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U.S. DEPARTMENT OF LABOR REVISES FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) REGULATIONS

On September 11, 2020, the U.S. Department of Labor (DOL) revised its regulations that implemented paid sick leave and extended family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA or Act). Four parts of the previous regulations were struck down by a federal district court,[1] which led the DOL to reevaluate certain requirements and definitions. The new regulations took effect on September 16, 2020. A summary of each change is below, as well as an explanation of what the changes mean for employers' compliance duties.

GENERAL OVERVIEW OF KEY REVISIONS

1. **Definition of "health care providers" -** Employers can exclude employees deemed "health care providers" from FFCRA coverage. The previous definition of health care providers was originally very broad, but the new regulations have narrowed the definition to include only employees who are health care providers under the Family and Medical Leave Act (FMLA) definition, as well as employees who provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. See below for a more detailed explanation of this important change.

2. **Work availability requirement -** The revised regulations reaffirm that leave can only be taken if the employee has work available from which to take leave. See below for a more detailed explanation.

3. **Approval for intermittent leave -** The revised regulations reaffirm that employees must obtain their employer's approval to take FFCRA leave intermittently. See below for a more detailed explanation.

[1] See State of New York v. U.S. Dep't of Labor, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020) (striking down the (1) requirement that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave; (2) requirement that an employee may take FFCRA leave intermittently only with employer approval; (3) definition of an employee who is a "health care provider"; and (4) requirement that employees must provide their employers with certain documentation before taking FFCRA leave).

4. **Documentation requirements -** The revised regulations provide that employees must give their employers information to support their need for leave as soon as practicable. See below for a more detailed explanation.

5. **Notice requirements -** Finally, the revised regulations clarify when an employee is required to give notice of leave to their employer. See below for a more detailed explanation.

DETAILED EXPLANATIONS OF REVISIONS

1. Definition of "health care providers"

Because the FFCRA allows employers to exclude "health care providers" from the Act's leave provisions, the breadth of how the DOL defines health care providers is important. The previous regulation, which focused on the identity and role of the employer, was struck down for being too broad. Under the previous regulation, employers could essentially exclude from FFCRA coverage *anyone* employed at a doctor's office, hospital, clinic, medical school, nursing facility, or related entity. This led the DOL to reevaluate that definition and adopt a new, more limited definition that focuses on the employee's skills, role, and duties. This means that employers in the medical field can no longer apply the exemption to *all* employees. Instead, only certain employees may be excluded.

The DOL revised and narrowed the definition of health care providers so that the exclusion applies only to the following **employees:**

A. **those who are "employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care," or**
B. **those who meet the definition of "health care provider" under existing FMLA regulations**.

In explaining the new definition of health care providers, the DOL clarified the scope of covered health care services:

- **Diagnostic services** include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting;

- **Preventative services** include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems;

- **Treatment services** include performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments; and

- **Other integrated and necessary services** that, if not provided, would adversely affect the patient's care include, for example, employees who perform bathing, dressing, hand

feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

Specifically, the revised regulations identify the following employees who may continue to be excluded from taking FFCRA leave:

- Nurses, nurse assistants, medical technicians and others directly providing diagnostic, preventative, treatment or other integrated services;

- Employees providing such services under the supervision, order, or direction of, or providing direct assistance to, a health care provider; and

- Employees who are "otherwise integrated into and necessary to the provision of health care services," such as nurse assistants, medical technicians, and laboratory technicians who process test results necessary to diagnoses and treatment.

Additionally, the DOL provided an illustrative list of "typical work locations" where employees providing health care services may 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. Of course, not all employees who work at one of these facilities are health care providers for FFCRA purposes, and not all health care providers work at these facilities.

Also excluded from the FFCRA leave provisions are those employees who are deemed health care providers under existing FMLA regulations. These include doctors of medicine and osteopathy and "others capable of providing health care services," including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and certain Christian Science practitioners.

Additionally, the DOL identified employees who do **<u>not</u>** fall within the definition of health care providers and who may **<u>not</u>** be excluded for FFCRA leave purposes, including: information technology professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers. Although the services provided by these employees may be related to patient care, the DOL decided they are too attenuated to be integrated and necessary components of patient care.

In sum, employers will need to conduct an employee-by-employee analysis pursuant to these guidelines to exclude employees from FFCRA leave.

