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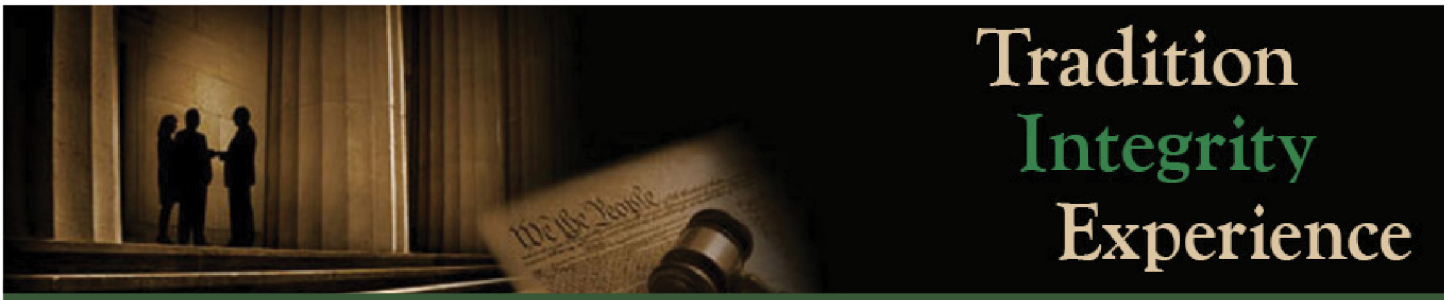

September 14, 2020

U.S. Department of Labor Announces Revisions to Paid Leave Under the FFCRA in Light of New York Federal Court Decision Invalidating Portions of the Regulations

On April 1, 2020, the U.S. Department of Labor ("DOL") issued its temporary rule implementing the paid sick leave and expanded family and medical leave provisions of the Family First Coronavirus Response Act ("FFCRA"). On August 3, 2020, the U.S. District Court for the Southern District of New York found certain portions of the regulations to be invalid. Those provisions relate to: (1) excluding employees from paid leave benefits if their employers do not have work for them; (2) permitting intermittent leave only upon the employer's consent; (3) excluding health care providers as broadly defined in the regulations; and (4) requiring certain documentation as a prerequisite to taking leave. See *New York v. U.S. Department of Labor, et al,* No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020) and our **previous alert** on that decision.

On September 11, 2020, the DOL announced revisions to the regulations to clarify workers' rights and employers' responsibilities under the FFCRA, in light of the District Court's decision. The revised rule, which takes effect on September 16, 2020, reaffirms and provides additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available, and that they need employer approval to take intermittent leave. The revisions also revise the definition of "healthcare provider," and clarify and correct documentation and notice requirements.

1. Reaffirming and Explaining the Work-Availability Requirement

The April 1, 2020 temporary rule stated that an employee is entitled to FFCRA leave only if the qualifying reason is a but-for cause of the employee's inability to work. In other words, an employee cannot take FFCRA leave if the employer would not have had work for the employee to perform, even if the qualifying reason for the leave did not apply. The District Court held that the work-availability requirement was invalid because it was only explicit in the regulations for 3 of the 6 qualifying reasons for FFCRA leave, and because the DOL provided insufficient reason for imposing the requirement. *New York*, 2020 WL 4462260 at *7-9.

The DOL nevertheless reaffirmed the work-availability requirement for taking leave under the FFCRA and, in keeping with the Department's original intent, amended the regulations to explicitly include the work-availability requirement to all qualifying reasons. 29 CFR 826.20(a)(3), (a)(4), (a)(10). The DOL also provided a fuller explanation for its reasoning, stating that it is consistent with Supreme Court precedent on statutory interpretation as well as the Department's long-standing interpretation of the term "leave" in the FMLA.

2. Reaffirming and Explaining the Employer-Approval Requirement for Intermittent Leave

The April 1, 2020 temporary rule provides that employees who report to the worksite may take FFCRA leave on an intermittent basis only to care for a child whose school or place of care is closed or unavailable due to COVID-19, and only with the employer's consent. This is due to the higher risk of spreading the virus associated with the other qualifying reasons for leave. As for employees who are teleworking and not reporting to the worksite, they may take intermittent leave for any of the qualifying reasons under the FFCRA, but only with the employer's consent. For employees reporting to the worksite, the District Court upheld the prohibition on intermittent leave for any reason other than school or child care closure due to COVID-19, but found that the requirement of employer consent was unreasonable. New York, 2020 WL 4462260, at *12

The DOL again reaffirmed the requirement that employer approval is needed to take intermittent leave under the FFCRA in all situations. 29 CFR 826.50. This is consistent with longstanding principles governing intermittent leave under FMLA regulations, and avoids unduly disrupting the employer's operations.

