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Revised FFCRA regulations to take effect on Wednesday

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In August, a federal judge in New York **vacated** portions of the regulations interpreting the Families First Coronavirus Response Act. It was not clear at first what the response of the U.S. Department of Labor would be. Among other options, it could have appealed the decision, or it could have issued revised regulations.

About a week ago, *Bloomberg Law* reported that the DOL was going to revise its regulations to address the issues raised in the court's decision. And this past Friday, **the revisions were issued**.

The revised regulations will take effect on Wednesday, September 16.

With one exception, the changes are not dramatic. For the most part, the DOL respectfully disagreed with the court, provided more explanation of the rationale for the existing regulations, and made minor tweaks or corrections.

However, health care employers should note that the "health care provider" exclusion from FFCRA eligibility has been significantly narrowed. As a result, health care employers who are subject to the FFCRA -- either because they have fewer than 500 employees or because they are public-sector employers -- will no longer be able to take advantage of a blanket exclusion of all employees from FFCRA eligibility.

"Health care provider" exclusion is narrowed

The FFCRA gave the Department of Labor authority to exclude from eligibility "health care providers." The original FFCRA regulations had a broad definition of "health care provider" that included, not only individuals who provided care to patients, but also those who supported the caregivers -- including, arguably, IT workers, Human Resources, other administration, and food services workers and custodians.

The court's decision said that the DOL's definition of "health care provider" was overbroad and invalid. The revised regulations provide a more narrow definition of "health care providers" who can be ineligible for FFCRA leave. First, anyone who qualifies as a "health care provider" under the FMLA regulations can be excluded. This would include physicians, some chiropractors, osteopaths, and nurse practitioners. In addition, the FFCRA exclusion will apply to employees who are "employed to provide" diagnostic,

preventive, or treatment services, "or other services that are integrated with and necessary to the provision of patient care." This includes nurses, nurse assistants, medical technicians and laboratory technicians (viewed on a case-by-case basis), and similar categories of employees.

"Integrated" services include bathing, dressing, feeding, and other tasks related to patient care.

The revised regulations specifically exclude employees whose work is administrative, related to food services (as opposed to feeding patients), or building maintenance.

As a result of this change, health care employers who are covered by the FFCRA but considered it a moot point because their entire workforce was "ineligible" under the original regulations, will have to quickly learn about the FFCRA and ensure that they are correctly applying it to the employees who are now eligible.

"Work available" requirement

The original FFCRA regulations provided that paid leave could not be taken unless work was otherwise available. For example, if an employer closed its facility because of a government shutdown order, none of the employees would be eligible to take paid FFCRA leave. On the other hand, if the employer was operating but an employee had an FFCRA-qualifying condition or situation, the employee would be eligible for paid leave.

The court's decision found that the DOL had not provided enough of an explanation for the "work available" requirement. It also found that the regulations applied only to certain categories of FFCRA leave with no explanation as to why the other categories were treated differently.

The DOL's response was to provide more explanation for the "work availability" requirement in the revised regulations, and to expand the requirement to all six categories of FFCRA leave – which it said it had intended to do all along.

Documentation and notice of need for FFCRA leave

There was a minor change to the portion of the regulations relating to employee notice and documentation of the need for FFCRA leave. The revised regulations provide that the employee does not have to provide notice to the employer of a request for leave before the leave begins but "as soon as practicable." If the leave is foreseeable, the DOL still expects the notice to be provided "as soon as practicable" and generally expects that this will be before the leave begins.

Documentation in support of a request for FFCRA leave must be also be provided "as soon as practicable."

Employer permission for intermittent FFCRA leave

The original regulations provided that employees could not take FFCRA leave intermittently if the leave was because of the employee's COVID-19 or symptoms, because the employee was caring for someone with COVID-19 or its symptoms, or under the "catchall" provision (Reasons 1-4, and Reason 6), *and* if the employee had to work on site. But in the case of a school closing (Reason 5) or if the employee out of work for one of the other reasons was teleworking, the employee could take intermittent leave if the employer agreed. In the revised regulations, the DOL keeps these rules but provides more of a rationale.

First, the DOL noted that the FFCRA statute was silent about intermittent leave but gave broad regulatory authority to the DOL. The primary rationale for the restriction on on-site employees taking leave for Reasons 1-4 and 6 is to prevent potential exposure of co-workers and others to COVID-19. In the case of leave for Reason 5 or employees who can telework, the employee poses minimal, if any, risk to co-workers. In these circumstances, the employee's need for intermittent leave can be balanced against the employer's need to minimize the disruption to its operations, similar to the Family and Medical Leave Act when the leave is not for a serious health condition. (For example, under the FMLA, "baby bonding" leave cannot be taken on an intermittent basis unless the employer agrees.) This same reasoning should apply to intermittent leave for school closings under the FFCRA, according to the Department of Labor.

The DOL did specifically note that time off for alternate-day school schedules is not "intermittent" leave and can be taken without the permission of the employer. (For example, if a school is having in-person classes on Monday-Wednesday-Friday and remote learning on Tuesday and Thursday, it would not be "intermittent" FFCRA leave if the parent took leave on Monday, Wednesday, and Friday. In other words, the employer's consent to the schedule would not be needed in this circumstance.)

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