NY Federal District Court Invalidates Key Provisions of the FFCRA Paid Leave Regulations

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On August 3, 2020, a federal judge in the United States District for the Southern District of New York, vacated four key provisions from the U.S. Department of Labor's (DOL) final rule under the Families First Coronavirus Response Act (FFCRA) (Final Rule) which we previously summarized here. The provisions struck down include: (1) the work-availability requirement, (2) the definition of "health care provider"; (3) the requirement that an employee secure employer consent for intermittent leave; and (4) the requirement that documentation be provided before taking leave. Each of these items is summarized below, as well as the impact of this decision on employers, possibly even nationwide, as the court did not limit its ruling to New York and there are no other court decisions addressing these matters.

Recap

The FFCRA provides for two different categories of leave, Emergency Paid Sick Leave (EPSL) and Expanded Family Medical Leave (EFML).

EPSL is available in six different circumstances described briefly as:

1. being subject to a governmental quarantine or isolation order;
2. being advised to self-quarantine by a health care provider;
3. for the time spent seeking a diagnosis when the employee is experiencing symptoms;
4. for the time spent caring for an immediate family member who has been ordered to quarantine by a governmental entity or health care

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provider;

5. to care for a child because of the unavailability of the child's school or care provider, including camp, due to the COVID-19 emergency as declared by a governmental agency; and
6. an employee suffering substantially similar conditions as specified by the U.S. Department of Health and Human Services.

EFML is only available for reason (5) listed above.

Work Availability Requirement

In the Final Rule issued by the DOL, employers would not have to provide EPSL or EFML unless the employer had work available for the employee. The Stay-at-Home orders and drastic and sudden downturn in the economy caused many employers to reduce hours, and many such employers paid employees on EPSL or EFML based on those reduced schedules.

According to the District Court, the DOL's rule unreasonably limited the statute's intended scope, and therefore the limitation was void. The District Court is apparently requiring employers to pay employees on FFCRA leave for all hours the employee would otherwise have worked if the employer had not reduced the work hours. But the District Court did not rule on when the employer was to determine what schedule would apply. For example, if a person went out on FFCRA leave on week one while working forty hours per week and on week two the employer reduced every other employee to thirty-two hours per week because it closed on Friday, it appears that the District Court would require the employer to continue to pay the employee on FFCRA leave for 40 hours per week.

If the employee began FFCRA leave after the employer reduced hours of work from 40 to 32, then what would happen? The District Court did not provide clarity as to when an employer would measure the regular hours of work. True, the DOL regulations provide guidance on how to calculate a person's pay depending on their regular schedule, but the regulations also provided that they would only have to be paid for the 32 hours if they went on FFCRA leave and the employer reduced hours. The District Court's failure to address this issue leaves a gaping hole in the guidance needed for full compliance.

One question that employers have been asking is whether a person who is laid off needs to be paid FFCRA leave. The answer should be "no" based on long-standing DOL guidance and interpretation. For example, the DOL issued an Opinion Letter dated April 5, 2004 through which it opined that employees on temporary layoff are not currently employed. The DOL Field Operations Manual for FMLA cases also

specifically notes that when someone is laid off, there is no employer-employee relationship.

Additionally, the New York Attorney General, who filed the lawsuit, alleged in the complaint only that the work availability rule was unreasonable insofar as it required that work be available on a particular day. The Attorney General and the District Court did not expressly take issue with the DOL's position that employees on continuous furlough or temporary layoff are not eligible for FFCRA leave. The Attorney General also did not attack, nor the District Court vacate, the provisions of the Final Rule providing that (1) an employee may be laid off while on FFCRA leave so long as the employee would have been laid off even if he or she had not taken leave—which is the current rule for traditional FMLA leaves; and (2) employees on layoff or furlough are not counted as employees for determining whether an employer is covered but are counted once recalled. The District Court also did not discuss FFCRA's unemployment subsidy, which was the protection provided to employees on permanent or temporary layoffs and furloughs, likely because this was not an issue raised in the complaint or raised by the Attorney General.

Consequently, it is our opinion that employees on layoff are not eligible for FFCRA leave and that the District Court opinion does not change the definition of employee or create new obligations for the FFCRA that are greater than those in the Family Medical Leave Act. An employee who has been laid off should not be eligible for FFCRA leave because they are not actually an employee. Be careful though: laying off an employee who has requested or is on FFCRA leave may earn the employer a retaliation claim.

As further evidence of the conclusion that the District Court was not expanding the definition of employee, but merely ruling on whether an employee was eligible for leave when not otherwise working, the District Court gave the example of when someone missed work for a snow day. These isolated and occasional absences are not layoffs and no reasonable person would argue that someone not working for one day was a former employee. Instead, it appears that the District Court has ruled that if the employer has reduced the work week from 5 days to 4 days and someone is on FFCRA leave, that individual is to be paid for the five days they worked before the employer changed the hours. Again, the issue of when to determine what work schedule applies to the FFCRA pay is an open issue.

