U.S. Department of Labor Revises Families First Coronavirus Response Act Regulations

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Responding to a recent New York federal court decision invalidating certain of its regulations interpreting the paid leave provisions of the Families First Coronavirus Response Act (FFCRA), the U.S. Department of Labor (DOL) has issued new regulations addressing the issues raised by the decision. While the DOL revised its regulations to comply with the court's decision, it also pushed back on some of the court's objections, providing further explanation to justify rules invalidated by the court.

First, the DOL narrowed its previous definition of a "healthcare provider" who may be denied FFCRA leave. The court had rejected the DOL's initial definition of that term for being overly broad, as it effectively precluded any employee that worked for a company providing health care or related services from taking FFCRA leave. Under the revised rule, the health care provider exemption only applies to employees who are directly involved in patient care, which allows employees of companies providing health care or related services who are not directly involved in patient care access to paid leave under the FFCRA.

Second, the DOL revised its regulations regarding employees' obligation to provide documentation supporting their need for leave. The court held that these documentation requirements were unlawful as preconditions to leave to the extent that the regulations required employees to provide this documentation in advance of taking leave. In response, the DOL revised the regulations to clarify that employees do not need to provide employers with documentation supporting their need for leave before they take leave. Rather, they must provide such documentation to their employers as soon as is practicable.

As to the work-availability and intermittent leave rules the court rejected, however, the DOL merely reaffirmed its existing rules, but provided additional justification for them. As to the work-availability requirement, the Department's initial regulations had made clear that it applied to three types of FFCRA leave, but were not clear as to the other three types. The court rejected this regulation because the differential treatment of the different types of leave was not justified, and because it held that the reasoning behind the work-availability requirement was "circular." The new regulations make clear that the work availability requirement applies to all six bases for taking FFCRA leave. They also added additional explanation for the work-availability requirement based on the Supreme Court's interpretation of "but-for" causation, which, when applied to FFCRA leave, would require that leave would not be available if the need for leave occurred (even in part) due to another non-COVID related reason, such as a layoff or furlough. Accordingly, employees still will not be eligible for leave if their employer does not have work available for them in the first place.

The DOL has also stuck with its rule regarding employee use of intermittent leave for medically-related purposes when an employee is teleworking. The court had rejected this rule because the DOL had not sufficiently justified its reason for requiring employer consent. In response, the DOL amended the regulations to explain that its requirement was justified because, under the FFCRA, employer permission was a prerequisite for teleworking in the first place. As such, employers will continue to be able to regulate their employees' use of intermittent leave under the FFCRA.

These new regulations provide some much needed clarity in the wake of the court's decision overturning the previous regulations. Employers should review their policies and practices to make sure they are providing FFCRA leave consistent with this new guidance on the healthcare provider definition and documentation requirements. However, the DOL's choice not to amend its work availability and intermittent leave rule suggests that the DOL may be gearing up for a fight over these regulations in court. We will continue to keep

clients apprised as to any developments with respect to the rules.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Portal or contact your Foley Hoag attorney.

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