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Department of Labor Revises FFCRA in Light of New York Federal Court Opinion

Please contact our

Carr Allison COVID-19 Response Team

with any questions you may have.

Article Co-Authors:

Brett Adair

badair@carrallison.com

Phone: (205) 949.2930

Melisa C. Zwilling

mzwilling@carrallison.com

Phone: (205) 949.2949

www.carrallison.com

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On September 11, 2020, the U.S. Department of Labor (DOL) issued clarification and revised regulations under the Families First Coronavirus Response Act (FFCRA). These revisions came after a New York federal court decision which invalidated certain parts of the Rule. The revisions became effective September 16, 2020 and are available HERE.

Background

On March 18, 2020, in response to the COVID-19 pandemic, President Trump signed the FFCRA into law. The FFCRA created two new emergency paid leave requirements. First, public health emergency leave was added under the Family and Medical Leave Act (FMLA). In addition, the Emergency Paid Sick Leave Act (EPSLA) was enacted. Both types of emergency leave are set to expire on December 31, 2020.

The EPSLA portion of the FFCRA provides that certain employees of covered employers may take up to two weeks of paid sick leave if the employee is unable to work for specific reasons related to COVID-19. Those reasons are:

1.) being subject to a Federal, state, or local quarantine or isolation order related to COVID-19;

2.) being advised by a health care provider to self-quarantine due to COVID-19 concerns;

3.) experiencing COVID-19 symptoms and seeking a medical diagnosis;

4.) caring for another individual who is either subject to a Federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to COVID-19 concerns;

5.) caring for the employee's son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID-19 related reasons; and

6.) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services (HHS).[1]

The FFCRA also amended Title 1 of the Family and Medical Leave Act[2] to allow "certain employees of covered employers to take up to 12 weeks of expanded family and medical leave, ten of which are paid, if the employee is unable to work due to a need to care for his or her son or daughter whose school, place of care or child care provider is closed or unavailable due to COVID-19 related reasons."[3] The full cost to employers of providing these expanded leave benefits will ultimately be paid by the Federal Government in the form of tax credits to employers.

[1] FFCRA section 5102(a)(1)-(6).

[2] 29 U.S.C. 2601 et seq.

[3] FFCRA section 3012, adding FMLA section 110(a)(2)(A).

New York District Court Decision

On April 14, 2020, the State of New York filed a lawsuit in federal court challenging certain parts of the FFCRA. On August 3, 2020, the New York District Court held that four parts of the 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 an employee who is a "health care provider," whom an employer may exclude from being eligible for FFCRA leave; and

4.) the statement that employees who take FFCRA leave must provide their employers with certain documentation before taking leave.[4]

In response to that decision, the DOL issued the following revisions and clarifications to the FFCRA:

1.) The DOL reaffirmed that paid sick leave and expanded family and medical leave may only be taken if an employee has work from which to take leave. The DOL clarified why the requirement was necessary and noted that it applies to all qualifying reasons to take paid sick leave and expanded family and medical leave.

2.) The DOL reaffirmed that, when intermittent FFCRA leave is permitted by the DOL's regulations, an employee must obtain the employer's approval to take paid sick leave or expanded family and medical leave intermittently under the Rule and further explained the basis for such requirement.

3.) The DOL revised the definition of "health care provider" to include "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."[5]

4.) The DOL revised the Rule to clarify when employees must provide notice and documentation supporting the need for leave.

[4] *New York v. U.S. Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).

[5] https://www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act#footnote-1-p57677

Work-Availability Requirement

Under the original Rule, the DOL required that an employer must actually have work available from which an employee would need to take leave. If an employer did not have work for the employee to do, FFCRA paid leave would not be available. Though the New York District Court concluded that the work-availability requirement was invalid, the DOL disagreed and maintained that such requirement was valid and would remain. Revisions to the Rule were made to provide clarification that the work-availability requirement applied to every potential qualifying reason for leave under the FFCRA. The DOL stated:

> The Department's continued application of the work-availability requirement is further supported by the fact that the use of the term "leave" in the FFCRA is best understood to require that an employee is absent from work at a time when he or she would otherwise have been working. . . . After reconsideration, the Department now reaffirms that even if "leave" could encompass time an employee would not have worked regardless of the relevant qualifying reason, the Department, based in significant part on its experience administering and enforcing other mandatory leave requirements, interprets the FFCRA as allowing employees to take paid leave only if they would have worked if not for the qualifying reason for leave. "Leave" is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave.

Accordingly, the work-availability requirement remains firmly in place with regard to leave under the FFCRA.

Employer Approval Requirement for Intermittent Leave Reaffirmed

The DOL also reaffirmed that, when intermittent FFCRA leave is permitted by the DOL's regulations, an employee must obtain the employer's approval to take paid sick leave or expanded family and medical leave intermittently under the Rule. In the discussion, the DOL distinguished between workers who were physically reporting to a worksite and those who were teleworking. The DOL stated that the FFCRA "permits an employee who is reporting to a worksite to take FFCRA leave on an intermittent basis only when taking leave to care for his or her child whose school, place of care, or child care provider is closed or unavailable due to COVID-19, and only with the employer's consent." With regard to teleworking employees, the DOL stated that "[a] n employee who is teleworking (and not reporting to the worksite) may take intermittent leave for any of the FFCRA's qualifying reasons as long as the employer consents."[6]

During its discussion, the DOL noted that the "employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent under § 826.50." In such situations, the DOL noted that "each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that)."

[6] 29 CFR 826.50(c).

Definition of Health Care Provider Revised

The FFCRA originally allowed employers to exclude employees who were “health care providers” or “emergency responders” from eligibility for expanded FMLA or EPSLA leave. The purpose was to allow the health care system to be adequately staffed to care for those infected with COVID-19. The original Rule, however, allowed for a very broad definition of health care providers, such that individuals who were connected in any way with a health care employer, such as IT professionals, building maintenance staff, human resources professionals, records managers, food service workers, billers and others, could be excluded from FFCRA coverage. Noting that such an interpretation was not consistent with the intention behind the FFCRA, the DOL revised the definition of health care provider to focus on the actual skills and role that individuals play within a health care facility. Under the revised Rule, only the following are excluded from eligibility for FFCRA leave:

1.) Nurses, nurse assistants, medical technicians, and any other persons who directly provide covered services;

2.) Employees providing covered services under the supervision, order, or direction of, or providing direct assistance to, a person directly providing covered services (such as a doctor, nurse, nursing assistant or medical technician); and

3.) Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

Notice and Documentation Requirements for Leave

The New York District Court also invalidated the FFCRA to the extent that employees were required to provide notice of the need for leave prior to actually taking the leave. In response, the DOL revised the Rule to allow an employee to provide documentation supporting the need for leave “as soon as practical, which in most cases will be when the employee provides notice” that FFCRA leave is needed.

Conclusion

Employment laws are rapidly changing in response to the COVID-19 pandemic. It is now more important than ever to stay current on laws that impact businesses. If you have an employment question or potential employment issue, we invite you to give us a call to discuss the same prior to making decisions or taking action. We will be happy to provide guidance and help ensure your compliance with all of the applicable laws.