Employers Beware: New York Federal Court Strikes Down the DOL's Employer-Friendly FFCRA Regulations

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By Peabody & Arnold on August 20, 2020

On August 3, 2020, the U.S. District Court for the Southern District of New York issued a decision striking down significant portions of the U.S. Department of Labor (DOL) regulations implementing the Families First Coronavirus Response Act (FFCRA). Specifically, the District Court determined that the following DOL regulations were invalid: the "work-availability" requirement; certain provisions relating to intermittent leave; the documentation requirement; and the definition of "health care provider."

While the decision has an immediate significant impact on employers in the Southern District of New York who are subject to the FFCRA, the range of its impact is not yet clear. For example, questions remain about the geographical scope of the decision and whether it applies retroactively. The impact of the decision will ultimately depend on how the DOL chooses to respond to the decision. The DOL may appeal the decision to the Second Circuit Court of Appeals and seek a stay of the ruling, issue revised regulations (a less likely option given that the FFCRA is set to expire on December 31, 2020), or the DOL may comply with the decision and modify its regulations. In the meantime, employers in other parts of New York and the United States will be eager to see if and how this decision may be used by their local courts.

This post provides an overview of the practical impact that the District Court's decision to invalidate each of these four DOL regulations has on employers. Employers are advised to consult with counsel for assistance in understanding whether and how the District Court's decision may impact their workplace.

Employees May Be Eligible for FFCRA Leave Even if the Employer Has No Work Available

As a reminder, there are two types of leave available to qualifying employees under the FFCRA: paid leave under the Emergency Paid Sick Leave Act ("EPSLA"); and leave under the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). EPSLA leave is granted to employees who are "unable to work (or telework) due to a need for leave" because of any six COVID-19-related reasons. Similarly, EFMLEA leave is available to employees who are "unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency." The DOL's regulations, however, provide that an employee whose employer "does not have work" for him/her is not eligible for leave under the EFMLEA or under the EPSLA when the qualifying reason for leave is because (1) the employee is under a quarantine order; (2) the employee is caring for an individual under a quarantine order; or (3) the employee's children's school or place of care is closed or child care provider is unavailable.

The District Court was tasked with determining whether the DOL's work-availability requirement is consistent with the FFCRA. The DOL's stated rationale for applying the work-availability requirement only to three of the six qualifying reasons for leave under the EPSLA is because the employee would be unable to work even if he or she did not have the qualifying condition. The District Court rejected the DOL's rationale, calling the DOL's differential treatment of the six qualifying reasons "manifestly contrary

to the statute's language" since all six of the qualifying reasons for leave under the EPSLA "share a single statutory umbrella provision containing the causal language." Ultimately, the District Court struck down the work-availability requirement for being "entirely unreasoned."

From a practical standpoint, this decision creates significant questions about whether furloughed employees may qualify for leave under the EPSLA and/or EFMLEA. While the decision does not expressly hold that furloughed employees *are* entitled to such leave, it certainly calls into question the DOL's previous unequivocal guidance on the issue by invalidating the work-availability rule. Employers should now consider this lack of clarity in deciding whether to furlough or lay off employees during business shutdowns or slowdowns caused by the pandemic.

Employees No Longer Need Employer Approval to Use FFCRA Leave on an Intermittent Basis

One of the most confusing aspects of the FFCRA for employers surrounds whether an employee may use leave on an intermittent basis. The FFCRA itself does not expressly address intermittent leave. As a result, the ability of an employee to use FFCRA leave on an intermittent basis is based entirely on the DOL's regulations. The DOL regulations provide that employees may take leave under the EPSLA or EFMLEA on an intermittent basis "only if the Employer and Employee agree," and so long as the leave is for certain qualifying leave conditions. The District Court acknowledged that because intermittent leave is omitted from the FFCRA entirely, the DOL has broad regulatory authority to fill in the gaps of the statute. The District Court nevertheless took issue with part of the DOL's regulatory actions.

While the District Court found the DOL's regulations justifiably prevent employees who may be infected or contagious from returning to a worksite on an intermittent basis where they could transmit the virus, the court found that there is no justifiable explanation why the employee needs the employer's consent to use intermittent leave for qualifying conditions "which concededly do not implicate the same public-health considerations." Therefore, the District Court rejected the DOL's regulations with respect to requiring an employer's consent to use FFCRA leave on an intermittent basis.

From a practical standpoint, this decision eliminates the requirement that employers need to consent to an employee's use of FFCRA leave on an intermittent basis. As an example, if the court's decision stands, an employee in New York City whose child's school or place of care is unavailable may now take leave under the EPSLA and EFMLEA on an intermittent basis without consent from his or her employer.

Employers Cannot Require Employees to Provide Documentation before Taking FFCRA Leave

The FFCRA requires that employees provide their employer with notice of the need for leave. The EFMLEA requires that where an employee's need for leave is foreseeable, the employee "shall provide the employer with such notice of leave as is practicable." The EPSLA provides that "an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time" after the first missed workday or portion thereof. The DOL's regulations require employees to submit to their employer "prior to taking [FFCRA] leave," documentation indicating their reason for leave, the duration of the requested leave, and, if applicable, the authority for the isolation or quarantine order qualifying the employee for leave.

The District Court rejected the DOL's regulatory document requirement as being in direct conflict with

the statute. According to the District Court, the DOL's "blanket (regulatory) requirement that an employee furnish documentation *before taking leave* renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice completely nugatory." The District Court further explained that the regulatory requirement is more onerous than the "unambiguous statutory scheme Congress enacted." Accordingly, the District Court struck down the DOL's documentation requirements to the extent they are a precondition to leave.

From a practical standpoint, this decision limits the ability of employers to require employees to submit documentation before taking leave. For example, while employers may still require documentation from an employee whose child's school is closed or whose childcare provider is unavailable, they cannot require the employee to provide such documentation *before* taking leave.

The Definition of Health Care Provider has been Significantly Narrowed

Under the FFCRA, employers are permitted to exclude "health care providers" from eligibility for leave under the EPSLA and EFMLEA. The FFCRA expressly incorporates the definition of "health care provider" from the Family and Medical Leave Act ("FMLA"). For purposes of the FFCRA, the DOL invoked the Secretary's authority to provide an extremely expansive regulatory definition of who qualifies as a "health care provider" to include employees who work for or contract with a health care provider.

The District Court rejected the DOL's expansive regulatory definition of "health care provider." According to the District Court, the term "health care provider," as it is used in the FFCRA, serves the purpose of allowing employers to exempt employees "who are essential to maintaining a functioning health care system during the pandemic."

From a practical standpoint, this decision requires employers to now rely solely on the FMLA's existing definition of "health care provider," which is much more limited than what the DOL's regulatory definition provided. As a result, for example, employees who provide direct care to patients, such as physicians, may remain exempt from the FFCRA, where other employees working for health care providers whose job duties are unrelated to the provision of health care, such as receptionists at a doctor's office, may now be entitled to leave under the FFCRA.

FURTHER INFORMATION

As this post illustrates, the District Court's decision significantly impacts employers located in the Southern District of New York. While we wait to see whether this is the end of the line for this decision, it would not be surprising to see similar litigation surrounding the DOL's regulations in the future around the United States. Employers are encouraged to contact a member of Peabody & Arnold's Employment Law and Litigation Practice Group for updated information and an analysis of their unique workplaces as they continue to sort through the issues surrounding COVID-19.

