FFCRA UPDATE: New Revised DOL Regulations Impact Key FFCRA Paid Leave Regulations

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As previously reported, in early August 2020, a New York Federal District Court invalidated certain U.S. Department of Labor (DOL) regulations relating to the Families First Coronavirus Response Act (FFCRA), which applies to employers with fewer than 500 employees. That court decision vacated four key provisions of the DOL's FFCRA implementing regulations, including (1) the work-availability requirement, (2) the requirement that an employee secure employer consent for intermittent leave, (3) the exclusion for "health care providers," and (4) the requirement that documentation be provided before taking leave. In response to the court's decision, the DOL released revised FFCRA regulations, which are effective September 16, 2020, and address each of those concerns as summarized below.

Work-Availability Requirement

The revised regulations clarify that for any of the FFCRA qualifying reasons, paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave. This means that an employee is not entitled to take FFCRA paid leave if the employer would not have had work for the employee to perform, even if the qualifying reason did not apply. This revision was intended to clarify that if an employee were laid off or furloughed, FFCRA benefits would not be available.

Employer Consent for Intermittent Leave

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The DOL reaffirmed that, where intermittent FFCRA leave is permitted as previously defined in the DOL's prior regulations, an employers' approval may be required. In the DOL's comments to the revised regulations, the DOL confirmed that intermittent leave would only be available under the paid sick leave for employees who are capable of and permitted to telework or for the childcare reasons. Expanded FMLA is limited to childcare reasons and, therefore, intermittent leave also may be available if approved by the employer.

However, the DOL made a significant distinction and clarified that expanded FMLA need only be taken if the employee's child's school is actually closed to that child. Therefore, employer approval cannot be a condition where an employee takes "FFCRA leave in full-day or even partial day increments to care for their children whose schools are operating on an alternative day or partial-day (or other hybrid-attendance) basis, because such leave would not be intermittent under [the regulations]." For example, if a child's school schedule is in-person learning on Monday, Wednesday, and Friday, but remote learning on Tuesdays and Thursdays, the employee's request for FFCRA leave on Tuesdays and Thursdays will not be considered a request for intermittent leave. The DOL explained that, for FFCRA purposes, each school closure day (or partial day closure) "constitutes a separate reason for FFCRA leave that ends when the school opens for that child the next day."

However, the DOL distinguished the situation where a school is closed for a period of time and only offering remote learning, which requires an employee to "take leave for portions of that period for reasons other than the school's in-person instruction schedule." The DOL reasoned that such a request would be for intermittent leave that would require employer approval.

Definition of Health Care Provider Who Can Be Excluded from FFCRA Benefits

To address the NY court decision, the DOL significantly narrowed the exclusion for healthcare providers. The prior DOL regulations defined the FFCRA exclusion for "health care providers" by employer, such as a hospital or nursing home, as opposed to by categories of employees performing certain duties. The DOL revised the FFCRA regulations and provided a new definition of "health care provider" based on the duties performed by employees.

Under the revised FFCRA regulations, the definition of "health care provider" was narrowed to include only (1) a medical professional who is licensed to diagnose serious health conditions, such as a doctor, or (2) an employee who is capable of providing health care services, such as those who provide diagnostic services, preventive services, treatment services, and, if not provided, would adversely impact patient care.

The new FFCRA definition of "health care provider" specifically includes nurses, nurse assistants, medical technicians, laboratory or other medical technicians who take, process or interpret samples, test results, or other diagnostic tests or procedures, necessary for diagnoses and treatment, and any other persons who directly provide health care services or are "otherwise integrated into and necessary to the provision of health care services" as described above. It also would include those employees providing services as described above and who are being directly supervised by the above list types of employees.

The DOL provides the following further clarifications of the FFCRA definition of "health care provider" to include:

> (A) Diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.
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> (B) Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.
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> (C) Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.
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> (D) Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

However, employees now **NOT** considered "health care providers" under FFCRA include those who provide services that "affect, but are not integrated into, the provision of patient care." Such employees would include "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers" even if their services could affect the provision of health care services. This list is merely illustrative and not exhaustive.

FFCRA Documentation Requirements

Lastly, the DOL revised the FFCRA regulations to make clear that documentation of the reasons for the leave cannot be required to be provided by the employee before the leave is taken. But the DOL noted that

such documentation should be provided as soon as practicable.

If you have any questions regarding these new regulations or your obligations under FFCRA, please consult your Laner Muchin labor and employment counsel.