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Blog Post

Department of Labor Addresses Court Ruling by Issuing New FFCRA Leave Regulations

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In response to a New York federal court striking certain aspects of the Department of Labor's regulations interpreting the Families First Coronavirus Response Act (FFCRA), last week the DOL issued a revised Temporary Rule (the "Revised Rule"), in some ways resisting and in others yielding to the court's ruling. In particular, the Revised Rule maintains the DOL's prior positions that FFCRA leave is available only if the employer has work available for the employee to do and that employees must have the employer's consent to intermittent leave for certain qualifying conditions, but it narrows the DOL's prior definition contained in the original Rule of health care provider and modifies the prior requirement that employees provide documentation of the need for leave prior to taking it.

A. Background of FFCRA

The FFCRA (which we previously wrote about here), generally requires employers with fewer than 500 employees and government employers to provide paid leave due to certain circumstances related to COVID-19, referred to as: (i) the Emergency Paid Sick Leave Act (EPSL) and (ii) the Emergency Family and Medical Leave Expansion Act (EFMLA).

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As a reminder, the FFCRA permits an employee to take EPSL if the employee is unable to work or telework for any of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised to self-quarantine by a health care provider due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order under (1) above or been advised under (2) above.
5. The employee is caring for his/her son or daughter if the school or place of care of the child has been closed or the childcare provider is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

The FFCRA permits an employee to take EFMLA in one circumstance only: if the employee is unable to work or telework due to a need for leave to care for the employee's son or daughter under 18 years of age, if the child's school or place of care has been closed, or if the child care provider is unavailable due to a COVID-19 emergency declared by a federal, state, or local authority.

B. New York Court Vacates Parts of DOL's Original FFCRA Rule

On April 1, 2020, the U.S. DOL issued its original Rule providing guidance on interpretations of the FFCRA. Shortly thereafter, the State of New York filed a lawsuit against the DOL and the Secretary of Labor in the U.S. District Court for the Southern District of New York challenging parts of the rule.

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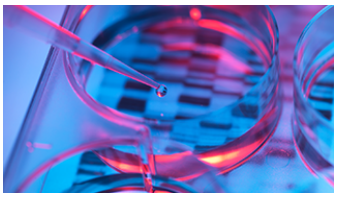

On August, 3, 2020, United States District Judge J. Paul Oetken issued a decision vacating certain aspects of the original Rule, namely: (i) the work-availability requirement, (ii) the definition of "health care provider," (iii) the requirement that an employee secure employer consent for intermittent leave, and (iv) the requirement that documentation be provided to the employer before the employee takes leave. In response to the Court's decision, on Friday, September 11, 2020, the DOL issued the Revised Rule modifying and clarifying the features of its earlier rule that were invalidated.

C. DOL's FFCRA Revised Rule

i. The Work-Availability Requirement

The State of New York challenged what the Court referred to as "a fundamental feature of the regulatory scheme," the work-availability requirement. Notably, both the EPSL and EFMLA grant paid leave to employees who are "unable to work (or telework) due to a need for leave" for any of the prescribed reasons. Pursuant to the original Rule, however, the DOL stated that employees are not entitled to paid leave under the FFCRA if their employers "do not have work" for them to do. In vacating that work-availability requirement, the Court concluded that the DOL exceeded its authority because that requirement applied only to three of the six qualifying reasons for EPSL (qualifying reasons (1), (4), and (5) above), as well as the EFMLA qualifying reason, which the Court found to be "entirely unreasoned." (The DOL argued that the Court should "superimpose" the work-availability requirement on the three remaining EPSL qualifying reasons, but the Court rejected that request). The Court also found that the DOL's "barebones explanation" for the work-availability requirement was "patently deficient," namely due to the "enormously consequential" impact it has on narrowing the scope of the FFCRA.

In the Revised Rule, the DOL reaffirmed the work-availability requirement, explaining that EPSL and EFMLA may be taken only if the employee has work from which to take leave, but further clarified that this requirement applies to all qualifying reasons under EPSL and EFMLA. The DOL noted that the FFCRA states that an employer shall provide its employee FFCRA leave to the extent that the employee is unable to work (or telework) due to a need for leave "because" of or "due to" a qualifying reason for leave under EPSL and EFMLA. Disagreeing with the Court, the DOL, relying on U.S. Supreme Court guidance, declared that it "continues to believe that the traditional meaning of "because" and "due to" as requiring but-for causation is the best interpretation of the FFCRA leave provisions." Stated differently, according to the DOL, the FFCRA only allows an employee to take EPSL or EFMLA when a prescribed qualifying reason is the reason the employee is unable to work, but not if work is unavailable due to other reasons. Thus, the DOL reaffirmed its prior position that, in the FFCRA context, "if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave." The DOL further added that its continued application of the work-availability requirement is 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, noting, "'[l]eave' 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."

The DOL also stated that removing the work-availability requirement would not serve one of

the FFCRA's purposes: discouraging employees who may be infected with COVID-19 from going to work. To this point, the DOL stated that "[i]f there is no work to perform, there would be no need to discourage potentially infected employees from coming to work through the provision of paid FFCRA leave. Nor is there a need to protect a potentially infected employee who stays home from an employer's disciplinary actions if the employer has no work for the employee to perform."

