Published on *The National Law Review* https://natlawreview.com

DOL Revises Families First Regulations

Article By:

Health Law Group Robinson & Cole

On Friday, September 11, the U.S. DOL issued revised regulations under the Families First Coronavirus Response Act ("FFCRA"). Responding to a Federal Court's August 4 decision invalidating four provisions in the prior regulations (see Post here), the Revised Regulations become effective September 16 and will sunset on December 31, 2020.

Adopted with lightning speed in March 2020 to respond to the Coronavirus Pandemic, the FFCRA established two separate paid leave provisions: Emergency Paid Sick Leave (capped at 80 hours of paid leave) and Emergency Family and Medical Leave (capped at 12 weeks of leave). Due to its emergency nature, Congress provided that these two leave provisions expire on December 31, 2o20. Congress further directed the DOL to adopt implementing regulations with immediate effect.

When the DOL issued the original regulations in April, advocates and others attacked them in large part for being overly "business friendly." For example, under the original regulations, intermittent leave could not be taken absent a manufacturer's consent. Additionally, the regulations permitted a manufacturer to deny leave to employees for whom no work was available. Furthermore, the Regulations defined the term "health care provider" broadly, permitting manufactures to exclude a broad array of individuals from coverage.

The Revised Regulations reinstate most of the challenged provisions, with additional explanations and justification. For example, the Revised Regulations re-affirm that employees are not eligible for leave if no work is available (stressing that manufacturers cannot use the "no available work" defense to subvert employee leave entitlements) and re-affirm that intermittent leave is not available unless the manufacturer consents to it. Interestingly, and somewhat confusingly, the Revised Regulations assert that when a child's school requires the child to attend on alternating days, that schedule is not an "intermittent one," but each day constitutes a "separate" school closing. Manufacturers must, accordingly, grant leave to the care-giver under those circumstances.

The Revised Regulations do, however, narrow the definition of "health care provider" to more closely align the law to those whose services are directly involved with the provision of health care, even if the employee does not actually interact with the patient.

While ultimately effective for a limited period, the Revised Regulations likely will impact how manufacturers administer their FFCRA leave programs and will live on for quite some time. Manufacturers may wish to confer with counsel of their choice to implement these new requirements.

National Law Review, Volume X, Number 258