Definition of Health Care Provider

The DOL's Final Rule defined a "health care provider" as:

Anyone employed at 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 institution, employer, or entity.

This includes:

1. any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions;
2. any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility;
3. anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and
4. any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The District Court found this definition to be so "vastly overbroad," that it included employees "whose roles bear *no nexus whatsoever* to the provision of healthcare services." The District Court pointed out that this excessive interpretation resulted from the fact that the DOL based the definition of "health care provider" on the identity of the *employer*, rather than the skills, role, duties, or capabilities of a class of *employees*. The District Court noted that a cafeteria worker could be denied FFCRA leave under the DOL's Final Rule. The District Court did not find any justification that the denial of leave to someone not directly involved in the delivery of health care was consistent with the language or purpose of the FFCRA. As a result, the court found that the definition of "health care provider" in the Final Rule could not stand.

The District Court did not indicate whether its ruling was retroactive. Thus, employers who denied leave to employees under the now invalidated provision are left to wonder whether they will be cited with a violation of the FFCRA. Going forward, employers are advised to apply the definition of Health Care Provider as set forth in the Family Medical Leave Act, which limits that definition to those individuals who are actually providing the health care services.

Requirement for Employer Consent for Intermittent Leave

The Final Rule prohibited intermittent leave for individuals with symptoms of COVID-19, who were diagnosed with COVID-19, were subject to a quarantine or self-isolation order or directive and who were

caring for an individual with symptoms or a diagnosis of COVID-19. Essentially, the Final Rule prohibited employees who were at risk of spreading COVID-19 from coming into the office. Naturally, there was no prohibition on intermittent teleworking. However, even for intermittent leave related to childcare, the Final Rule required that the employer and employee agree to intermittent leave. While the court conceded that the Final Rule's prohibition on intermittent leave for certain qualifying conditions was justifiable, it found that the DOL "utterly failed" to explain why employer consent is required for intermittent leave related to childcare, as such was not required under the unambiguous terms of FFCRA. Therefore, the District Court held that insofar as the Final Rule requires employer consent for intermittent leave for childcare reasons, the Rule was unreasonable and vacated to that extent.

Again, the District Court did not opine on whether its ruling is retroactive. The District Court also did not address whether the employee could demand continuous leave when only intermittent leave is required (for example, for a child whose school has adopted a hybrid model, with class in person on some days and online on other days). Employers are not able to fully assess their liability and any past corrective steps. However, going forward, employers are best served to evaluate their employees' requests for intermittent leave under the FFCRA childcare provisions similar to such requests under the FMLA.

Requirement that Documentation be Provided Before Taking Leave

The plain language in the FFCRA statute did not include a requirement that an employee provide the documentation necessary to support the need for leave *before* that employee actually began the leave. And, logically, in some cases that may not be possible. Yet, the Final Rule required that employees submit to their employer, prior to taking FFCRA leave, documentation indicating, among other things, the reason for the leave, the duration of the requested leave, and when applicable, the authority for the isolation or quarantine order that supports the FFCRA leave. The District Court found this requirement to be inconsistent with FFCRA's unambiguous notice provisions, which simply required notice to an employer that FFCRA leave is necessary. As a result, the District Court vacated the requirement that an employee provide his/her employer with such documentation before taking FFCRA leave.

The District Court left intact the requirement that employees do provide documentation if requested or required by the employer. Going forward, employers should presumptively grant FFCRA leave and then seek documentation to verify that the original request qualifies. If the employee fails to subsequently provide the required paperwork, that can be dealt with under the employer's normal procedures on the failure to provide paperwork necessary to support a leave of absence.

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Employer Takeaways

It is likely that the DOL will either appeal the District Court's decision and move to stay the District Court's order pending appeal and/or issue revised regulations consistent with the court's order. In the meantime, while the District Court agreed with the parties that the provisions at issue were severable from the remainder of the Final Rule, which will remain enforceable, employers should not rely on the provisions of the Final Rule that were vacated by the court.

In other words, in light of the decision, employers nationwide should contact their employment attorneys and discuss the following:

1. The impact of the rule on the current schedule and "work-availability" requirement for purposes of determining the amount of paid leave benefits to provide each week under FFCRA;
2. Which health care providers should truly be exempt employees from FFCRA leave benefits;
3. A review of FFCRA-impacted policies relating to any requirement for employer consent for intermittent leave;
4. A review of FFCRA-impacted policies related to the presentation of documentation to support a request or leave under the FFCRA; and
5. A review of all prior FFCRA decisions that may now be of concern given the District Court's ruling to see if any risk-reduction measures can be taken.

Pending this decision being stayed and overturned if the DOL appeals or the DOL issuing amendments to the Final Rule, employers may best reduce liability risks by complying with the FFCRA and the Final Rule, as modified by the District Court's decision. As always, your Laner Muchin labor and employment lawyers stand by ready to help employers navigate through this ever-changing legal landscape.