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DOL Revises FFCRA Regulations to Clarify Paid Sick Leave and Expanded FMLA

Background

Throughout the COVID-19 pandemic, the US Department of Labor (DOL) has continually issued updated guidance to employers and employees, including revised regulations under the Families First Coronavirus Response Act (FFCRA) after a federal court recently struck down four parts of the FFCRA's Final Rule.

Summary

The Southern District of New York (SDNY) federal court recently struck down the following parts of the FFCRA Final Rule: 1) the requirement that FFCRA leave is applicable only if an employer has work available for the employee from which leave can be taken; 2) the requirement that an employee may take FFCRA leave intermittently only with employer approval; 3) the definition of employees who are "health care providers" that may be excluded from FFCRA leave

eligibility; and 4) the requirement that employees must provide certain documentation prior to taking FFCRA leave.

On September 13, 2020, the DOL responded to the SDNY ruling with a revised Final Rule to "reaffirm its regulations in part, revise its regulations in part, and further explain its positions." The revised Final Rule became effective on September 16, 2020. Below is a summary:

- The DOL reaffirmed that FFCRA leave may only be taken if there is work available from which an employee can take leave and further stated that FFCRA leave is not available "if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave," such as the employer closing the worksite temporarily or permanently The DOL reaffirmed that an employer must approve an employee taking intermittent FFCRA leave (consistent with FMLA regulations), stating that this balances the employee's need for leave with the employer's interest in avoiding disruptions to operations.
- The DOL narrowed the definition of "health care providers" that can be exempted from FFCRA leave coverage, now putting focus on the individual employee's role rather than the employer as a whole. Further, the revision limits the definition of "health care provider" to nurses, nurse assistants, medical technicians, and others directly providing diagnostic, preventive, 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 lab technicians who process test results necessary to diagnoses and treatment. However, the revision does not specifically mention employees who do not actually provide health care services, even if their services could affect the provision of health care (such as IT professionals, building maintenance, HR, records managers, consultants, billers, etc.). The regulations do mention that solely working at a site where medical services are provided does not necessarily mean an employee is a health care provider.
- The DOL clarifies that an employee is not required to submit documentation prior to taking the leave, but rather should submit documentation as soon as practicable, which in most cases will occur before taking leave.

Employer Next Steps

- Review the DOL revisions regarding the FFCRA to ensure you are compliant with these clarifications and updates.
- Continue to stay up to date with the most recent guidance from the DOL and other government agencies.
- If you are a Full-Service or Virtual HR client and would like our assistance with updating your FFCRA policies, please email us.

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