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Revised DOL FFCRA Rules Narrow Health Care Provider Exemption, Ease Advance Notice Requirements

The Department of Labor (DOL) issued revisions to its Families First Coronavirus Response Act (FFCRA) paid leave rules on Friday, in response to a New York federal court ruling that struck down portions of the original rule issued in April. FFCRA, enacted by Congress in March as a stimulus measure, provides eligible workers for up to two weeks of paid leave, subject to caps, for certain coronavirus-related absences, and up to an additional 10 weeks of paid leave to care for children who are at home due to school or day care closures. The rule updates are scheduled to go into effect September 16.

On August 3, the District Court held four parts of the DOL's FFCRA rule invalid: (1) its definition of employees who are "health care providers" and thus ineligible for paid leave benefits and protections; (2) the requirement that employees provide documentation before taking leave; (3) the position that employers must agree to provide FFCRA leave on an intermittent basis; and (4) the position that leave protections and benefits apply only during times when the employee has work available. On the first two points, the court found the DOL rule inconsistent with the statute, and the DOL has revised both of these positions by narrowing the definition of "health care providers" and easing the documentation requirement to "as soon as practicable." The court held that the DOL rationale was insufficient on the latter two points, and the DOL has reaffirmed these positions with expanded analysis and justification.

A Narrower Health Care Provider Definition

The DOL had interpreted this exemption as applying broadly to employees working at any health care facility, even those not responsible for patient care, such as food service workers and janitorial staff. The District Court found that interpretation overbroad. The new definition focuses not on the nature of the employer, but on the specific employee role. It exempts, in addition to emergency responders, all health care providers who are

authorized to sign FMLA certifications as well as those who “provide diagnostic, preventive, treatment services, or other patient care services” or whose work is integrated with and necessary to providing those services. Examples of roles that are exempt under the revised rule are a laboratory technician who processes medical test results that will be used in diagnoses and treatment; a nurse who counsels patients on diabetes prevention or stress management; and an aide who helps bathe, dress, and feed a patient who is incapable of such self-care. Employers in roles not directly affecting the provision of health care services (such as IT professionals, accounting and billing personnel, and human resources staff) are not exempt from FFCRA provisions even if they work for health care operations.

A Relaxed Documentation Timing Requirement

The DOL also revised its position to address the court’s holding invalidating the requirement that employees provide documentation before taking leave. The new rule allows workers taking paid leave to provide the documentation “as soon as practicable.” For expanded family and medical leave to care for a child during a school or day care closure, advance notice is still required when the need for leave is foreseeable.

Continued Employer Agreement Requirement for Intermittent Leave

The DOL did not change its position that employers may decline to allow paid intermittent FFCRA leave, but expanded its analysis to address the court’s ruling on this point. The new rule notes that unlike the FMLA, Congress did not address intermittent leave in the FFCRA, but empowered the DOL to regulate implementation of the relief statute. An update to the DOL’s posted FAQs on FFCRA interpretation and application explains that although teleworkers may take paid sick leave on an intermittent basis if the employer agrees, onsite workers may take such leave for most reasons only in full-day increments and must take the leave continuously until leave time is exhausted or the employee no longer has a qualifying reason for leave. This is because the intent of the FFCRA is to support workers financially in staying home to prevent spreading the virus.

Intermittent use of paid leave for child care due to school or day care closure is allowed, subject to employer agreement, because its purpose is different from preventing virus spread. The guidance distinguishes, however, between a situation where, for example, a school closure is for a full week but the employee wishes to take only three days to care for the child, with someone else providing care on the remaining days, and a situation where the school is only closed on the three days a week when the employee is requesting leave. The former situation is intermittent leave, requiring employer agreement, because the employee is asking for time off during only part of a single period of a qualifying reason for leave. The latter is not considered intermittent because each day of closure is a separate reason for leave.

A Reaffirmed 'Work Available' Requirement

The DOL reaffirms in its new rule that workers are eligible for leave only when the employer has work available for them. Accordingly, employees who are on layoff status remain ineligible for FFCRA benefits. This is significant to employers who relied on the prior rule in denying leave to workers who were not scheduled to work when they had otherwise-qualifying reasons for leave. To address the District Court ruling, the new rule provides a detailed analysis of the statutory language and relevant precedent, plus discussion of congressional intent and the statutory purpose, that support the DOL's conclusion that in order for a qualifying situation to entitle an individual to paid leave benefits, it must have been the "but for" cause of the absence from work.

Scope and Effect of the New Rule

The DOL also addressed a point left unclear after the federal court ruling, which was whether that ruling was effective only within the district where it was issued, or nationwide. The DOL's position is that the ruling applies nationwide, but has been effectively addressed with this update.

To the extent the DOL has changed its rules for interpreting and applying FFCRA provisions, employers are faced with the decision whether to try to retroactively grant paid leave benefits (to the extent the necessary information is available) to employees who would have qualified under the new rules. This would include, for example, support services staff (janitorial, food services etc.) in health care facilities. Good faith reliance on the existing DOL guidance may provide a sound defense to any claim for retroactive benefits, but employers may wish to consult counsel for more specific guidance.

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