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DOL Issues Revised Regulations on COVID-19-Related Leave Under the FFCRA

The U.S. Department of Labor ("DOL") has issued revised regulations regarding the availability of paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act ("FFCRA"). These revised regulations come in the wake of a decision by a New York federal district judge striking down several key portions of the DOL's original rule. As discussed in an earlier update, in an August 3, 2020 decision, S.D.N.Y. Judge Paul Oetken concluded that four aspects of the DOL's FFCRA regulations were invalid: (1) the work availability requirement, under which employees were not eligible for FFCRA leave if their employer does not have work for them to perform; (2) the restrictions on intermittent leave; (3) the definition of "health care provider"; and (4) the documentation requirements imposed by the regulations.

In response to Judge Oetken's decision, the DOL has issued revised regulations to clarify the scope of leave under the FFCRA. In the revised rule, the DOL "reaffirms" its earlier position and provides additional explanation of its rationale regarding two portions of the rule struck down by Judge Oetken: the work availability requirement and the restrictions on intermittent leave. With respect to the other two challenged provisions—the definition of "health care provider" and the documentation requirements for employees taking leave—the DOL has revised the regulations to narrow and clarify their scope.

Work Availability Requirement: In the revised regulations, the DOL reaffirms that FFCRA leave is available *only* where the employer has work available for the employee to perform, but offers additional justifications in support of its position. The DOL explains that the FFCRA provides for leave "because of" or "due to" the statutorily enumerated reasons, and notes that the Supreme Court has repeatedly interpreted these phrases to require "but-for" causation. The DOL also notes that the work availability requirement is implied by the word "leave" which is "most simply and clearly understood as an authorized absence *from work*," and explains that if the employee is not expected or able to work, their time away is not properly understood as "leave."

In addition, the DOL suggests that interpreting the FFCRA to extend to employees whose employers do not have work for them to perform could lead to illogical results. For example, if an employer furloughed all of its employees, employees with FFCRA-qualifying reasons would nonetheless be entitled to paid leave, while employees without those reasons would not. However, the DOL guidance cautions that employers should not attempt to manipulate the work-availability requirement as a means to avoid providing leave to employees who would otherwise be entitled to leave under the FFCRA, as such behavior constitutes improper retaliation.

In addition, the DOL has revised the regulations to clarify that the work-availability requirement applies to *all six* qualifying reasons for paid sick leave and expanded family and medical leave, in response to Judge Oetken's observation that the original regulations could be read as applying this requirement to only some of the qualifying reasons.

Intermittent Leave: The revised regulations also reaffirm the DOL's earlier position that intermittent leave is available *only* with employer approval. The DOL explains that this approach aligns with how intermittent leave is generally treated under the FMLA, and is necessary to ensure consistency between the FMLA and FFCRA, in accordance with Congressional mandates.

The DOL guidance also provides helpful clarification on how the intermittent leave requirement applies in the context of schools which are reopening on alternate day or other hybrid in-person schedules due to the COVID-19 pandemic. The DOL explains that the employer approval condition for intermittent leave *does not apply* to an employee wishing to take leave on alternating days (or other hybrid schedule) because his or her child's school is open for in-person instruction on

a part-time basis. The reason for this is that each day (or series of days) that the child's school is closed for in-person instruction constitutes a separate basis for FFCRA leave that ends when the child is scheduled to return to school for in-person instruction. Thus, an employee who takes leave only on those days when their child is not physically in school is not taking leave on an intermittent basis, and therefore *does not need employer consent to do so*. By contrast, an employee whose child's school is operating on a fully remote basis but who wishes to take leave on half-days, alternating days, or other intermittent schedule *does need employer consent to do so*, because the qualifying reason (*i.e.,* the school closure) is ongoing even on the days when the employee does not wish to take leave.

Health-Care Providers: The DOL revised and narrowed the definition of "health care provider" for purposes of identifying employees who may be excluded from eligibility for leave under the FFCRA.[1] The prior definition, which Judge Oetken criticized as "vastly overbroad," depended exclusively on whether the *employer* provided health care services, regardless of whether the specific *employee* did so. The revised regulations narrow the definition of health-care provider to apply to employees who are *themselves* "capable of providing health care services" which encompasses any employee who provides "diagnostic services, preventive services, treatment services, or other services necessary to the provision of patient care." This revised definition would include physicians and others who make medical diagnoses, nurses, nurse assistants, medical technicians, and other employers providing direct assistance to such health care providers or who are otherwise integrated into and necessary to the provision of health care services. This final category would include, for example, a laboratory technician processing bloodwork or other testing; someone who performs care services such as bathing, dressing, or hand feeding patients; or someone who transports patients and medical samples. By contrast, the DOL guidance indicates that the definition of "health care provider" does not include individuals who provide services that *affect but are not integrated into* the provision of health care, including, for example, IT professionals, building maintenance staff, HR personnel, cooks, consultants, and billers.

Notice and Documentation Requirements: The revised rules clarify that employees need not provide documentation *prior* to taking leave under the FFCRA in all instances. Rather, employees should provide documentation *"as soon as practicable"* under the circumstances. The DOL also corrected the provisions regarding notice to clarify that employers may require notice of the request to take expanded family and medical leave as soon as practicable, which in many instances will be prior to the first day of leave.

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The revised regulations go into effect on ***September 16, 2020***. Employers should review their FFCRA policies to ensure that they are consistent with the DOL's updated guidance.

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[1] The revised regulations also emphasize that this definition applies only for purposes of determining whether an employer may exclude employees from eligibility to take leave under the FFCRA. However, it does not apply to determining "health care providers" whose advice to self-quarantine may constitute a qualified reason for paid sick leave under the FFCRA.

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