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NEWSLETTER

Paid Leave During COVID-19: Complying with a Moving Target

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Paid leave for contractor employees has emerged as a moving target caught in the interplay between existing laws and new statutes and policies aimed at combating COVID-19. The new Families First Coronavirus Response Act (FFCRA) and evolving FFCRA U.S. Department of Labor (DOL) guidance, in particular, present unique challenges for contractors trying to develop paid leave compliance procedures and properly document the nature and basis for employees' claimed leave. Contractors should follow emerging FFCRA guidance, document how multiple paid leave options are implemented in their procedures, and maintain adequate records for potential audits down the road. This article highlights some of the challenges and potential solutions for addressing paid employee leave.

In March 2020, President Trump signed the FFCRA, providing paid sick leave and family and medical leave to workers affected by COVID-19. In general, FFCRA obligates employers with fewer than 500 employees to offer emergency paid sick leave (up to 80 hours) and expanded paid family and medical leave to employees unable to work because of COVID-19. In particular, FFCRA requires covered employers to provide paid sick leave to employees with one of six qualifying COVID-19 conditions, including when an employee: (1) is subject to a federal, state, or local quarantine or isolation; (2) has been advised to self-quarantine by a health care provider; (3) is experiencing COVID-19 symptoms and seeking medical diagnosis; (4) is caring for another individual in quarantine; (5) is caring for a child whose school or place of care is closed; or (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. The statute also allows for employers to

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deny leave to an employee with a qualifying condition if the employee is "a health care provider or an emergency responder." FFCRA provides additional rights and responsibilities of employers and employees under the statute, as covered previously in a Wiley alert. These additional rights protect employees against retaliation for using the paid leave and restore employees to their same or equivalent position upon return from paid leave. For employers, the statute provides caps on paid sick leave and expanded family and medical leave for furloughed workers.

DOL administers the FFCRA and issued a temporary implementing rule on April 6, 2020. Among other things, the rule clarified the qualifying reasons for leave, stated that intermittent leave was allowed only with an employer's permission, required leave documentation to be retained for four years, and defined the term "healthcare providers." Eight days later, the State of New York sued DOL under the Administrative Procedure Act in federal district court in the Southern District of New York (SDNY), claiming that aspects of the rule exceeded DOL's authority. While the case was ongoing, DOL continued to publish interpretive guidance on the rule and its paid leave requirements. On August 3, 2020, DOL released Q&A guidance for federal contractors on providing paid sick leave or expanded family and medical leave under FFCRA to employees working on contracts covered by the McNamara-O'Hara Service Contract Act (SCA) and the Davis-Bacon Act of 1931 (DBA). Wiley issued an alert on August 7 covering the guidance.

On the same day that DOL issued its Q&A guidance, the judge in the SDNY litigation ruled that parts of DOL's rule restricting who can take paid coronavirus leave under FFCRA exceeded the agency's authority. *State of New York v. U.S. Department of Labor*, No. 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020). The court acknowledged that DOL was under "considerable pressure" in promulgating the rule; however, it "jumped the rail" by exceeding its authority. The court identified four principal errors:

1. DOL exceeded its authority by blocking workers from taking leave under FFCRA if their employers did not have work for them to perform;
2. DOL excluded too many workers with its definition of "health care providers";
3. DOL failed to explain why employer consent to take intermittent leave is required for most of the qualifying conditions; and
4. DOL cannot require workers to document their reasons for taking time off.

On September 11, 2020, in response to the SDNY ruling, DOL issued a new temporary rule attempting to redefine who qualifies for emergency paid sick leave under FFCRA. DOL stated that it had considered the district court's opinion and offered additional explanation for DOL's reasoning regarding the original work-availability requirement, as well as some clarifications to the language in the rule. The new rule created fresh confusion, however, by not fully addressing all of the errors the SDNY court had identified and challenging the judge's critiques.

The revised DOL temporary rule largely reinforced the agency's original interpretation of FFCRA, in that it:

1. Reaffirmed the condition that paid sick leave and expanded family and medical leave may be taken only if an employee has work from which to take leave. It explained further why DOL believes the

requirement is appropriate and clarified that the condition applies to all qualifying reasons to take paid sick leave.

