FFCRA Definition of Health Care Provider Found Invalid

On September 16, 2020, the U.S. Department of Labor (DOL) Wage and Hour Division published revisions and clarifications to the April 1, 2020, temporary rule regarding public health emergency leave under the Family and Medical Leave Act (FMLA) that has assisted families in dealing with medical emergencies arising out of the COVID-19 pandemic. Part of this emergency medical leave was created by the March 2020 Families First Coronavirus Response Act (FFCRA) and is set to expire on December 31, 2020. An August 3, 2020 Southern District Court of New York decision found certain provisions of the temporary rule under FFCRA invalid.

Most notably, the District Court found invalid the FFCRA's definition of "health care provider" determining which employees an employer may properly exclude from being eligible for emergency medical leave. In response, the DOL revised the definition of "health care provider" consistent with 29 C.F.R. § 825.102 to include "other employees who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care." In 29 C.F.R. § 825.102, "health care provider" is defined as a doctor, or a person deemed capable of providing health care services to only include certain health care providers but it does not include caregivers or registered nurses working in nursing homes or assisted living facilities. Therefore, for nursing homes and assisted living facilities, the focus is on the Court's inclusion in the definition of "other employees who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care."

As a result, the question becomes, "What employees of nursing homes and assisted living facilities may be properly excluded for medical leave under this District Court decision?" The District Court said the definition of "health care provider" must hinge not solely on the employer's identity as a health care facility, but rather, on the "skills, roles, duties or capabilities of the employee." To do otherwise would be to bring into play all employees of health care facilities, said the Court, some of whom have no relationship to the provision of health care services. The focus is on the roles and duties of the employee. Specifically, a health care provider must be “employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.”

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Neither the FMLA nor FFCRA defines “health care services." However, the temporary rule clarifies and greatly narrows the interpretation of "services that are integrated with and necessary to the provision of patient care." And while it may be argued, and reasonably so, that cooks and other food service workers, maintenance and human resources (HR) personnel, records managers, billing personnel and consultants are indeed necessary and that their work is integrated with the provision of patient care, the DOL in its temporary rule thinks otherwise. These employees are deemed to NOT fall under the definition of "health care provider." Therefore, under this temporary rule, cooks and other food service workers, maintenance and HR personnel, records managers, billing personnel, consultants and perhaps other similarly situated employees may not be excluded from being eligible for emergency medical leave.

This explanation is only to be used to determine whether to exclude an employee from emergency medical leave and does not affect sick leave or FMLA. If you have questions about the new temporary rule, contact Bob Lightfoot or your Reinhart attorney.

For additional information on the DOL’s revised regulations as it relates to work requirement and intermittent leave rules, and clarification of the notice and documentation requirements, see our recent alert: Department of Labor Revises Families First Coronavirus Response Act Regulations Following New York Court Ruling.