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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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The U.S. Department of Labor Issues Revised FFCRA Regulations in Response to District Court Decision

On September 11, 2020, the United States Department of Labor (USDOL) issued revisions to the Temporary Rule it issued on April 1, 2020, implementing the employee leave provisions of the Families First Coronavirus Response Act (FFCRA). The revisions respond to the August 3 decision by the United States District Court for the Southern District of New York (District Court) that invalidated certain parts of the Temporary Rule. The revised regulations took effect on September 16, 2020.

In its August 3 decision, the District Court ruled that four parts of the Temporary Rule were invalid: (1) the requirement that an employee may only take FFCRA leave if there is work available from which to take leave; (2) the requirement that an employee may take intermittent FFCRA leave only with employer consent; (3) the definition of a "health care provider" whom an employer may exclude from taking FFCRA leave; and (4) the requirement that employees who take FFCRA leave must provide certain documentation to their employer prior to taking leave.

The USDOL reconsidered the portions of the Temporary Rule that the District Court held were invalid. It reaffirmed the regulations in part, revised the regulations in part, and provided further explanation of its rationale for its regulations.

The Work Availability Requirement

Under the Temporary Rule, an employee was not eligible for paid leave pursuant to the Emergency Family Medical Leave Act (EFMLA) or for three of the six qualifying reasons under the Emergency Paid Sick Leave Act (EPSLA) if the employer did not have work available for the employee to perform. The District Court invalidated this requirement, concluding that it was arbitrary and capricious for two reasons: (1) the USDOL had no rational basis for applying this requirement only to three of the six EPSLA qualifying reasons; and (2) the USDOL provided only a "barebones explanation" for the work availability requirement that was "patently deficient."

The USDOL amended the Temporary Rule to make the work availability requirement applicable to all qualifying reasons to take paid leave under the EPSLA and EFMLA. It also provided a "fuller explanation" for its original reasoning regarding the requirement. Specifically, the USDOL explained that under the FFCRA, an employer must provide leave to the extent that an employee is unable to work "because of" or "due to" a qualifying reason. The Supreme Court has repeatedly interpreted these terms to require "but-for" causation, which in these circumstances, means that the qualifying reason must be the only reason for needing leave. The USDOL further explained that "leave" is most simply and clearly understood as an authorized absence from work; if an employee is not otherwise expected to be at work, he or she is not taking "leave." Additionally, the USDOL explained that omitting a work availability requirement could have perverse consequences. For example, if a business temporarily closes and furloughs its workers, only those employees with a qualifying reason for FFCRA leave would continue to get paid. For these reasons, the USDOL reaffirmed its original position that an employee is eligible for FFCRA leave only if his or her employer otherwise has work available.

The Health Care Provider Exclusion

The Temporary Rule broadly defined a "health care provider" whom an employer may exclude from entitlement to FFCRA leave as "anyone employed at" numerous types of health care institutions. The District Court invalidated this definition,

reasoning that it is contrary to the statute because it focuses entirely on the identity of employers, rather than the skills, roles, duties or capabilities of employees.

The USDOL adopted a revised definition of "health care provider" for purposes of this exclusion. The revised definition is narrower than that originally set forth in the Temporary Rule. It includes physicians and others who make medical diagnoses. It also includes employees who are "capable of providing health care services." Specifically, the employee must be "employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care." The USDOL explained that its interpretation of "health care services" encompasses some services for which a license, registration or certification is not required.

The revised definition provides specific examples of services that may be considered "diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care." Examples of "diagnostic services" include taking or processing samples, performing x-rays or interpreting test or procedure results. Examples of "preventative services" include screenings, check-ups and counseling to prevent illness, disease or other health problems. Examples of "treatment services" include performing surgery or other invasive or physical interventions and administering medication. Lastly, examples of "services that are integrated with and necessary to the provision of patient care" include bathing, dressing, hand feeding and taking vital signs. Significantly, these tasks must be integrated and necessary to the provision of patient care.

Intermittent Leave

Under the Temporary Rule, intermittent leave was only available to an employee seeking leave due to a need to care for a child whose school or place of childcare is closed, or whose child care provider is unavailable, due to COVID-19. The Temporary Rule further provided that in all instances of intermittent leave, employer consent was required. The District Court upheld the limitation of intermittent leave only for childcare purposes because the other qualifying reasons for which intermittent leave is prohibited logically correlate with a higher risk of viral infection. However, the District Court held that the USDOL did not adequately explain its rationale for the employer consent requirement. Upon reconsideration, the USDOL affirmed its position that employer consent is needed to take FFCRA leave intermittently for childcare purposes.

To support its position, the USDOL cited the longstanding principle that intermittent leave taken pursuant to the FMLA should minimize undue disruption to the employer's operations. The employer consent requirement, it explained, balances the employee's need for leave with the employer's interest in avoiding disruptions that inevitably result from an intermittent schedule.

In harmony with several Frequently Asked Questions issued on August 28, 2020, the USDOL specified that the employer consent requirement does not apply to employees who take FFCRA leave in full day increments to care for children whose schools are operating on an alternate day or "hybrid" schedule. In these circumstances, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The USDOL apparently does not consider this type of leave to be "intermittent," so employer consent is not required in that situation.

Documentation Requirements

The Temporary Rule included a requirement that employees provide certain documentation "prior to" taking FFCRA leave. Under the statutory text, an employee must provide "notice" of leave as soon as practicable, but makes no mention of required documentation prior to leave. The District Court held that to the extent the documentation requirement in the Temporary Rule imposed a different and more stringent precondition to taking paid leave, it was inconsistent with the statute and invalid.

The USDOL revised the Temporary Rule to clarify that documentation need not be given "prior to" taking paid sick leave. Rather, it must be given "as soon as practicable," which, in most cases, will be at the same time the employee gives notice of his or her need for leave.

What This Means for Employers

The USDOL considers the invalidated provisions of the Temporary Rule to be vacated nationwide and the revised regulations to replace (or further explain) those vacated provisions are now in effect. Employers who receive inquiries or complaints from employees who were initially denied leave but believe that they should have been eligible for leave based on the revised regulations should consult with legal counsel before responding. In addition, any future requests for leave that may implicate a revised rule should be evaluated carefully and should be discussed with legal counsel before making a decision regarding the leave request.

If you have any questions about this information memo, please contact Mary E. Aldridge, any attorney in our Labor and Employment practice or the attorney at the firm with whom you are regularly in contact.

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