Four Provisions of FFCRA Struck Down by New York Federal Court

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Practice Area: Labor and Employment

In the immediate aftermath of the coronavirus pandemic, Congress passed the Families First Coronavirus Response Act ("FFCRA") in order to provide relief to American workers. The FFCRA generally requires employers to offer two (2) weeks of paid sick leave and emergency family and medical leave to employees who are unable to work or telework because of specific qualifying reasons related to the pandemic. The leave provisions of the FFCRA are set to expire on December 31, 2020.

Shortly after the FFCRA was passed, the United States Department of Labor ("DOL") promulgated its Final Rule interpreting and implementing the FFCRA. In response, the state of New York filed suit challenging four provisions of the Final Rule. This *Legal Update* will provide a brief overview of the challenged portions of the Final Rule, which have now been struck down by a New York federal district judge, as well as practical recommendations for further action in the face of the evolving legal landscape.

Challenged Portions of the DOL Rule
New York's lawsuit challenged the following four provisions of the DOL Final Rule (all other portions of the Final Rule, which are extensive, remain in effect):

1. The FFCRA permits employers to exclude "health care providers" from paid leave benefits. The Final Rule provided a broad and clear definition of the health care provider exemption, including "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 institutions, Employer, or entity."
2. The Final Rule allowed employers to deny leave under the FFCRA in certain circumstances based on work availability, where the "Employer does not have work for the Employee."
3. The Final Rule significantly limited the availability of intermittent leave under the FFCRA, requiring employer consent for usage of intermittent leave.
4. The Final Rule obligated employees to submit documentation to their employer prior to taking leave, indicating the reason for, and the duration of the leave, and where relevant, the authority for the isolation or quarantine order qualifying them for leave.

Challenged Portions of DOL Rule Struck Down
On August 3, 2020, the New York federal district judge struck the above four provisions of the DOL's Final Rule on the grounds that they exceeded the Secretary of Labor's authority to interpret and implement the FFCRA. All other provisions of the DOL Final Rule—which were not subject to New York's lawsuit—remain in place.

The district court's decision creates considerable uncertainty nationwide for employers who are subject to the FFCRA. It is unclear whether additional federal districts will follow the judge's decision. Therefore, it may no longer be possible for employers to rely upon the Final Rule's broad definition of the health care provider exemption, as the precise contours of the exemption are no longer clear. It is also uncertain whether employers may utilize the work availability rule to deny FFCRA leave. Considerable uncertainty is also present regarding usage of intermittent leave and submission of documentation to establish eligibility for FFCRA leave. Prudence and caution are recommended. Employers should take the following actions:

1. Employers who previously classified employees as exempt due to "health care provider" status should re-assess whether they are exempt, as the broad definition contained in the Final Rule may no longer be reliable or enforceable.
2. Employers may need to review and update their FFCRA leave policies to allow employees to take leave even if work is not available for them. Employers should proceed with caution before denying leave for work availability reasons.
3. Employees may now be entitled to take intermittent leave under the FFCRA without first seeking permission and consent from their employer. Further evaluation of the intermittent use of available leave is suggested.
4. Employees may no longer need to provide documentation prior to initially taking FFCRA leave as extensive as required under the Final Rule. FFCRA policies requiring documentation prior to taking leave may need to be updated.
5. We recommend a thorough review of all FFCRA policies in order to reduce legal risk and uncertainty.
