DOL Issues Revisions to the Families First Coronavirus Response Act

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The adage that "change is the only constant in life" aptly describes the legal landscape surrounding the current pandemic. Most recently, on Friday, September 11, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) posted revisions to regulations that implemented the paid sick leave and expanded family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA). These revisions are scheduled to take effect Wednesday, September 16, 2020.

The FFCRA took effect on April 1, 2020. Why the change now you may ask? These revisions were to address a recent decision issued by U.S. District Court for the Southern District of New York on August 3, 2020 in *State of New York v. U.S. Dept. of Labor*, Case 1:20-cv-03020 (S.D.N.Y. 2020), which found portions of the FFCRA to be invalid.

As stated by the DOL, the revisions do the following:

1. Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.

The Department's April 1, 2020 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. The District Court held that the FFCRA's use of "because" and "due to" in referring to the reasons an employee is unable to work or telework were ambiguous. In the revisions, the DOL reaffirmed that an employee cannot take FFCRA paid leave if the employer would not have had work for the employee to perform.

2. Reaffirm and provide additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently.

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Under the FMLA, intermittent leave is specifically defined as "leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks." 29 CFR 825.102. However, unlike the FMLA, the FFCRA did not specifically address intermittent leave. Instead, the DOL, based upon its grant of broad regulatory authority, initially interpreted and now reaffirmed in the recent revisions that employer approval is needed to take FFCRA leave intermittently in all situations in which intermittent FFCRA leave is permitted.

3. Revise the definition of "health care provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.

The FFCRA excludes health care providers and emergency responders to prevent disruptions to the health care system's capacity to respond to the COVID-19 public health emergency and other critical public health and safety needs that may result from health care providers and emergency responders being absent from work. However, the U.S. District Court for the Southern District of New York vacated the definition of "health care provider". The recent amendment limits this term to coverage as defined in the FMLA or to those "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care."

4. Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.

Section 826.100 initially stated that an employee is required to provide documentation supporting the leave "prior to" taking paid sick leave or expanded family and medical leave. The District Court, however, held that the requirement that documentation be given "prior to" taking leave "is inconsistent with the statute's unambiguous notice provision." Given this view, the DOL amends § 826.100 to clarify that the required documentation 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.

5. Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

Finally, the DOL is also revising § 826.90(b) to correct an inconsistency regarding the timing of notice for employees who take expanded family and medical leave. Previous § 826.90(b) stated, "Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave or Expanded Family and Medical Leave." The DOL indicated that this statement is correct with respect to paid sick leave but not for expanded family and medical leave. Thus, the DOL reasoned that advanced notice for expanded family and medical leave "is not prohibited" but "it is in fact

typically required if the need for leave is foreseeable." Revised § 826.90(b) corrects this error by stating that advanced notice of expanded family and medical leave is required as soon as practicable if the need for leave is foreseeable and that will generally result in providing notice before taking leave.

Employers should review their policies to insure consistency with the changes. For more information on the FFCRA and other Covid-19 related employment issues, please contact the authors of this alert or any member of the Butzel Long Labor & Employment team.

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