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New York Federal Court Modifies FFCRA Regulations in Several Key Areas

Timeline

3/18/20: Congress passed the Families First Coronavirus Response Act (FFCRA) which includes two temporary paid leave statutes: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).

4/1/20: The U.S. Department of Labor (DOL) issued its final rule implementing and interpreting the FFCRA.

4/14/20: New York State filed a lawsuit seeking declaratory and injunctive relief against the DOL and the Secretary of Labor in the U.S. District Court for the Southern District of New York. The lawsuit asserted that the final rule unlawfully denied leave to otherwise eligible employees by exceeding the DOL's and the Secretary of Labor's statutory authority.

8/8/20: The Southern District struck down portions of the DOL's final rule, providing guidance on interpretations of the FFCRA based on New York's lawsuit. The court decision changes the DOL's final rule in four provisions of the FFCRA: (1) the "work availability" requirement; (2) the employer agreement for intermittent leave for Emergency FMLA ("EFMLA"); (3) the "health care provider" definition for exclusions to Emergency Paid Sick Leave ("EPSL") and EFMLA; and (4) the documentation requirements prior to taking FFCRA leave.

Scope of Court Decision

While the Southern District's decision is applicable in New York, it remains unclear whether its decision to vacate portions of the final rule applies only to the state of New York.

Work Availability Requirement

New York's lawsuit challenged portions of the DOL's final rule providing that employees may not use Emergency Paid Sick Leave (EPSL) and/or Emergency FMLA (EFMLA) where the employer does not have work for the employee. The court concluded that an employee's leave entitlement is driven by the employee's individual circumstances or inability to work—not whether the employer makes work available. Thus, the work availability requirement was struck down and, at least in New York, the periods of time when an employee would not otherwise be expected to work may not count against an employee's FFCRA entitlements. In other words, periods of leave where the employee would not have been able to work anyway cannot be deducted from EPSL or EFMLA leave entitlements.

This part of the ruling opens the door for EPSL and EFMLA requests by employees who are furloughed or temporarily laid off or whose employers have had to temporarily cease operations under state or local orders, or due to economic circumstances during the pandemic.

4821-2532-7562, v. 1

Intermittent Leave

Congress did not address intermittent leave at all in the text of the FFCRA. Through its regulatory authority, in its final rule the DOL specified that for both EPSL and EFMLA the employee and the employer must agree to the use of intermittent leave. The final rule also made clear that the use of intermittent leave is limited to the employee's need to care for a child whose school or place of care is closed or where child care is unavailable.

In reviewing the DOL's final rule, the court agreed that intermittent leave should be limited to situations where there is no risk that the employee might spread the virus to others, so it should apply only in cases of school closure or child care issues. However, the district court rejected any requirement that the employer must consent to use of EPSL or EFMLA intermittently. Thus, if an employee requests EFMLA for child care purposes (school or daycare closure), an employer must allow the leave (provided the employee otherwise qualifies for leave).

Documentation Requirements

The final rule obligates employees to submit documentation to their employer prior to taking FFCRA leave. In its lawsuit, New York argued that documentation should not be required before an employee takes FFCRA leave. The court agreed with New York and held that an employer may not require an employee to furnish documentation before taking leave.

Although the court struck down any requirement that documentation be provided as a precondition to leave, the court left intact the final rule's overall documentation requirement to support the need for leave. Accordingly, employers should allow the leave and work on documentation after.

"Health Care Provider" Exclusion

The FFCRA permits employers to, at their option, exclude "health care providers" from paid leave benefits. The DOL's regulations broadly defined "health care providers" as anyone employed at "any doctor's office, hospital, health care center, clinic, post-secondary 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 institutions, Employer, or entity."

New York State argued that this exception was too broad. The district court agreed with New York and vacated the DOL's definition of "health care provider" for purposes of the possible FFCRA exclusion for these workers.

This was an important exception for many health care employers who have a need to exempt employees who are essential to maintaining health care systems during the pandemic.

The district court determined that the FFCRA should only exempt employees capable of providing health care services—not employees whose work is remotely related to someone else's provision of health care services. The district court left open the possibility that the DOL could re-interpret "health care provider"; however, unless or until that occurs, the only current regulatory definition for "health care

provider" for purposes of both EPSL and EFMLA is contained in the standard FMLA regulations at 29 CFR § 825.125.10. This dramatically narrows the FFCRA exemption to specifically identified direct health care professionals or providers.