DOL issues revised FFCRA regulations

Miriam L. Rosen | Monday, September 14, 2020

On Sept. 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations under the Families First Coronavirus Response Act (FFCRA). The revised regulations are the DOL's response to a New York federal court decision last month that struck down key aspects of the original FFCRA regulations. The revised regulations will now take effect Sept. 16, 2020.

FFCRA refresher

The FFCRA, which applies to employers with under 500 employees, provides two types of paid leave for COVID-19 related reasons. Under the Emergency Paid Sick Leave (EPSL) provisions, employees are eligible for up to 80 hours of paid sick leave for an employee's or a family member's COVID-19 related illness or quarantine and for child care related to a school/care provider closing. The FFCRA's Emergency Family and Medical Leave Expansion Act (EFML) provisions provide for up to 12 weeks of leave time - two weeks of unpaid time off followed by 10 weeks at partial pay for employees who cannot work or telework because their child's school or day care provider is closed. The FFCRA is currently set to expire on Dec. 31, 2020.

Challenge to the FFCRA

Shortly after the FFCRA regulations were issued, the state of New York filed a lawsuit in federal court challenging the DOL's interpretation of certain provisions of the FFCRA. In August, U.S. District Judge Paul Oetken struck down four parts of the FFCRA regulations that appeared to limit the availability leave time. The court decision struck the following provisions:

- Limits on FFCRA leave when no work is available (e.g., the employee is furloughed or laid off)
- Limits on use of intermittent leave
- Requirements related to notice and documentation
- Definition of health care provider under the FFCRA

The revised FFCRA regulations

While the DOL did not immediately react to the court's decision, a response has been widely anticipated over the last month. Now, the DOL has addressed the decision through revised regulations that cover each of the specific areas in Judge Oetken's decision.

1. **FFCRA leave when no work is available.** Under the original rule, an employee on furlough or lay off is not eligible for either type of FFCRA leave because, essentially, there is no work to leave. Judge Oetken's decision determined that the DOL's initial rule was overly broad because it blocked employees from taking FFCRA leave without sufficiently explaining the reason.

   In response to that finding, the DOL stood its ground. While noting that it "carefully consider[ed] the district court's opinion," the DOL offered a "fuller explanation for its original reasoning regarding the work-availability requirement." The DOL noted that, consistent with its interpretation of the Family Medical Leave Act (FMLA), an employer must actually have work available for an employee to perform in order for the employee to be eligible for leave from an employer.

2. **Use of FFCRA leave on an intermittent basis**. The court found that the DOL's original rule requiring employer approval for intermittent FFCRA leave limited access to leave without explaining why such consent was necessary The DOL again maintained its initial rule, but provided a more detailed explanation.

   The DOL noted that "[i]t is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid 'unduly disrupting the employer's operations.' It best meets the needs of businesses that this general principle is carried through to the COVID-19 context, by requiring employer approval for such leave.

3. **Documentation and notification requirements**. Judge Oetken also struck down the portion of the original rule that required an employee to provide documentation ***prior*** to taking FFCRA leave. Here, the DOL did "clarify" several aspects related to how employees notify their employers about FFCRA use. Consistent with existing FMLA regulations, the revised rule provides that documentation ***is not*** required prior to the leave, but should be provided "as soon as practicable, which in most cases will be when the employee provides notice" of the need for FFCRA leave.

4. **Health care provider exemption limited.** In the most significant modification to the original FFCRA regulations, the DOL reined in the rule's broad definition of the term "health care provider."

   The FFCRA gives employers the option of exempting employees who are "health care providers" from the leave provisions. The initial regulations broadly defined the term "health care provider" to include anyone employed at hospitals, medical schools and a range of other places "where medical services are provided." It also encompassed any employee of a contractor at one of those facilities and anyone employed by a business that produces medical equipment. Judge Oetken found that definition was too broad and left too many employees without the ability to use FFCRA leave.

   With the new regulations, the DOL has revised the definition to provide that an employee is a "health care provider" if the individual is "capable of providing health care services." The revised rule specifically indicates that the following types of services are considered "health care services":

   - **Diagnostic services**: Including taking or processing samples, performing or assisting the performance of x-rays or other diagnostic tests or procedures.
   - **Preventive services**: Including screening, check ups, and counseling to prevent illness, disease, or other health problems.
   - **Treatment services**: Including performing surgery, or other invasive interventions, prescribing medications, and providing or administrating prescribed medications.

   The revised regulations also now identify the types of employees who are "health care providers" and **may continue to be** excluded from FFCRA leave:

   - Nurses, nurse assistants, medical technicians, and any other persons who directly provide the health care services noted above.
   - Employees providing health care services under the supervision, order, or direction of, or providing direct assistance to, a health care provider.
   - Employees who are otherwise integrated into and necessary to the provision of healthcare services, such as laboratory technicians.

In another change, the revised regulations provide a list of "typical work locations" where an employee providing health care services might work, including: a doctor's office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided.

Finally, the revised regulations now list those employees who **are not** "health care providers" under the FFCRA, including: information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers. The DOL notes that while the services provided by these employees may be related to patient care—they are too attenuated to be integrated components of patient care.

Employer takeaways

The DOL issued the original FFCRA regulations hurriedly in early April 2020. With the revised regulations, the DOL holds its ground on much of its initial FFCRA interpretation while providing additional guidance to support its initial positions. As the DOL's Wage and Hour Division Administrator Cheryl Stanton noted, the updated FFCRA regulations "respond to this evolving situation and address some of the challenges the American workforce faces."

- While application of the FFCRA largely remains unchanged for most employers, that is not the case for many health care employers. Health care employers must promptly consider how the revised regulations impact the availability of FFCRA leave for those employees who are no longer considered "health care providers."
- Employers should note that the DOL has also updated its FAQs to address the changes in the revised regulations.
- The DOL is actively enforcing the FFCRA. With employees continuing to experience COVID-19 related situations and remote learning arrangements impacting child care, employers must continue to consider how both EPSL and EFML apply to their employees.

Employers with questions about the revised FFCRA regulations should contact their McDonald Hopkins employment attorney. The McDonald Hopkins Labor and Employment Response Team will continue to monitor developments and provide updates on the FFCRA and other employment issues impacted by the COVID-19 crisis.

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