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Alerts

DOL Issues Temporary Rule, Clarifies Paid Leave Under Families First Coronavirus Response Act

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Insights for Employers

The U.S. Department of Labor (DOL) issued a Temporary Rule on September 11, 2020, regarding the paid sick leave and expanded family medical leave rules under the Families First Coronavirus Response Act (FFCRA). Effective September 16, 2020, the Temporary Rule addresses the four main areas of the FFCRA that the U.S. District Court for the Southern District of New York struck down in *State of New York v. United States Department of Labor*: (1) the FFCRA's "work-availability" requirement, (2) the FFCRA's definition of "health care provider," (3) the requirement that employees may only take intermittent leave where their employers consent, and (4) the FFCRA's requirement that employees provide their employers with the required documentation prior to taking their FFCRA leave.

Following the decision in *State of New York* on August 3, 2020, questions remained about the decision's geographic scope and how the DOL would respond. Now, nearly six weeks later, the DOL has addressed them.

Work Availability

The Temporary Rule reaffirms that paid sick leave and expanded family medical leave, collectively "FFCRA Leave," may only be taken if the employer has work available for the employee seeking FFCRA Leave to perform. It may not be taken by an employee who, if not on leave, would be subject to a temporary or permanent layoff for lack of work. In reaffirming its rules, the DOL responded to the district court's criticism in *State of New York* by providing a more detailed rationale for its limitation. It also clarified that this requirement will apply to all grounds for which an employee may seek FFCRA Leave.

To quell fear of abuse, the DOL warned that the work-availability requirement should be understood in the context of the applicable anti-retaliation provisions, which prohibit employers from discharging, disciplining, or discriminating against employees for taking such leave. The DOL also cautioned that the availability or unavailability of work must be based on legitimate, non-discriminatory, and non-retaliatory business reasons.

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Intermittent Leave

The Temporary Rule affirms and clarifies that an employee may not take FFCRA Leave on an *intermittent basis* without prior employer approval. Notably, the court in *State of New York* attacked the DOL's Final Rule as lacking rationale and exceeding the DOL's authority. As a response to this criticism, the Temporary Rule provides an additional explanation for the requirement. The explanation more soundly ties the DOL's requirement that an employer consent to intermittent FFCRA Leave to the FMLA's intermittent leave provisions.

The one exception to this employer-approval requirement is for partial school closings—when a school is closed for "in-person" learning for part of the week, but open for "in-person" learning during the rest of the week. In that case, the employee would not need an employer's approval for intermittent leave because the need for leave on each day that the school is closed is seen as a stand-alone basis for leave. Further, each day that the school is closed for in-person learning, the employee would be eligible for FFCRA Leave. On the days when the school is open for in-person learning, the employee reports for work and does not need the day of leave.

Revised Definition of "Health Care Provider"

Notably, the Temporary Rule continues to allow employers to exclude certain "health care provider" employees from FFCRA Leave benefits. However, the definition has been significantly narrowed. Following the decision in *State of New York*, the exclusion in the Temporary Rule turns on the duties and capabilities of the particular employee, not the services of the employer. In other words, the employee does not qualify for the exclusion solely because he or she works for an entity that provides health care services. Instead, in order to be excluded from FFCRA eligibility, the employee must personally qualify as a "heath care provider" under the revised definition.

In addition to the FMLA's definition of "health care provider," the Temporary Rule's definition of that term covers employees who are, on an individual basis, capable of providing, and employed to provide: (a) diagnostic, preventative, or treatment services, or (b) care that is "integrated and necessary" to those services, which, if not provided, would adversely impact patient care. According to the DOL, examples of employees who meet the definition include nurses and physicians, as well as employees who set up medical equipment for procedures, bathe or hand feed patients, transport patients and samples—as opposed to providing general transportation services for the entity—and technicians who process test results.

To be clear, the Temporary Rule emphasizes that the definition of "health care provider" is narrow. Even if an employee provides services related to patient care, the employee would not meet the definition if the services were too attenuated to be integrated and necessary components of patient care. Examples of employees who would not be considered "health care providers" include: information technology (IT) professionals, building maintenance staff, human resources personnel, food service workers, records managers and billers. Those who do not qualify as a "health care provider" are still eligible for FFCRA benefits, regardless of whether or not their employer provides health care services.

Advance Notice

Finally, the Temporary Rule clarifies that an employee must notify their employer that he or she is taking FFCRA Leave as soon as is practicable. In so doing, the DOL explained that *advance* notice is not required if the need for the leave is immediate or unexpected. However, when the need for leave is foreseeable, notice must be given before an employee takes the leave. For example, if an employee becomes aware on Monday morning that his or her child's school will close on Tuesday (because of COVID-19), the employer must be notified of the need for leave on Monday.

Conclusion

It remains to be seen whether the Temporary Rule will face further legal challenges or if this effort by the DOL has adequately addressed the issues that served as the basis for the court in *State of New York* to strike down these aspects of the Final Rule. While the Temporary Rule clarifies and essentially affirms the "work-availability" requirement—and the requirement that employees may only take intermittent leave when their employers consent—it significantly revises the

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definition for "health care provider," which is necessary for both FFCRA Leave exclusion.

Employers who did not adjust their FFCRA Leave exclusion practices based on the decision in *State of New York* should promptly review and, if necessary, adjust their practices to conform with the revised definition in the DOL's Temporary Rule. Failure to do so may result in costly claims for denied benefits against them.

This law is set to fully expire under its own terms on December 31, 2020. Until then, employers should be on the lookout for further clarification and revisions to ensure that they remain compliant with this groundbreaking paid sick leave law. In the event that these changes play a significant role in your administration of FFCRA leave benefits, we recommend consulting your labor and employment attorney.

Paid sick leave under the FFCRA provides an employee up to ten days (80 hours) of paid leave for certain qualifying conditions related to COVID-19. Expanded family and medical leave provides up to 12 weeks (ten weeks of paid leave and two weeks of unpaid leave) of leave care for the employee's child when the child's school is physically closed, or the child's care provider is unavailable due to COVID-19.

The FFCRA also provides an exclusion for emergency responders. The Temporary Rule does not affect the emergency responder provision.

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