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DOL Responds to Federal Court Challenge with New Regulations Under FFCRA

Gray Reed Legal Alert

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Last month, a New York federal court struck down several Department of Labor (DOL) regulations interpreting the Families First Coronavirus Response Act (FFCRA). The affected regulations included: (1) the classification of employees as "health care providers" who may be exempted from paid leave benefits; (2) the work availability requirements for benefit eligibility; (3) the requirement that employees provide documentation prior to leave; and (4) the mandate that employees obtain their employers consent to take intermittent leave. In response, the DOL issued new regulations that took effect on September 16, 2020. Here is what employers need to know:

Health Care Provider Exemption

The FFCRA permits employers to exempt "health care providers" from paid leave under the statute. In response to the court's rejection of the DOL's prior expansive definition of "health care providers," the DOL amended the definition to include only those employees who qualify as "health care providers" under the existing Family and Medical Leave Act (FMLA) regulations[1], and those employees who provide diagnostic, preventative, or treatment services, or other services integrated with and necessary to the provision of patient care. The revised regulations provide specific guidance to help employers distinguish between certain employees who may continue to be excluded from taking paid leave under the FFCRA (e.g., nurses, nurse assistants, and medical technicians) and those employees who may not be exempt because they do not actually provide health care services even though their work affects the provision of health care services (e.g., IT professionals, maintenance staff, food service workers, and billers).

Work Availability Requirement

Under the previous DOL rule, employees would not qualify for FFCRA leave unless the employer actually had work available for the employee to perform when the need for leave occurred. In striking the rule down, the court took issue with the DOL's insufficient explanation for the requirement. To remedy the court's complaint, the new rule reaffirms the continued application of the work availability requirement but provides some additional rationale in support. Importantly, however, the DOL warns that employers may not arbitrarily withhold work in an effort to prevent an employee from taking leave. Rather, work must be unavailable due to legitimate, non-discriminatory, non-retaliatory reasons.

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Leave Documentation

The court took issue with the DOL's prior rule requiring employees to provide documentation supporting the need for leave in advance of the leave. In response, the DOL's new rule takes a more relaxed approach, providing that documentation need not be provided prior to taking leave but rather "as soon as practicable, which in most cases will be when the employee provides notice" of the need for leave. In situations where leave is foreseeable (e.g., an employee knows their child's school will be closed), the employee is expected to provide notice and supporting documentation before taking leave.

Employer Consent for Intermittent Leave

Although the court struck down the DOL's prior attempt to require employees to obtain employer consent to take intermittent FFCRA, the DOL's new rule reaffirms that employer consent is required and offers extensive reasoning to support its position. Because the FFCRA does not address intermittent leave, the DOL has broad discretion to fill the statutory gap.

Employers in the health care industry are most likely to see the immediate impact of the new DOL regulations and must carefully examine how the change impacts some or all employees currently exempted from FFCRA leave. The DOL's affirmation of the work availability requirement is welcome news for employers dealing with furloughs and short term layoffs. Additionally, the DOL's firm stance on employer approval for intermittent leave seeks to add some balanced consideration of employer operational and organizational needs to an otherwise unregulated process.

As the DOL seeks to address the rapidly evolving challenges COVID-19 poses to the workforce, the need for refinement and clarification will continue. For more information concerning the FFCRA and other COVID-19-related issues please visit Gray Reed's website and Gray Reed's COVID-19 Resource Center.

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[1] The FMLA defines a "health care provider" as: (1) a doctor of medicine or osteopathy; or (2) any other person determined by the Secretary to be capable of providing health care services. Others capable of providing health care under the FMLA include only: (1) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors; (2) nurse practitioners, nurse-midwives, clinical social workers and physician assistants; (3) Christian Science Practitioners; (4) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition or substantiate a claim for benefits; and (5) a health care provider

listed above who practices outside the U.S. who is authorized to practice in accordance with the law of that country.

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