3. Revising the Definition of "Health Care Provider"

The FFCRA allows employers to exclude employees who are "health care provider[s]" or "emergency responder[s]" from eligibility for paid sick leave and expanded family and medical leave. The April 1, 2020 temporary rule adopted the FMLA definition of "health care provider," 29 CFR 825.102 and 825.125, when referring to medical professionals who may advise an individual to self-isolate due to concerns related to COVID-19. In this context, the term "health care

provider" 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. The DOL promulgated a different definition of "health care provider" when referring to employees who can be excluded from the entitled to paid leave under the FFCRA. The District Court held that this second definition was overbroad, as it would include employees of health care facilities with no nexus whatsoever to the provision of healthcare services. *See New York*, 2020 WL 4462260, at *9–10.

Revised Definition

The DOL revised its definition of "health care provider" which applies only for purposes of determining which employees can be optionally excluded from FFCRA leave, 29 CFR 826.30(c)(1)(i)(B), as follows:

> (1) *Health care provider*—(i) *Basic definition*. For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is
>
> > (A) Any Employee who is a health care provider under 29 CFR 825.102 and 825.125, or;
> >
> > (B) Any other Employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

The revised definition thus includes employees who fall within the FMLA definition under 29 CFR 825.1102 and 825.125, such as physicians and others who make medical diagnoses. It also includes additional employees who are "capable of providing health care services," meaning those "employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care." *See* 29 CFR 826.30(c)(1)(i)(B). Under this definition, it is not enough that an employee merely works for an entity that provides health care services, but must be employed to provide diagnostic, preventative, or treatment services or services that are integrated with and necessary to the provision of those services.

Types of Employees

Section 826.30(c)(1)(ii) of the regulation lists three types of employees who may qualify as "health care providers," which include only:

(A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A) of this section; and

(C) 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.

Thus, individuals who provide services that affect, but are not integrated into, the provision of patient care are not covered by the definition. Examples of excluded employees are IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants and billers.

Typical Work Locations and Examples of Services

The revised definition also provides a non-exhaustive list of facilities where health care provides may work, including temporary health care facilities. 29 CFR 826.30(c)(1)(iv). The list contains almost the same set of health care facilities listed in the original regulation but, consistent with the District Court's decision, explicitly provides that not all employees who work at such facilities are necessarily health care providers within the definition. Thus the list is merely meant to be a helpful guidepost.

Finally, the revised definition provides specific examples of services that may be considered diagnostic, preventative, treatment or other services integrated with and necessary to the provision of patient care. 29 CFR 826.30(c)(1)(v). The examples, which are non-exhaustive, include diagnostic services such as taking or processing samples, performing or assisting the performance of x-rays and other diagnostic tests and interpreting tests; preventative services such as screenings, check-ups and counseling; treatment services such as performing surgery, administering or providing medication and providing or assisting in breathing treatments; and other integrated and necessary services such as bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures and transporting patients and samples.

4. Revising Notice and Documentation Requirements

The FFCRA permits employers to require employees to follow reasonable notice procedures in order to continue receiving paid sick leave and, where the need for leave is foreseeable, require employees taking expanded family and medical leave to provide notice of leave as is "practicable." However, the April 1, 2020 temporary rule provides a list of documentation that an employee must provide the employer in order to take FFCRA leave, and

states that the documentation must be provide "prior to" taking leave. 29 CFR 826.100. The District Court held that the requirement to provide documentation "prior to" taking leave is inconsistent with the statute's notice provision.

The DOL amended the regulation to clarify that the documentation requirement need not be given "prior to" taking paid sick leave or expanded family and medical leave, but rather may be given as soon as practicable. 29 CFR 826.100. In addition, section 826.90(b), which governs the timing and delivery of notice, previously stated that "Notice may not be required in advance, and may only be required after the first workday" that an employee takes paid sick leave or expanded family and medical leave. 29 CFR 826.90. That regulation, which was correct with respect to paid sick leave, was revised to state that advanced notice of expanded family and medical leave is required as soon as practicable, which generally means providing notice before taking leave. *Ibid*.

Takeaway

Employers of health care workers and those with child care needs as schools partially reopen should re-examine whether they must provide paid sick leave and expanded family and medical leave under the FFCRA, including intermittent leave, and the notice and documentation requirements necessary to support such leave.

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

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