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Monthly Minute Memo: *Revised FFCRA Rules and Regulations*

On April 14, 2020, the State of New York filed suit in the Southern District of New York challenging the Families First Coronavirus Response Act's ("FFCRA") rules and regulations issued by the Department of Labor ("DOL"). On August 3, 2020, the New York District Court struck down the following: (1) FFCRA leave is only available if an employer has work available for the employee; (2) the employer must consent to intermittent FFCRA leave; (3) the definition of health care provider; and (4) the requirement employees must provide employers with certain notice before taking FFCRA. On September 11, 2020, the DOL issued revised FFCRA rules and regulations to address the issues raised by the District Court.

The New York District Court did not articulate whether this decision applied nationwide as the decision is limited to the particular court's jurisdiction. However, according to the DOL, the District Court's decision applied nationwide and therefore, the newly revised rules and regulations will impact all employers covered by the FFCRA. The revised rules and regulations became effective on September 16, 2020.

The Work Availability Requirement

Under the previous DOL rule, in order for an employee to qualify for certain FFCRA leave, the employer must have work available for the employee. If the employer's business is closed, FFCRA leave is not available, as no work is available. However, the work availability requirement only applied to leave for individuals subject to a quarantine order, to care for an individual, or to care for a son or daughter. Other qualifying reasons such as self-quarantine or seeking a medical diagnosis, were not subject to the work availability requirement.

The New York District Court held the work availability requirement was invalid for two reasons: (1) the requirement for only three of the six reasons to take leave was unreasoned and inconsistent with the statutory text; and (2) the DOL did not sufficiently explain the reason for imposing this requirement.

In response to the New York District Court's decision, the DOL now applies the work availability requirement to all qualifying reasons for leave pursuant to the FFCRA. The DOL interprets the FFCRA as allowing employees to take paid leave only if the employee would have worked but for the qualifying reason for leave. If an employee is not expected or required to work, he or she is not taking leave. Additionally, the DOL opined that removing the work-availability requirement would not serve one of the FFCRA's purposes of discouraging employees who may be infected with COVID-19 from going to work. If there is no work to perform, there is no need to discourage potentially infected employees from coming to work. This, however, does not permit an employer

to claim that there is a lack of work for an employee, in order to deny FFCRA leave. The work availability requirements must be used in a legitimate, non-retaliatory manner. In sum, work must be available in order for an employee to be eligible for leave pursuant to the FFCRA.

Employer-Approval for Intermittent Leave

The District Court opined that the DOL did not adequately explain the rationale behind the rule that employer-approval is needed for an employee to take intermittent leave pursuant to the FFCRA. In the revised rules and regulations, the DOL reaffirmed its earlier interpretation with additional explanation. This additional explanation is only a supplement and not a replacement of the rationale used in the initial rules and regulations.

The regulations do not allow employees to take paid sick leave and return to work intermittently if they are subject to a quarantine or isolation order, advised by a health care provider to self-quarantine, experiencing symptoms of COVID-19 and seeking a medical diagnosis or is caring for an individual. However, employees who take paid sick leave for these reasons may telework on an intermittent basis.

Under the revised rule, since employer permission is a precondition to telework, it is also an appropriate condition for teleworking intermittently due to a need for FFCRA leave. Employer permission is required for intermittent leave to care for a child whose school or place of care is closed or unavailable. However, this employer-approval condition is not applicable when an employee takes FFCRA leave in full-day increments to care for their child whose schools are operating on an alternate day (or hybrid model) basis. This leave is not intermittent since the school is physically closed on certain days for students. Each day of a school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. However, if the school is closed and the employee wishes to take leave for only certain portions of that period for other reasons, the employee's FFCRA leave is intermittent and would require the employer's agreement.

Definition of Healthcare Provider Revised

The FFCRA allows employers to exclude "health care providers" from leave under the Act. In its original rule, the DOL provided an expansive definition of a "health care provider" by focusing on the types of employers who could exercise the exemption. However, in striking this provision, the District Court held that any definition of health care provider must include a role-specific determination of who is capable of providing healthcare services depending on the skills, roles, duties or capabilities of the employees and cannot hinge entirely on the identity of the employer.

In determining the set of employees who may be excluded from FFCRA leave, the DOL defined two groups: (1) anyone who is a licensed doctor of medicine, nurse practitioner or other health care provider permitted to issue a certification for FMLA purposes; and (2) any other person who is employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care.

An employee is not a health care provider merely because his or her employer provides health care services, or the employee provides a service that affects the provision of health care services. Examples of these employees include IT professionals, building maintenance staff, human resources personnel, cooks, food services, records managers, consultants, and billers. These employees are not health care providers, even if they work at a hospital or a health care facility.

Notice and Documentation Requirements

Under the previous rules and regulations, the DOL required the employee to provide the employer certain documentation prior to taking FFCRA leave. The District Court held that this requirement is inconsistent with the statute's notice provision which allows an employer to request notice for taking leave only after the first workday for paid sick leave or as is practicable for E-FMLA. As a result, the DOL amended this provision to allow documentation to be given as soon as practicable, usually when the employee provides notice. In situations where an employee seeks E-FMLA leave to care for a child, the employee must provide the employer with notice of leave as soon as practicable. If E-FMLA is foreseeable, such as a school closure an employee learns in advance, the DOL anticipates the employee will give notice before taking leave. However, if E-FMLA leave is not foreseeable, an employee may begin taking leave without giving prior notice but must still give notice as soon as practicable.

Currently, leave under the FFCRA ends on December 31, 2020. We will continue to monitor this situation and will provide updates regarding any new or updated guidance relating to the FFCRA.