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DOL Responds to NY Federal Court FFCRA Decision

As previously [reported](#), on August 3, 2020, a New York District Court invalidated four parts of the Department of Labor's (DOL) implementing regulations (Temporary Rule) that provided interpretative guidance of the Families First Coronavirus Response Act (FFCRA). The District Court ruled that four parts of the Temporary Rule were invalid: (1) the requirement that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave; (2) the requirement that an employee may take FFCRA leave intermittently only with employer approval; (3) the definition of a "health care provider"; and (4) the requirement that employees who take FFCRA leave must provide their employers with certain documentation *before* taking FFCRA leave. *New York v. U.S. Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).

In response, the DOL issued a revised Temporary Rule, effective **September 16, 2020**, that provides, in relevant part:

- In order for employees to be eligible for paid sick leave and expanded family and medical leave under the FFCRA, the employer must have work available. According to the DOL, unless there is work available, an employee has no need to take "leave" from work and is not eligible for paid leave under the FFCRA. It rejected the Court's concerns. Thus, employees still are ineligible for FFCRA leave if an employer shuts down due to COVID. 826.20(a)(2), (a)(3), (a)(4), (a)(6), (a)(9), and (a)(10).
- The definition of "health care provider" for purposes of those for whom leave may be restricted is redefined to mean employees who are health care providers under 29 CFR 825.102 and 825.125 and other employees who are "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care." This definition is considerably narrower than under the original Temporary Rule

but broader than under the FMLA. Employers are advised to reevaluate any decisions they made concerning the availability of FFCRA leave for health care employees based on the original text of the Temporary Rule. 826.30.

- An employee must provide support for the need for leave under the FFCRA “as soon as practicable” rather than before leave begins. This change brings the documentation requirement in line with the notice requirements under the FFCRA. 826.100(a).
- An employee may only take intermittent leave under the FFCRA in certain situations and only with the employer’s consent. The DOL rejected the District Court’s concerns about the Temporary Rule’s limitations on intermittent leave. The DOL focused on both the health risks associated with intermittent leave and the lack of statutory mention of intermittent leave in the FFCRA itself. 826.50

Of note, the DOL included a comment in the revisions that the restriction on intermittent leave being permitted only with the consent of the employer would not apply when employees take FFCRA leave in full-day increments to care for their children whose schools are operating on a hybrid or alternate-attendance schedule. According to the DOL, an “employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so.” In that scenario, “each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.”

Although not immune to further legal challenge, the DOL (for now) has addressed four issues raised by the New York District Court. It also appears the DOL likely will appeal the District Court’s decision. Unfortunately, the various questions we raised in our August 11, 2020 advisory remain unresolved. Hopefully, clarity and certainty soon will prevail.

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