pay for leave for employees it otherwise cannot afford to pay.

Intermittent Leave

The DOL also reaffirmed that employees must still receive their employer's consent before taking intermittent FFCRA leave, despite the same rule being vacated.

The DOL did, however, make one substantive clarification with regards to intermittent leave. For employees with children whose schools require students to alternate between in-person classes and virtual learning, each day of school closure—i.e. the days the child participates in virtual learning—"constitute[s] a separate reason for FFCRA leave that ends when the school opens [for the child] the next day." In other words, when parents take leave on days their child is participating in virtual schooling, it is not considered "intermittent" leave. Thus, employees do not need to obtain their employer's consent to take FFCRA leave for each virtual school day.

However, if the child spends part of a single school day at school and part of it at home, the parent must continue to obtain the employer's consent before taking intermittent leave during the time the child is participating in virtual schooling.

Because the DOL issued these reaffirmed rules anew, employers should expect that the DOL will enforce them as written despite their previous iterations being struck down.

Next Steps

The revised regulations go into effect on Wednesday, September 16, 2020.

Employers, particularly those in the health care industry, should review their policies and procedures to ensure they are in compliance with the revised regulations. Employers should also prepare to field FFCRA requests from previously ineligible employees.

Employers with questions regarding the DOL's revised FFCRA regulations should contact any member of Reinhart's Labor and Employment Practice.

represent you.