



Insights: Legal Alert

COVID-19: New York Court Order Strikes Down Portions of DOL's FFCRA Regulations

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force](#) page and/or your email for updates.

On Monday, August 3, U.S. District Judge Paul Oetken, sitting in the Southern District of New York, issued an [Order](#) that struck down parts of the Department of Labor (DOL) issued [guidance](#) interpreting the leave entitlements created under the Families First Coronavirus Response Act ("FFCRA"), which took effect April 1, 2020. (We have written extensively about the FFCRA and DOL regulations previously, [here](#)).

The lawsuit brought by the State of New York claimed that the DOL exceeded the agency's authority in several aspects when it promulgated its "Final Rule" implementing the law's provisions. As a brief refresher, the statutory language of the FFCRA granted up to 80 hours of Emergency Paid Sick Leave ("EPSL") to employees who were "unable to work (or telework) due to a need for leave because of" any of six COVID-19 related criteria (paid at between 2/3 and full regular rate of pay). Similarly, the Emergency Family and Medical Leave Expansion Act ("FMLA+") created an additional up to 10 weeks of leave paid at 2/3 the employee's regular rate of pay to employees "unable to work (or telework) due to a need for leave to care for ... [a child] due to a public health emergency," like COVID-19. To offset the cost of this leave, Congress created the ability for employers to offset the expenses of paid leave through refundable tax credits.

According to the Order, the lawsuit took issue with four components of the DOL's Final Rule: the "so called 'work-availability' requirement; its definition of 'health care provider'; its provisions relating to intermittent leave; and[,] its documentation requirements." The Order struck down all four provisions, taking specific issue with the following components of the DOL Final Rule:

- that employers who are closed and/or have furloughed employees are not required to provide impacted employees with paid FFCRA leave, which leaves employees who have been laid off or furloughed outside the range of covered employees;
- that the DOL regulations allowed too broad of a definition of "health care provider," which improperly excluded too many employees from coverage;

- that employer consent was required before an employee could take intermittent leave under the FFCRA leave entitlements related to child care responsibilities, which improperly limited the opportunities employees otherwise covered under the Act; and,
- that employees were required to provide notice before taking FFCRA leave, which was an improper limitation on employee eligibility.

In concluding the Order, the Court acknowledged the DOL's efforts laboring “under considerable pressure in promulgating the Final Rule[.]” saying: “[t]his extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.” Notably, both the DOL and State of New York agreed that the portions of the Final Rule contested by the lawsuit were severable from the remainder of the regulations, which allowed the Court to “set[] aside only the offending part[s] of the rule.” Below we discuss the four portions of the DOL's FFCRA Final Rule that were invalidated by the Order.

The Work-Availability Requirement

As to the Work-Availability Requirement, the DOL's Final Rule implementing the EPSL and FMLA+ leave entitlements excluded from the benefits employers who do not have work for their employees. The Court noted that this “limitation is hugely consequential for the employers and employees covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing in turn a decrease in work immediately available for employees who otherwise remain formally employed.” The Court held that the DOL failed to meet its burden for two reasons, but “more fundamentally” because “the agency's barebones explanation for the work-availability requirement is patently deficient.” Elaborating, the Court found that the DOL's minimal support for such an “enormously consequential determination” was unproven and insufficient.

Definition of Health Care Provider

As to the definition of a “health care provider,” the Court agreed with New York that the DOL's promulgated definition in the Final Rule exceeded the agency's authority under the FFCRA. The Court noted that “[b]ecause employers may elect to *exclude* ‘health care providers’ from leave benefits, the breadth of the term ‘health care provider’ has grave consequences for employees.” After quoting the long-existing definition of ‘health care provider’ from the traditional FMLA statute, and the wholly different definition used by the DOL in its Final Rule, the Court noted that the DOL's definition was “needless to say, expansive.” The Court also stated that even the DOL conceded that “an English professor, librarian, or cafeteria manager at a university with a medical school would all be ‘health care providers’ under the [DOL's] Rule.” Finding that the DOL's definition focused improperly on the identity of the employer and not the employee, the Court held that the DOL's definition “cannot stand.”

Intermittent Leave

Regarding the DOL's regulations prohibition on intermittent leave under the FMLA+ provisions of the FFCRA,

the Court adopted portions of arguments from both New York and the DOL. Because Congress did not address intermittent leave at all in the FFCRA, the Court reasoned this provision was “precisely the sort of statutory gap ... that DOL's broad regulatory authority empowers it to fill.” However, the Court also found that the DOL's regulations concerning intermittent leave faltered at the reasonableness prong of judicial review. The Court found the DOL's regulations reasonable regarding why intermittent leave was not available where the qualifying reason for leave “logically correlate[s] with a higher risk of viral infection.” The impacted leave requests under the regulation were those where the individual had symptoms of COVID personally and/or was providing care for an individual with symptoms, both of which imply the individual's exposure to someone possibly infected. In such circumstances, the Court agreed that the public health concerns about limiting exposure justified the prohibition on intermittent leave. However, the Court was not equally persuaded by the DOL's promulgated requirement that an employer agree to the intermittent leave in the other instances, “which concededly do not implicate the same public-health considerations.” The Court held that the DOL's Final Rule was allowed “[i]nsofar as it bans intermittent leave based on qualifying conditions,” but that it was “entirely unreasoned and fails” insofar “as it requires employer consent for intermittent leave.”

Documentation Requirements

The DOL's Final Rule “requires that employees submit to their employer, ‘prior to taking [FFCRA] leave,’ documentation indicating, *inter alia*, their reason for leave, the duration of the requested leave, and when relevant, the authority for the isolation or quarantine order qualifying them for leave.” In contrast, the FFCRA requires that for FMLA+ leave, “[i]n any case where the necessity for [leave] is foreseeable, and employee shall provide the employer with such notice of leave as is practicable”; similarly, for EPSLA leave, the FFCRA requires that “[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.” The Court held that, “[t]o the extent the Final Rule's documentation requirement imposes a different a more stringent precondition to leave, it is inconsistent with the statute's unambiguous notice provisions ...”

Employer Takeaways

As with all things COVID-19 related, employers should be prepared for additional changes regarding the impact of this Order, as this is unlikely to be the final word on the subject. For sure, Judge Oetken's Order immediately impacts the obligations of employers in the Southern District of New York; however, the continuing impact of the decision has yet to be solidified. Other federal courts may not take the same view as the S.D.N.Y. when analyzing the pertinent regulations. Even employers outside of the S.D.N.Y. who are covered by the FFCRA should familiarize themselves with the changes, as it is likely other states may now bring similar challenges to the FFCRA regulations. Additionally, it is possible that the DOL may update its guidance by amending the regulations. Employers with questions about how this decision impacts their obligations related to prior, existing, or future requests for leave under the FFCRA should contact legal counsel. We will continue to monitor the situation and update as necessary.

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