U.S. Department of Labor issues revised FFCRA rules in response to New York District Court decision

September 14, 2020

On September 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations in response to a recent decision from a federal court in New York striking down parts of the DOL's Families First Coronavirus Response Act (FFCRA) regulations. As we shared in a prior publication, the New York court found that four parts of the DOL's regulations overly restricted workers' ability to take leave under the FFCRA. The decision left those employers subject to the FFCRA without clear answers in terms of whether or not the decision applied to them or how they should proceed when implementing these provisions. The DOL has responded with revised regulations and new FAQs, which provide some answers:

1. The court's decision applied nationwide, not just to the parties in the case, according to FAQ #102. Likewise, the revised regulations apply nationwide, not just in New York.
2. In a somewhat unexpected twist, the revised regulations largely reaffirm the prior rules, although there are a couple important exceptions.

What has changed and what stays the same?
With its revised regulations, the DOL:

1. Reaffirmed its work-availability rule, which states that FFCRA leave is not available if an employer does not have work for the employee (e.g., the employee has been furloughed or laid off). In response to the New York court's decision, the DOL provided additional explanation and analysis for the rule, but did not back off this requirement.
2. Reaffirmed the requirement that employees obtain employer consent to take FFCRA on an intermittent basis, providing

further explanation for this requirement. However, adding a new complication, the preamble to the DOL regulations specifically addresses hybrid learning situations in which schools are open for in-person learning on certain days of the week but offer only virtual learning on other days. According to the DOL, employees requesting leave to be home with their child on the days of virtual learning are not requesting intermittent leave (thus, no approval for intermittent use of FFCRA leave is required). Rather, each day of school closure "constitutes a separate reason for FFCRA leave that ends when the school opens the next day."

3. Clarified that supporting documentation from the employee need not be provided before taking leave, but only as soon as practicable.
4. Revised its definition of "health care providers" whom employers may choose to exempt from the FFCRA's requirements. The DOL's prior rule broadly defined "healthcare provider" in terms of the nature of the employer's business and applied to anyone employed by doctor's offices, hospitals, post-secondary educational institutions offering health care instruction, retirement facilities, laboratories, pharmacies and more. In contrast, the new definition is limited to individuals 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." The DOL explained that this does not include those who do not actually provide such healthcare services, even if their services could affect the provision of health care, "such as IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers."

The other DOL regulations pertaining to leave under the FFCRA remain unchanged.

When do the revised regulations take effect?
The revised rules are effective on September 16, 2020. As before, the FFCRA and its implementing regulations are only effective through December 31, 2020.

What does this mean for your business?
The revised regulations are likely welcome news for most covered employers, who can largely proceed as they have been when responding to employee leave requests under the FFCRA. Health care employers, however, should take special note of the new, narrower definition of potentially exempt "health care providers." Additionally, all covered employers should consider the potential implications of the DOL's discussion regarding intermittent leave in the context of employees with children in hybrid learning situations. Employers with questions about how these new rules may impact their FFCRA leave administration should consult with their legal counsel.

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