

# Federal Court Significantly Changes the FFCRA and Uncertainty Abounds

## Labor & Employment Law Update

on August 5, 2020

As our readers know, the Families First Coronavirus Relief Act (FFCRA) requires employers with less than 500 employees to provide paid leave to employees who are unable to work (or telework) for a variety of COVID-related reasons (including caring for children not in school due to COVID) through December 31, 2020. On April 6, the U.S. Department of Labor (DOL) issued a final rule implementing the FFCRA. Shortly thereafter, the State of New York filed suit claiming the regulations unduly restrict employees' right to paid leave.

This week a federal judge in the Southern District of New York struck down portions of the DOL's regulations, finding the DOL exceeded its authority. Specifically, the court invalidated the work availability requirement, much of the health care provider exception, the employer consent requirement for intermittent leave, and employers' right to require documentation in advance of leave. All remaining parts of the DOL regulations are unaffected by the ruling. Because the case was decided under the Administrative Procedures Act, the ruling could apply nationwide (although the Judge did not address the reach of the ruling specifically).

### Work Availability Requirement

The DOL regulations make clear that an employer need only provide paid leave if it has work available for the employee. If there is no work for the employee to do, they are not entitled to paid leave, even if they would otherwise qualify. The ruling struck down the work availability requirement finding it had no basis in the language of the FFCRA itself, leaving employers to wonder whether they might be obligated to pay furloughed workers.

### Health Care Provider Exception

The FFCRA excludes "health care providers" from the universe of employees eligible for leave but, beyond medical doctors, left it to the DOL to define "health care providers." The DOL defined the term very broadly to include essentially anyone working in the health care space (including, for example, receptionists, janitors, IT personnel). The court concluded the DOL overstepped its bounds and struck down the DOL's broad definition of "health care providers"). However, it is

unclear to which employees the health care provider exception applies because the Judge did not elaborate.

### Intermittent Leave Only with Employer's Consent

The DOL regulations allow eligible employees to take FFCRA leave intermittently where there is no risk that the employee might spread the virus to others (to take care of children at home due to school closings) *but only if the employer agrees*. The court agreed that limiting the use of intermittent leave was grounded in preventing the spread of COVID and therefore reasonable. However, the court then concluded that requiring employer consent had no basis in the statute, thus paving the way for employees to take intermittent leave over their employer's objection.

### Requiring Documentation Before Leave.

The DOL regulations allow an employer to require an employee to provide documentation of the reason for the leave, the duration of the leave, and the authority for the quarantine order (if applicable). The court stated that to the extent these documentation requirements are preconditions to taking leave, they are invalid. Employers can require documentation, but cannot require employees to provide anything more than notice prior to commencing leave.

### What Does All This Mean for Me?

The DOL will likely appeal the ruling. However, we do not yet know whether the court of appeals will halt application of the decision while the case works its way through the appeals process. It is also possible that the DOL will revise its regulations in response to the decision. Also, the Judge did not address the reach of the ruling specifically because the State of New York did not seek a nationwide injunction. For now, employers are cautioned not to rely on the provisions the court struck down without first carefully analyzing the situation with trusted employment counsel.

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