Lastly, the DOL stated that removing the work-availability requirement would lead to "perverse results." For example, the DOL said, if an employer closes its business and furloughs its workers, none of those employees would receive paychecks during the closure or furloughed period because there is no paid work to perform. However, if an employee with a qualifying reason could take FFCRA leave even when there is no work, he or she could take FFCRA leave, potentially for many weeks, even when the employer closes its business and furloughs its workers. In that scenario, the employee on FFCRA leave would continue to be paid during this period, while his or her co-workers who do not have a qualifying reason for taking FFCRA leave would not. According to the DOL, it "does not believe Congress intended such an illogical result." However, despite reaffirming the work-availability requirement, the DOL did caution that employers may not make work unavailable in an effort to deny FFCRA leave "because altering an employee's schedule in an adverse manner because that employee requires or takes FFCRA leave may be impermissible retaliation."

ii. Definition of "Health Care Provider"

The FFCRA permits employers to exclude a "health care provider or emergency responder" from paid leave benefits. The original DOL rule defined "health care provider" broadly, including,

but not limited to, anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, nursing facility, retirement facility, home health care provider, any facility that performs laboratory or medical testing, a pharmacy, as well as any individual employed by an entity that contracts with any of these types of institutions to provide services or to maintain the operation of the facility and anyone employed by any entity that provides medical services, produces medical products or is otherwise involved in the making of COVID-19 related medical equipment, tests, vaccines, or treatment.

The State of New York took issue with that expansive definition of a "health care provider," as compared to the definition made part of the FFCRA, which adopted the definition supplied by the FMLA. The FMLA defines a health care provider far more narrowly as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices, or any other person determined by the Secretary to be capable of providing health care services. The Court agreed with the State's argument, explaining that the FFCRA itself "forecloses" the rule's "health care provider" definition because the FFCRA requires that the Secretary of Labor determine that the employee be capable of furnishing healthcare services. In other words, the Court explained that the Secretary's determination must be that the person is capable of providing healthcare services, not that their work is remotely related to someone else's provision of healthcare services. To illustrate the expansive nature of the rule's definition, the Court noted that the DOL conceded "that an English professor, librarian, or cafeteria manager at a university with a medical school would all be "health care providers" under the rule. The Court stated that the FFCRA requires "at least a minimally role-specific

determination," and the original Rule's definition of 'health care provider' "hinges entirely on the identity of the employer, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties or capabilities of a class of employees," which was held to be "vastly overbroad."

In the Revised Rule, the DOL revised the definition of "health care provider," to mean employees that are health care providers under the FMLA's implementing regulations, 29 CFR 825.102 and 825.125 (this includes, but is not limited to, a doctor of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, nurse-midwives, clinical social workers, and physician assistants), 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. The Revised Rule provides a lengthy, albeit non-exhaustive, list of examples of services that may qualify under the revised definition of "health care provider."

iii. Intermittent Leave

Although the FFCRA does not address whether employees are eligible for intermittent paid leave under EPSL or EFMLA, the original Rule permitted employees to take EPSL and EFMLA intermittently only if: (i) the employee and employer agree; and (ii) only for a subset of qualifying conditions. The State of New York challenged both aspects arguing, in part, that the original Rule required employees to take any qualifying leave in a single block, and that any leave not taken consecutively in a single block is thereafter forfeited. While the Court upheld the original Rule's prohibition on intermittent leave for employees who are reporting to the worksite when the reason for leave correlates to a higher risk of spreading COVID-19 (i.e., all qualifying

reasons except for caring for the employee's child due to school or childcare closure or unavailability), the Court vacated the original Rule's requirement of employer consent, explaining that the DOL offered no justification for imposing such a requirement.

In the Revised Rule, the DOL reaffirmed its position that employer approval is required to take intermittent FFCRA leave, explaining that the basis for this requirement "is consistent with longstanding FMLA principles governing intermittent leave." The DOL explained the difference between intermittent leave and consecutive requests for leave. According to the Revised Rule, "[t]he 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." The DOL reasoned that in an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. Thus, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. For example, the Revised Rule states that an 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). However, according to the Revised Rule, if the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule, this would constitute a request for intermittent leave and the employer's consent would be required.

iv. Documentation Requirement

The State of New York also challenged the original Rule's requirement that an employee submit to their employer, before taking FFCRA leave, documentation indicating, among other things, their reason for leave, the duration of the requested leave, and, to the extent relevant, the authority for isolation or quarantine order qualifying them for leave. The Court pointed out that the FFCRA contains a notice, but not a documentation, requirement before an employee takes leave. The Court reasoned that the original Rule's documentation requirement imposed a different and more stringent precondition to leave than is required under the unambiguous notice provisions of the FFCRA.

In response, the Revised Rule discards the requirement that an employee provide documentation "prior to" taking leave under EPSL or EFMLA. Rather, according to the Revised Rule, the information the employee must give the employer to support the need for his or her leave should be provided to the employer "as soon as practicable." Additionally, the Revised Rule revises an "inconsistency" regarding the timing of notice for employees who take leave under the EFMLA, namely that advanced notice of such leave is required as soon as practicable.

The DOL's Revised Rule seemingly addresses the key issues raised by the New York federal court and provides clarity to employers. If you need assistance with respect to FFCRA leave or other workplace issues, please contact your Akerman attorney.

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