U.S. Department of Labor Revises Regulations Under the Families First Coronavirus Response Act

By Maria F. Dwyer / Sep 14, 2020

On September 11, 2020, at the close of the business day, the U.S. Department of Labor's Wage and Hour Division (DOL) posted revisions to the Families First Coronavirus Response Act (FFCRA). The revisions become effective September 16, 2020.

The revisions clarify workers' rights and employers' responsibilities under the FFCRA's paid-leave provisions. The revisions followed the decision by the U.S. District Court for the Southern District of New York in an August 3, 2020 ruling that found portions of the regulations invalid. In its decision, the Court held that certain portions of the regulations unlawfully restricted workers' eligibility for emergency family leave and paid sick leave under the FFCRA.

The Department's revisions and clarifying language do the following:

- Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them. Specifically, the DOL revised the regulation to make clear, for every qualifying reason, that leave may not be used unless the employer has work available for the employee to perform, but the employee cannot work due to the COVID qualifying reason.
- Reaffirm and provide additional explanation for the requirement that an employee have employer approval to take FFCRA leave intermittently, which is consistent with longstanding FMLA principles governing intermittent leave. The DOL examined various distinctions, including preapproval for telework, and incorporated some of its recent FAQs by addressing FFCRA for hybrid-attendance and school closures. Specifically, for the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opens the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). The DOL reasoned this does not create an intermittent need for leave, rather a new reason for leave each day of school closure.
- Revise the definition of "healthcare provider" in response to criticism that the prior definition was too broad and the court's order invalidating it. The revised regulation states that a healthcare provider is: (1) anyone deemed a healthcare provider under the FMLA, or (2) any employee who is capable of providing health services, meaning he or she is employed to provide diagnostic services, treatment services, or other services that are integrated with and necessary for the provision of patient care. The revised regulations include examples of the types of employees who qualify as healthcare providers and those who do not. Any employer exempting healthcare-provider employees from the FFCRA's paid-leave provisions should review the revised regulation to assess whether their employees still qualify for exemption.
- Revise the regulation to clarify that advance notice may not be required for use of emergency paid sick leave and that notice may only be required after the first workday or portion thereof for which the employee uses paid sick leave. After the first workday, notice should be provided "as soon as practicable" and may be provided by an employee's family member or other spokesperson if the employee is unavailable. For leave due to school closures, notice should be provided as soon as practicable. If the closure is foreseeable, prior notice should be provided in advance of the need for leave.
- Clarify that the documentation required need not be given "prior to" taking paid sick leave or expanded family and medical leave but rather may be given as soon as practicable, which in most cases will be when the employee provides notice under 29 CFR 826.90.

The regulations remain in effect until December 31, 2020.

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