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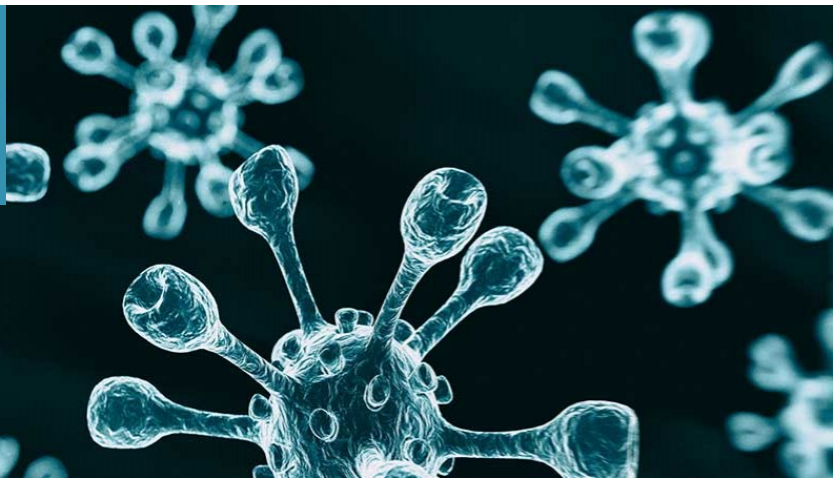

NEW YORK COURT VACATES PORTIONS OF FFCRA REGULATIONS

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On August 3, 2020, a federal judge in the U.S. District Court for the Southern District of New York invalidated several key portions of the U.S. Department of Labor's ("DOL") Final Rule implementing the Families First Coronavirus Response Act ("FFCRA").

The FFCRA provides emergency paid sick leave and expanded family and medical leave to employees unable to work for certain qualifying reasons related to COVID-19. After Congress passed the Act, the DOL promulgated a Final Rule implementing the FFCRA's provisions. Almost immediately, the State of New York filed suit against the DOL, claiming that several portions of the Final Rule exceeded the DOL's authority under the FFCRA. The Court largely agreed with the State of New York, striking down the Final Rule's (1) "work availability" requirement; (2) definition of "health care provider;" (3) employer consent for intermittent leave requirement; and (4) the requirement that employees provide documentation before taking FFCRA leave.

"WORK AVAILABILITY" REQUIREMENT

Under the Final Rule, employees are not entitled to emergency paid sick leave or expanded family and medical leave if their employer has no work available for them. The State challenged this requirement, arguing it was contrary to both the text and purpose of the FFCRA. The Court agreed, describing the DOL's "barebones explanation" for the requirement as "patently deficient," especially when considering the practical effect of narrowing the FFCRA's applicability. After striking down the requirement, covered employees in the Southern District of New York are now entitled to paid FFCRA leave even when there is not work available for the employee, so long as they have a qualifying reason for the leave. This means even employees on furlough or temporary layoffs may be eligible for paid FFCRA leave.

DEFINITION OF "HEALTH CARE PROVIDER"

The FFCRA allows employers to use their discretion to exclude "health care providers" from paid leave benefits. The Court began by noting the FMLA provides the relevant definition for the FFCRA provisions at issue, and defines a "health care provider" as: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services." Seizing on the second portion of that definition, the DOL's Final Rule broadly defined "health care providers" to include, in part, "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 Court found the DOL's definition to be overbroad and inappropriately focused on employers, rather than on employees' actual job duties, as even employees with "no nexus whatsoever" to providing healthcare services could be exempt from FFCRA leave. Specifically, the Court observed that an English professor, librarian, or cafeteria manager at a university with a medical school could all be considered "health care providers" under the Final Rule's definition. The Court suggested that instead, the regulation should focus on the "skills, role, duties, or capabilities of a class of employees." While the Court left open the possibility that the DOL could issue a new and more focused regulation, for now, the only available regulatory definition of "health care provider" is the significantly narrower original FMLA definition of the term.

INTERMITTENT LEAVE

Under the DOL's Final Rule, employees can only take FFCRA leave intermittently if the employee and the employer agree, and even then, only to care for a child whose school or place of care is closed or whose childcare is unavailable. The DOL's rationale for these restrictions was that employees taking leave for other reasons (such as those who may have COVID-19) present public health risks if they return to work on an intermittent basis before the potential for spreading the virus relents.

Here, the Court agreed with the DOL's interpretation, limiting the use of intermittent leave to those employees who use leave for childcare reasons, because it related to the DOL's rationale for the restrictions (limiting public health risks) and intermittent leave was not mentioned in the text of the FFCRA. But the Court concluded the DOL's public health reasoning did not justify requiring employer consent for the use of intermittent leave and struck down that portion of the Final Rule. Accordingly, eligible employees in the Southern District may only take intermittent leave for childcare reasons, but do not need their employer's consent to take such leave.

PRIOR DOCUMENTATION REQUIREMENT

The Final Rule also requires employees submit documentation indicating the employee's reason for leave, the duration of the requested leave, and, where applicable, the authority for the isolation or quarantine order qualifying them for leave before taking FFCRA leave. The FFCRA, however, only provides that an employer may require an employee taking emergency paid leave to provide reasonable documentation after the employee's first day of leave, and an employee taking expanded family and medical leave must give his or her employer notice of leave "as is practicable."

Because of the specific notice requirements set out in the statute, the Court found the DOL exceeded its authority by requiring employees to provide documentation supporting their need for leave before taking leave. The Court clarified, however, that its decision did not negate the FFCRA's notice requirement that an employee provide appropriate documentation after an employee takes FFCRA leave.

SCOPE OF DECISION

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There are open questions about the impact of the Court's ruling outside the Southern District of New York. While the Court's order does not expressly include a nationwide injunction that would bar the enforceability of the regulations across the country, there is some possibility the Court could order these regulations to be vacated nationwide. In addition, other courts may adopt all or some of this court's reasoning in similar challenges. It is also possible the DOL will appeal the ruling and seek a stay of the Order, and eventually could issue new regulations addressing these matters.

Employers should consult with an experienced employment attorney to discuss the potential implications of the Court's ruling on their organization.

FOR MORE INFORMATION

If you have questions or want more information regarding FFCRA regulations, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Tara Eberline** at 913.253.2136 or teberline@foulston.com, or **Travis Hanson** at 913.253.2132 or thanson@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

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