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New York Court Vacates Key Aspects of DOL's Final Rule on Families First Coronavirus Response Act

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On Monday, August 3, 2020, the U.S. District Court for the Southern District of New York vacated several significant provisions of the U.S. Department of Labor's (DOL) "Final Rule" regarding the Families First Coronavirus Response Act ("the Act" or "FFCRA"). The Final Rule, which Foley's Coronavirus Resource Center detailed here, outlines the DOL's rules and directions regarding administration of the Act.

At issue in the Court's decision are four provisions of the Final Rule: (1) the so-called "work availability" requirement; (2) the definition of "health care providers" who may be excluded from FFCRA eligibility; (3) the requirement for employer consent to intermittent leave; and (4) the advance documentation requirements. Regardless of their location, employers covered by the FFCRA should revisit their practices with respect to these provisions. We anticipate the DOL will appeal the ruling to the Second Circuit, which may reinstate the Final Rule pending its review. However, in the meantime, employers who do not heed the Court's interpretation of the Act are at risk of non-compliance and associated penalties and liability.

By Way of Reminder, the Act Requires Paid Leave in Six Situations.

The Act mandates that covered employers provide paid leave pursuant to the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family Medical Leave Expansion Act (EFMLEA). Under the EPSLA, employees are entitled to up to 80 hours of paid leave if they are unable to work (or telework) due to a need for leave because:

- they are subject to a government quarantine/isolation order related to COVID-19;
- they were advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
- they are experiencing symptoms of COVID-19 and seeking a diagnosis;
- they are caring for an individual who is subject to a government quarantine/isolation order or who has been advised by a healthcare provider to self-quarantine;
- they are caring for their child whose school or childcare facility has been closed or whose

childcare provider is unavailable due to COVID-19 precautions; or
- they are experiencing a substantially similar condition specified by certain federal government agencies (no such condition has been specified to date).

The EFMLEA applies for the same child-care related reason as the EPSLA, but for up to 12 weeks, ten of which are paid.

The Court's Decision Vacates Four Key Aspects of the Final Rule.

1. The Court struck down the Final Rule's "work availability" requirement. What this means for employers: employees may be eligible for FFCRA-paid leave even if there is no work for them to do.

The Final Rule clarified that employees are not entitled to FFCRA-paid leave if their employers do not have work for them to do. This so called "work availability" requirement was significant because many businesses have slowed down or temporarily closed due to the impact of COVID-19. According to the DOL, the Act supports this interpretation because employees are not really "unable to work (or telework)" due to one of the above-listed six reasons if their employer has no work available for them to perform.

The Court disagreed, finding the Act ambiguous as to whether the FFCRA-specific reason had to be the reason an employee is unable to work, or whether it could be one of multiple causes. Given that ambiguity, the Court went on to find that the work availability requirement is an impermissible interpretation of the Act. One, the Court found that the Final Rule only applied the work availability requirement to three of the six FFCRA-qualifying reasons, which rendered it inconsistent and unreasonable. Two, the Court found the DOL's "barebones explanation" for the requirement to be "patently deficient."

Employers should be cognizant that under the Court's interpretation of the Act, they cannot deny FFCRA-paid leave to an employee who satisfies one of the qualifying reasons on the basis that the employer did not have work for that employee to do.

2. The Court struck down the Final Rule's definition of "health care provider." What this means for employers: employers may not have the option of denying FFCRA paid leave to a broad range of employees who work in the health care field.

The Act enables employers to exclude "health care providers" from coverage, at their discretion. As we previously reported, for purposes of that provision, the Final Rule defined healthcare workers broadly—to encompass virtually any employee of an employer in the health care field. While the DOL's intent was to promote an "all hands on deck" response to the COVID-19 pandemic, the Court found the definition went too far. In particular, the Court took issue with the DOL's reliance on the identity of the employer, not on whether a particular employee's role has some nexus to the provision of healthcare.

As we have previously advised, employers in the health care field will need to consider, on a case-by-case basis, potential exclusions from FFCRA-paid leave in the context of the employee's specific role and ability to provide healthcare services.

3. The Court partially struck down the Final Rule's intermittent leave provisions. What this means for employers: employers cannot require an employee to secure consent for

intermittent leave.

In the Final Rule, the DOL differentiated between leave related to an employee's own COVID-19 condition, symptoms, or exposure (for which intermittent leave may not be allowed unless the employee can telework), and leave related to childcare (for which intermittent leave is allowed). In all cases, though, the Final Rule required employer consent to intermittent leave arrangements.

The Court agreed with the DOL's distinction between types of leave, as it is aimed at preventing the spread of COVID-19. However, the Court found that the DOL failed to explain why employer consent is required for intermittent leave arrangements. Thus, the Court vacated the Final Rule to the extent it requires employees to secure employer consent to take intermittent leave. This is of particular concern as the school year commences in the coming weeks, because some districts are opening on a remote or hybrid remote/in-person schedule. Parents will inevitably need flexibility in scheduling child care as a result, and so employers should be prepared to offer intermittent EFMLA leave.

4. The Court struck down the requirement that employees provide documentation before taking leave. What this means for employers: employers cannot condition leave on advanced documentation.

The Final Rule required employees to submit documentation regarding the details of their need for leave prior to taking the leave. The Court found this advance-notice requirement inconsistent with the Act. Under the EFMLEA provisions of the Act, employees must generally provide notice as soon as practicable. Under the EPSLA provisions of the Act, employees may be required to provide notice after the first workday (or portion thereof) that they are on leave. The Court rejected the DOL's attempt to distinguish between notice (which the Act discusses) and documentation (which the Final Rule discusses). Thus, employers cannot require employees to provide their FFCRA documentation in advance of taking leave.

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