Back To Square One: Court Ruling Upends COVID-19 Leave Rules

Insights
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In a surprising and significant ruling yesterday, a New York federal judge tossed out several key Department of Labor rules regulating the Families First Coronavirus Response Act (FFCRA), meaning that more workers will be able to take paid leave under the new law. The ruling also creates uncertainty for employers trying to comply with administrative aspects of the leave act requirements, and brings us back to the confusing early days of the new law before the DOL issued clarifying regulations. The scope of the ruling is unclear at present, as the judge did not specifically indicate if it applies nationally or just in New York. However, even if limited in scope, the same reasoning could be followed by other courts considering similar challenges in other parts of the country.

As a result of the decision, employers covered by this ruling must now do the following:

- **Determine whether any employees you have been excluding from FFCRA coverage because they fell under the "health care provider" exemption can still be exempted now that the court narrowed the definition;**
- **Avoid using work availability as a consideration when determining whether leave should be provided;**
- **Cease requiring your consent prior to allowing otherwise-permitted intermittent leave; and**
- **Refrain from requiring documentation as a precondition prior to permitting employees to take available FFCRA leave.**

Who Is A Health Care Provider Who May Be Excluded From FFCRA Leave Provisions?
The FFCRA permits employers to exclude "health care providers" from the Act's leave benefit provisions. Many health care employers have worked hard to determine which employees may be exempted from some or all FFCRA benefits since the April 1 effective date. Their goal has been to balance both the needs of individual employees with the practical needs of the nation's healthcare system during this pandemic. A threshold question had therefore been: "Who is a health care provider?"

The only statutory definition of "health care provider" in the FFCRA points to the definition found in the Family Medical Leave Act (FMLA), which is narrow. It defines a health care provider as a "doctor of medicine or osteopathy" who is authorized to practice in their state; or any other person

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of medicine or osteopathy" who is authorized to practice in their State, or any other person

determined by the Secretary of Labor to be capable of providing health care services. Professionals so designated include podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, and other similar professionals.

The definition provided in the DOL's rule, on the other hand, was much more expansive – too expansive for Judge J. Paul Oetken, who said it was overbroad and based on the wrong criteria. It excluded from FFCRA coverage "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, 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 institution, employer, or entity." The DOL's definition went on to include any individual employed by an entity that contracts with any of these institutions, as well as anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical supplies.

The court said that the DOL inappropriately based its rule upon the identification of employers (such as being a doctor's office, clinic or a hospital), rather than basing its identification upon the skills, role, duties, or capabilities of the employees who could be exempted. For example, Judge Oetken's analysis explained how application of the DOL's employer-based rule could result in an English professor at a university with a medical school being exempted from FFCRA benefits, even if the professor was incapable of providing healthcare services.

By striking down the definition of "health care provider" from the rule, the judge left only the FMLA-based definition of a health care provider to identify which employees may be exempted from the FFCRA's leave benefits. Notably, the FMLA definition does *not* include many health care providers who are currently engaged in and essential to the country's continuing public health response to the COVID-19 crisis, such as registered nurses, respiratory therapists, biomedical equipment technicians, and nursing assistants. As a result of the court's ruling, employers covered by this ruling may no longer exempt these employees from leave benefits pursuant to the FFCRA.

While the court's analysis indicates that a different, job-based rule could pass muster in the future, covered employers for now may rely only upon the FMLA-based definition of a health care provider for purposes of exempting employees from the leave benefits mandated by the FFCRA.

Court Rejects Work-Availability Requirement

The two main provisions of the FFCRA are the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The statutory language of the EPSLA requires covered employers to provide paid sick leave to employees who are "unable to work (or telework) due to a need for leave because" of one of the following qualifying reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

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COVID-19;

2. The employee has been advised by a health care provider to self-quarantine related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. The employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

The EFMLEA similarly applies to employees "unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency."

The DOL's rule, however, imposed a work-availability requirement for three of the six qualifying reasons for EPLSA and the qualifying reason for EFMLEA. It said that these benefits are not required to be provided to employees whose employers do not have work for them.

