U.S. Department of Labor Issues Revised FFCRA Rules and Regulations

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On September 11, 2020, the United States Department of Labor ("DOL") issued revised regulations for the Families First Coronavirus Response Act ("FFCRA") relating to the administration of both the FFCRA's Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). The DOL revised these regulations in response to a New York federal court decision that invalidated four provisions of the original regulations.

On August 3, 2020, the New York federal court struck down the following four provisions of the DOL's original FFCRA regulations:

1. **Health Care Provider Exemption**: The definition of an employee who is a "health care provider" who can be excluded from paid leave benefit eligibility.
2. **The Work Availability Requirement**: The requirement that leave under the EPSLA and EFMLEA can be taken only where the employer has work available for the employee seeking leave.
3. **Taking of EPSLA and EFMLEA Leave on an Intermittent Basis**: Intermittent leave was only available where the employer consented to the employee's utilization of intermittent leave.
4. **Prior Notice and Documentation**: Employees were required to provide employers with notice and certain documentation prior to taking leave.

On September 11, 2020, the DOL revised its regulations to comply with the federal court decision. The new rules revise the definition of "health care provider" for purposes of the FFCRA exemption. The prior notice and documentation rules have been amended to eliminate the requirement that notice and documentation be submitted prior to taking leave under FFCRA. As to the challenge to the "work availability" and "intermittent leave" rules, the DOL has reaffirmed it guidance, despite the federal court's decision. The FFCRA only applies to employers with less than 500 employees.

Revised Health Care Provider Exemption Definition – Focus on Patient Care Functions

The FFCRA allows employers to exclude "health care providers" from EPLSA and EFMLEA leave eligibility. The DOL originally defined the scope of the health care provider exemption in a manner the federal court found overly broad, with the DOL including as exempt health care provider employees engaged in work functions with no actual connection to patient care.

The revised DOL regulation narrows the scope of the health care provider exemption. The exemption is now limited to employees involved with patient care functions, specifically employees "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 new health care provider definition will include both employees directly and indirectly involved in patient care functions. For example, under the revised guidance, nurses, nurse assistants, medical technicians, and other persons who directly provide patient care services will be considered health care providers, in addition to employees who provide certain direct assistance or support to such employees. The guidance also clarifies that other employees "who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians" will be covered.

While the definition of healthcare provider remains broad, the guidance specifically excludes employees who "do not provide health care services," even if "their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers." Some of these employees may be able to work from home, so they may not need FFCRA or EFMLEA leave.

The guidance also contains detailed definitions of what constitutes diagnostic, preventive, treatment and other integrated and necessary services, which generally focus on identifying employees whose services, if not provided, would cause an adverse impact on patient care. For example, diagnostic services will include performing or assisting in x-rays or other diagnostic tests. Preventive services will include screenings, check-ups, and counseling to prevent illnesses. Performing surgery or other invasive or physical interventions, and prescribing medicine will be considered treatment services. Additionally, employees engaged in bathing, dressing, and transporting patients will be considered integrated with and necessary to diagnostic, preventive, or treatment services.

From the guidance one thing is clear, determinations as to the application of the exemption to the employment setting will need to be done on a case-by-case basis. Healthcare employers are encouraged to consult with experienced employment counsel to determine whether and which of their employees will be exempt as health care providers.

The Work Availability Requirement for Taking Leave Remains in Place

Under the original DOL regulations, employers were allowed to deny leave under the FFCRA in certain circumstances when the employer did not have work available for the employee. Although the New York District Court struck down this work availability requirement, the DOL reaffirmed it. Therefore, employees may only take EPSLA or EFMLEA paid leave if the employee's inability to work is for a qualifying reason, not because there is no work available for the employee. If an employer does not have work available for an employee, the employee will not be eligible for the FFCRA available leave. However, the DOL did caution that the employer is not permitted to make work unavailable in an effort to deny FFCRA leave. Instead, the employer must have a "legitimate, non-retaliatory reason why the employer does not have work for an employee to perform."

Employer Consent Still Required for Usage of Intermittent Leave
The original DOL guidance required employer approval for taking FFCRA leave on an intermittent basis. Despite the invalidation of this requirement by the federal court, the DOL reaffirmed the need for employer approval for employees to take intermittent leave under the FFCRA. The DOL did note that there are certain limited situations where employer consent would not be required in the context of child care. For example, when a child participates in hybrid learning where schools operate on an alternating schedule or where the school is physically closed with respect to certain students on particular days as directed by the school, the leave would not be considered "intermittent" because the need for leave is determined by the school, and not the employee. So an employee might be permitted to take FFCRA leave on Monday, Wednesday and Friday of one week and Tuesday and Thursday of the next, provided the leave is actually needed to care for the child during the time and no other suitable person is available to do so. Absent these limited circumstances, intermittent leave will still require employer consent under the new guidelines.

The Notice and Documentation Requirements Have Been Relaxed
The DOL originally required employees seeking leave under the EPSLA to provide notice and documentation to their employer *prior to* taking leave. The new guidance affirms that notice is required but clarifies that it may be provided after the first workday (or portion thereof) for which the employee is taking sick leave. After the first workday, it is reasonable for an employer to require notice "as soon as practicable under the facts and circumstances." Similarly, employees taking leave under the EFMLEA are required to provide notice "as soon as practicable," and if the "leave is foreseeable," the employee is generally required to provide notice prior to the need to take leave.

The guidance also clarifies that documentation no longer needs to be submitted in advance of leave. Instead, similar to the notice requirement, documentation must be provided "as soon as practicable," with the DOL envisioning that "in most cases" the employee will submit documentation along with the notice.

What the New Regulations Mean for Employers
While all employers are subject to the revised DOL guidance, healthcare employers will need to take immediate action to evaluate the impact of the change in the definition of "health care provider" on their operations. For example, health care employers will need to evaluate those positions included in the scope of the exemption as they have applied it – such as maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers. Under the guidance, these positions may well be outside the scope of exclusion from certain FFCRA leave rights. Such employers will need to update their FFCRA leave policies and handbooks to reflect the revised scope of the exemptions.

Moreover, all employers should update FFCRA leave policies to:

- Conform to the new notice and documentation requirements;
- Confirm the work availability requirement; and
- Apply the intermittent leave rules consistent with the employer consent requirements, and specifying childcare scenarios where consent is not needed.

Employers who deny leave based on work-availability reasons should also be mindful that their decisions may be subject to challenge based on the DOL's direction that the employer must have legitimate, non-retaliatory reasons for denying leave if work is not available. In order to minimize legal risk, employers should consult with experienced employment counsel before making such a determination.
