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SDNY Holds that DOL "Jumped the Rail" and Strikes Down Certain DOL Rules on FFCRA Leave

On August 3, 2020, the Southern District of New York (SDNY) struck down various aspects of a U.S. Department of Labor (DOL) Rule interpreting the paid leave requirements of the Families First Coronavirus Response Act (FFCRA). While the court's decision in *New York v. DOL* may ultimately be appealed and/or stayed, in the interim, the ruling means that a larger number of employees may now be eligible for FFCRA leave in Manhattan and the rest of the SDNY (Bronx, Westchester, Rockland, Putnam, Orange, Dutchess and Sullivan counties). Employers in these locations should reevaluate documentation requirements and intermittent leave procedures in light of the court's ruling. Although this decision only applies to the SDNY, employers in other jurisdictions should plan for the possibility that the court's holdings may be adopted by other courts.

Background

On March 18, 2020, President Trump signed the FFCRA into law. The Act provides eligible employees with up to 12 weeks of paid public health emergency leave (EFMLA Leave) and up to 2 weeks of emergency paid sick leave (EPSL Leave) for certain covered reasons. On April 6, 2020, the DOL issued a final rule implementing the FFCRA (the Rule). Our prior Alerts regarding the FFCRA and the Rule can be found here, here and here. New York State thereafter filed a lawsuit in the SDNY challenging various aspects of the Rule.

Work-Availability Requirement

The FFCRA grants EFMLA and EPSL Leave to employees who are "unable to work (or telework)" due to covered reasons. Under the Rule's

The Bottom Line

While the DOL will likely appeal the SDNY's decision, which may be stayed pending appeal, employers in the SDNY should be mindful that employees who have been furloughed due to lack of work may be eligible for EFMLA or EPSL Leave. In addition, such employers should review and update their policies and practices to ensure they are not requiring documentation as a precondition to FFCRA leave, or prohibiting intermittent use of Childcare Leave. Finally, health care entities in the SDNY should review their policies to ensure that employees who do not actually provide health care services are eligible to receive EFMLA and EPSL Leave.

work-availability requirement, for an employee to be eligible for EFMLA or EPSL Leave, their employer must have work available for them. New York challenged this aspect of the Rule as overstepping the DOL's authority.

The court first held that the Rule only applied the work-availability requirement to three of the six qualifying reasons for EPSL Leave — when an employee is:

1. subject to a quarantine or isolation order related to COVID-19;
2. caring for an individual who is subject to such an order; or
3. caring for a child whose school, place of care or care provider is closed or unavailable due to COVID-19 (Childcare Leave).

However, the court ultimately struck down the work-availability requirement altogether, holding that the DOL failed to adequately explain its reasoning for it. The DOL previously applied this work-availability requirement in opining that employees who are furloughed due to unavailability of work are not entitled to EFMLA or EPSL Leave. While the explicit text of the FFCRA only provides for leave to employees who are "unable to work (or telework) due to" the covered leave reasons (*i.e.*, someone who would otherwise have work available to them), the court's decision leaves open the question of whether furloughed employees could now be eligible for such FFCRA leave. The court did not go so far as to rule that furloughed employees are entitled to leave under the FFCRA, finding only that the DOL exceeded its authority in promulgating the work-availability Rule. Nevertheless, SDNY employers should be cautious in relying on the Rule's work-availability provision to deny leave to a furloughed employee in light of the court's ruling.

"Health Care Provider" Exemption Definition

Under the FFCRA, employers may deny EFMLA and EPSL Leave to an employee who is a "health care provider or emergency responder." For purposes of this exemption, the Rule defined "a health care provider" as "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," as well as "any individual employed by an entity that contracts with any of these institutions." Under this expansive definition, the DOL's Rule would exempt from EFMLA or EPSL leave all employees of health care providers, including employees who do not actually provide health care services, which could apply to office and janitorial staff, or even, as the DOL conceded, a librarian, professor or cafeteria manager for a medical school.

The court struck down this definition as "vastly overbroad," reasoning that to be considered "health care providers," employees themselves must be capable of providing health care services, not simply doing work that is related to someone else's provision of health care services or working for an employer that provides such services. Accordingly, to the extent that health care entities previously applied this broad definition to deny FFCRA leave to their employees, they should review their policies to ensure that employees who are not actually engaged in providing health care services are granted EFMLA or EPSL Leave for covered reasons.

Intermittent Leave Availability

The Rule allowed employees to take intermittent leave only if the employer agreed, and according to the court, only in the context of Childcare Leave. While the court took no issue with the Rule prohibiting intermittent leave for other qualifying reasons that correlate to a higher risk of viral infection, it rejected the Rule's requirement that the employer must agree in order for an employee to be able to take Childcare Leave intermittently.

Employers thus cannot refuse intermittent use of Childcare Leave, but they can still prohibit intermittent use of leave that is based on an employee's risk of viral transmission (*i.e.*, when an employee is subject to a quarantine or isolation order related to COVID-19 or caring for an individual who is subject to such an order, is experiencing COVID-19 symptoms and takes leave to obtain medical diagnosis or is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services).

Documentation Requirements

The Rule included documentation requirements that an employee must submit *prior* to taking EFMLA or EPSL Leave. While the court did not strike down the contents of the documentation requirement, it found that the Rule's requirement that an employee provide such documentation *before* taking leave contradicted the FFCRA. Accordingly, while employers can require that employees provide the documentation that is delineated under the DOL Rule, under the court's ruling they cannot require that such documentation be provided before an employee is allowed to take such leave (though this can still be strongly encouraged). Employers should make sure that they obtain documentation even after the employee takes paid leave to the extent they will seek a tax credit in connection with such leave.

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