2. Reaffirmed that where intermittent FFCRA leave is permitted by DOL's regulations, an employee must obtain employer approval to take paid sick leave. DOL also further explained the basis for this requirement.
3. Revised the definition of "health care provider" to mean employees who are health care providers under 29 C.F.R. § 825.102 and § 825.125, and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.
4. Clarified that the information an employee must furnish to an employer to substantiate claimed leave should be provided to the employer as soon as practicable.
5. Corrected an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to an employer.

The most significant change was DOL's new definition of "healthcare provider," which DOL reasoned should be broader than the definition found in the Family and Medical Leave Act (FMLA). In the revised rule, DOL stated that the definition of "healthcare provider" for purposes of a possible exemption from FFCRA coverage should be based on the position's duties, not the nature of the employer. The revised rule explained that all "healthcare providers" defined by the FMLA can be exempted along with "any other employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care." The revised rule also provided examples of occupations that are considered healthcare providers, such as nurses, nurse assistants, medical technicians, employees providing services under another healthcare provider's supervision, and laboratory technicians, and examples of employees who would not meet the new definition, such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants and billers.

The revised rule did not change other requirements the SDNY decision identified as problematic, although DOL provided further explanation for them. The revised rule leaves intact the "work availability" requirement, clarifying only that it applies to all FFCRA-qualifying reasons, not just some of them. Employer consent also is still required for an employee to take intermittent FFCRA leave. With DOL and the SDNY offering different interpretations of the rule and DOL's authority on these key issues, contractors may struggle to comply with the updated DOL guidance while also trying to adhere to the SDNY court's ruling.

For example, contractors should be careful when applying the "work-availability" requirement. Under the SDNY decision, employees may be eligible for FFCRA paid leave even if the employer has no work for them. However, the DOL affirmed in its September 11 temporary rule that an employee cannot take FFCRA paid leave unless the employee has work from which to take leave. Given the conflicting view of work availability, a contractor will be forced to choose which guidance to follow unless and until further clarifying guidance is

provided. Depending on the circumstances, some contractors may opt to adopt the more expansive SDNY guidance in order to avoid conflict with an employee over an FFCRA paid leave request

Contractors also need to document in their records precisely the law under which an employee takes either paid or sick leave, as the standards for taking leave may differ depending on the type of leave taken by an employee. For instance, the federal paid sick leave law that now applies to SCA- and DBA-covered contracts has detailed guidance on when an employee may take federal paid sick leave, which includes broader circumstances than permitted under FFCRA. State sick leave laws, where applicable, also often have broader coverage. The revised DOL guidance makes it clear that paid sick leave under FFCRA cannot be applied against any other applicable sick leave requirements and is to be made in addition to those requirements. Contractors cannot afford to simply assume the law under which an employee is seeking to take paid leave; if the contractor makes assumptions, it does so at its own peril.

Eventually, auditors (internal, external, or DOL) will likely be examining the paid leave provided by contractors and associated records to assess the authority under which paid leave was taken. Clear and concise documentation supporting each paid leave request and identifying whether leave was provided under FFCRA, other applicable paid sick leave rules, or some other contractor paid leave program (such as personal time off) will be essential. Despite the confusing legal landscape, contractors will do well to document their compliance at each stage in the development of sick leave policies and be prepared to justify the FFCRA leave determinations they make, despite the differences in interpretation offered by the SDNY and new DOL FFCRA guidance.

TAKEWAYS:

- Understand the FFCRA, federal labor standards obligations under the SCA and DBA, and federal and state paid sick leave and how they can intersect and overlap when an employee seeks paid time off.
- Remember the potential conflict between the SDNY court's FFCRA decision and new DOL guidance, and document any decisions made in "gray areas" of FFCRA leave guidance.
- Keep clear and auditable records documenting the law under which each employee's paid leave was taken.
- Communicate with employees and ensure they understand the paid leave available to them to use during the pandemic.

Wiley routinely counsels government contractors on various labor law requirements, compliance efforts, and enforcement involving the paid leave requirements discussed in this article, and other minimum wage and benefit requirements in the SCA and DBA.

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