The court struck down this requirement. It determined the FFCRA's statutory language that an employee is "unable to work (or telework) due to a need for leave because" of any of the six qualifying conditions, or in the case of the EFMLEA, "unable to work (or telework) due to a need for leave to care" a child due to COVID-19, was ambiguous. Second, it determined that the DOL's differential treatment of the six qualifying reasons – that is, the decision to apply the work-availability requirement to only three of the six qualifying reasons – was entirely unreasoned and contrary to the statute's language. More fundamentally, the court determined that the DOL's rule did not sufficiently explain the reasoning for including the work-availability requirement.

As a result, employers covered by this ruling should not currently rely on the work-availability requirement for EPSLA and EFMLEA eligibility. The court's decision seems to hold that covered businesses subject to this ruling that have temporarily closed operations because of a federal, state or local order or other reason may be required to provide paid leave if an employee is unable to work or telework due to a qualifying reason.

Employer Consent for Intermittent Leave is Not Required

The court next struck down part of the DOL's rule that required employer consent for intermittent FFCRA leave. By way of background, the DOL's rule permits employees to take EPSLA or EFMLEA intermittently (i.e., in separate periods of time, rather than one continuous period) "only if the employer and employee agree, and, even then, only for a subset of the qualifying conditions."

Under the DOL's regulations, employees may not take intermittent leave for reasons that would logically correlate with a higher risk of viral infection, including (a) when an employee is subject to government quarantine or isolation order related to COVID-19; (b) has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; (c) is experiencing symptoms of

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COVID-19 and is taking leave to obtain a medical diagnosis; (d) is taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; (e) or is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. With the employer's consent, however, intermittent leave is available to an employee who is caring for the employee's child if the child's school or place of care has been closed or the child care provider of such child is unavailable due to COVID-19-related reasons.

The court found the DOL's intermittent leave regulations for certain qualifying conditions were reasonable because they balanced the statute's goals of employee welfare and public health "by constraining the exercise of intermittent leave to circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees." However, the court also found the DOL failed to rationalize why employer consent is required for the remaining qualifying conditions that did not implicate the same public-health considerations. The court determined such a blanket requirement was unreasoned and therefore should be stricken from the law.

As a result of yesterday's decision, employers covered by this ruling should review their current FFCRA policies on intermittent leave to ensure compliance with this latest ruling. As stated, while the previous prohibitions on intermittent leave still stand, it is now clear that employer consent is no longer required for permitted intermittent leave. Your policies should reflect this new reality.

Supporting Documentation May Not Be Required As A Precondition for Leave

Finally, the Court also vacated the DOL regulations' mandate requiring employees to provide employers with supporting documentation as a precondition for the requested leave. The DOL regulations require employees to submit to their employer, "prior to taking FFCRA leave," documentation indicating the reason for leave, the duration of the requested leave, and, when relevant, the authority for the qualifying isolation or quarantine order. For certain qualifying reasons, additional documentation is required.

Notably, while the requirement to provide supporting documentation does not inherently contradict the original FFCRA statutory scheme, the court concluded the mandate that such documents be provided "prior to taking FFCRA leave" starkly contradicts the FFCRA's notice provisions. Under the EFMLEA, for example, an employee is to provide notice as is practicable when leave is foreseeable. With regard to the EPSLA, an employer may require the employee to follow reasonable notice procedures after the first workday the employee receives such leave.

For these reasons, the court concluded that the requirement in the DOL regulations that an employee provide documentation prior to taking leave "is an unyielding condition precedent to the receipt of leave and, in that respect, is more onerous than the unambiguous statutory scheme Congress enacted." Thus, the court held that documentation requirements, to the extent they are a precondition to leave, cannot stand. Employers covered by this ruling should take note and change your policies and practices to ensure documentation is not required to start a leave under the FFCRA.

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FFCRA.

What Should Employers Do?

It is probable that the Trump administration will appeal this ruling in an attempt to have these portions of the rule resurrected. It is possible that the 2nd Circuit Court of Appeals may soon reinstate the regulations and temporarily keep them in place while a full appeal is pending. But banking on this possibility is risky for employers covered by this ruling, and you should assume that the rules described above are gone for good.

Besides taking the action items outlined above, you should note that you may be eligible for a small-employer exemption if you have under 50 employees and meet other eligibility criteria. Check with your Fisher Phillips counsel to determine if you qualify. It is also important to remember that you may claim credit for this leave benefit required by the FFCRA against your quarterly payroll tax payments to the federal government, so it is vital for you to ensure compliance.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate – especially as it relates to the scope of this ruling. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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