2. Work availability requirement

The DOL reaffirmed its position on the work availability requirement from the original rule, which provided that the employer must actually have work available for the employee to

perform when the need for FFCRA leave arises. In other words, if the employee was not scheduled to work (e.g., due to a business closure or furlough), then there would be no work from which the employee could take leave. The federal district court struck down this rule for lack of explanation. In its revisions, the DOL did not change the work availability requirement, but instead explained its reasoning and restated that work must be available for an employee to be eligible for FFCRA leave.

The DOL maintained that an employee may only take FFCRA leave if there is work from which the employee can take leave and the FFCRA qualifying reason for leave is a "but-for" cause (i.e., the sole reason) of the employee's inability to work. The revised regulations explicitly apply the work availability requirement to all FFCRA qualifying reasons for leave.

The DOL also explained that the term "leave" is "an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave." This interpretation is consistent with the FMLA's use of the term, which states that periods of time when an employee would not otherwise be expected to work do not count against the employee's entitlement to FMLA leave. The DOL noted that removing the work availability requirement would fail to serve a key purpose of the FFCRA: to discourage employees who may be infected with COVID-19 from reporting to work. Additionally, the DOL explained that removing the work availability requirement would lead to "perverse" results under the court's reading of the regulation, such as paying a furloughed employee for several weeks because the employee has a qualifying reason.

For those reasons, the DOL reaffirmed its position on the work availability requirement. This provides employers with clarity that work must be available for an employee to be eligible for FFCRA leave. Not surprisingly, however, the DOL noted that employers may not arbitrarily withhold work in an effort to thwart an employee's ability to take leave; rather, work is deemed unavailable only due to legitimate, nondiscriminatory, and non-retaliatory reasons.

3. Approval for intermittent leave

Under the revised regulations, intermittent leave (when permitted by the FFCRA) still requires an employee to obtain their employer's consent. Again, the court struck down the revised regulation for lack of specific explanation, and the DOL stood firm in its original position. Essentially, the DOL reasoned that requiring employers to approve employees taking paid sick leave or expanded family and medical leave intermittently is consistent with longstanding FMLA regulations.

When Congress passed the FFCRA, it did not address intermittent leave, but rather, granted the DOL broad regulatory authority to fill this gap and ensure consistency between paid sick leave and expanded family and medical leave. The FMLA already requires a medical need or an agreement between the employer and employee before an employee may take intermittent leave. The DOL noted that FFCRA leave should "balance the employee's need for leave with the employer's interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave."

The DOL revisions expressly apply in the case of an employee taking leave to care for a child whose school or place of care is closed or unavailable due to COVID-19. The employee may only take this intermittent FFCRA leave with the employer's consent. The DOL noted that unrestricted intermittent leave would be inconsistent with the purpose of the FFCRA, as traveling back and forth to the workplace frustrates efforts to slow the transmission of COVID-19. Overall, the DOL's position is that intermittent leave should not unduly disrupt the employer's operations. Thus, intermittent leave requires employer approval in certain instances.

4. Documentation requirements

The original DOL regulations required employees to provide employers with supporting documentation for FFCRA leave prior to taking leave. The revised regulations still require the documentation, but clarify that employees should provide documentation in support of FFCRA leave "as soon as practicable." The DOL noted that, in most cases, "as soon as practicable" will be when the employee provides notice of the need for FFCRA leave (see below for a discussion on notice). Thus, employers should no longer require documentation *prior* to providing FFCRA leave.

5. Notice requirements

Finally, the revised regulations cure an inconsistency regarding when an employee may be required to give notice for expanded family and medical leave. Previously, the regulations stated that employers could not require advance notice of the need for paid sick leave or expanded family and medical leave—notice could only be required on or after the first day of leave taken. Now, under the revised regulations, that is only true for paid sick leave.

Under the revised regulations, advance notice of expanded family and medical leave is required "as soon as practicable." The DOL specifically explained how this applies to school closures, stating:

> "[I]f an employee learns on Monday morning before work that his or her child's school will close on Tuesday due to COVID-19 related reasons, the employee must notify his or her employer as soon as practicable (likely on Monday at work). If the need for expanded family and medical leave was not foreseeable—for instance, if that employee learns of the school's closure on Tuesday after reporting for work—the employee may begin to take leave without giving prior notice but must still give notice as soon as practicable."

In other words, if the need for leave is foreseeable, then advance notice is typically required.

To review the DOL's revised regulations, please CLICK HERE.

The FFCRA remains in effect through December 31, 2020. For more information on employers' obligations under the FFCRA or other questions arising from the impact of COVID-19, please reach out to a member of Cline Williams' Labor and Employment Law Section and Employee Benefits Section.

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