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New York Federal Court Strikes Down Certain Restrictions on Federal Coronavirus Leave

On March 18, 2020, the federal Families First Coronavirus Response Act ("FFCRA") was signed into law, requiring certain employers to provide federally subsidized paid sick leave or expanded family and medical leave to employees who are unable to work because of the pandemic.

On April 6, 2020, the U.S. Department of Labor ("DOL"), which was charged with administering the statute, promulgated a Final Rule implementing the law's provisions. See 85 Fed. Reg. 19,326 (Apr. 6, 2020) ("Final Rule"). The State of New York brought suit against the DOL under the Administrative Procedure Act, claiming that four features of the Final Rule exceeded the agency's authority under the statute. Those provisions relate to: (1) excluding employees from paid leave benefits if their employers do not have work for them; (2) excluding health care providers as broadly defined in the Final Rules; (2) permitting intermittent leave only upon the employer's consent; and (4) requiring certain documentation as a prerequisite to taking leave. On August 3, 2020, the U.S. District Court for the Southern District of New York issued its Opinion and Order, striking down the four provisions, as summarized below. *See New York v. U.S. Department of Labor, et al,* No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020).

Overview of the Families First Coronavirus Response Act

The litigation involved two provisions of the FFCRA, the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), and the Emergency Paid Sick Leave Act ("EPSLA").

The EFMLEA, which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 206 et seq. ("FMLA"), permits certain employees to take up to twelve weeks of leave, up to ten weeks of which must

be paid, if they are unable to work (or telework) because they must care for a dependent child whose school or place of care is closed or whose child care provider is unavailable, due to COVID-19 related reasons.

The EPSLA requires certain employers to provide eligible employees up to two weeks of paid sick leave if the employee is unable to work (or telework) because the employee: (1) "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19"; (2) "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19"; (3) "is experiencing symptoms of COVID-19 and seeking a medical diagnosis"; (4) "is caring for an individual subject" to a quarantine or isolation order by the government or a healthcare provider; (5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or (6) "is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor." *See* FFCRA §§ 5102(a).

Decision

On April 6, 2020, the DOL promulgated its Final Rule implementing the FFCRA, and the State of New York thereafter filed suit challenging four provisions of the Final Rule, including: (1) the "work-availability" requirement; (2) the definition of "health care provider;" (3) provisions relating to intermittent leave; and (4) documentation requirements. On August 3, 2020, the Court issued its ruling, striking down the four challenged provisions as exceeding the DOL's authority, as follows.

Work-Availability Requirement. While both the EFMLEA and the EPSLA apply to employees unable to work (or telework) due to a qualifying COVID-19 related reason, the Final Rule implementing the FFCRA excludes from these benefits employees whose employer "does not have work" for them, such as if the employer temporarily closes. See Final Rule at 19329 (§ 826.20). The court found that the DOL's work-availability requirement is arbitrary and capricious and contrary to the statute's language. *See New York v. U.S. Department of Labor, et al*, No. 20-CV-3020 at *16-17.

Definition of "Health Care Provider." Both the EFMLEA and the EPSLA permit employers to deny exclude from coverage employees who are health care providers or emergency responders. See FFCRA §§ 3105, 5102. The term "health care provider," as defined under the FMLA, is limited to a "doctor of medicine or osteopathy who is authorized to practice medicine or surgery" by the state, or "any other person determined by the Secretary to be capable of providing health care services." See 29 U.S.C. 2611. Under the Final Rule, the definition of "health care provider" is expanded to include anyone:

> employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or

> temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as:

> any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support 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, drugs, vaccines, diagnostic vehicles, or treatments.

Final Rule at 19,351 (§ 826.25). The court found that the interpretation in the Final Rule is overbroad and exceeds the DOL's authority. *See New York v. U.S. Department of Labor, et al,* No. 20-CV-3020 at *19.

Intermittent Leave. Intermittent leave is not addressed in the FFCRA itself. However, the Final Rules provide that an employee may take paid leave intermittently under the EPSLA or EFMLEA only for certain qualifying conditions, and only with the employer's consent. *See* Final Rule at 19353 (§826.50). As to those qualifying reason for which intermittent leave is not permitted, once an employee begins taking paid sick leave, the employee must use the permitted days of leave consecutively until the need for leave abates. But the employee retains any remaining paid leave and may resume leave if and when another qualifying condition arises. *Ibid*. The court found that the intermittent-leave rule is reasonable insofar as it bans intermittent leave on certain qualifying conditions, but unreasonable insofar as it permits intermittent leave only upon employer consent. *See New York v. U.S. Department of Labor, et al,* No. 20-CV-3020 at *23.

Documentation Requirements. While the EFMLEA provides that, where the need for leave is foreseeable, employees should provide the employer with such notice of leave as is "practicable," and the EPSLA provides that employers may require employees to follow reasonable notice procedures in order to continue receiving paid sick leave, the Final Rules require employees to submit documentation indicating the reason for leave, duration, and authority for the isolation or quarantine order prior to taking FFCRA leave. See Final Rule at 19,355 (§826.100). To the extent the documentation requirements in the Final Rule are a precondition to leave, the court found they are inconsistent with the statute. *See New York v. U.S. Department of Labor, et al*, No. 20-CV-3020 at *24.

Implications

This is the first lawsuit challenging the DOL's Final Rules, and it is expected that the ruling will be appealed. Nevertheless, employers who are facing further temporary closures or who employ health care workers should re-examine whether they must provide leave to certain employees under the FFCRA, including intermittent leave, and what type of notice and documentation will be required.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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