Coronavirus (COVID-19) Update

September 16, 2020

The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you with currently available information regarding COVID-19's impact on leave of absence programs, but please know that this information is subject to change as the situation continues to evolve.

On August 3, 2020, the United States District Court in the Southern District of New York issued a ruling in the *State of New York v. United States Department of Labor* that invalidated four parts of the Families First Coronavirus Response Act (FFCRA). On September 11, 2020, the Department of Labor provided a response to the Court's ruling. This bulletin summarizes the Court's ruling and the DOL's response.

Updates

- Department of Labor's Response to *State of New York v. United States Department of Labor* in regards to Families First Coronavirus Response Act (FFCRA)

Department of Labor's Response to State of New York v. United States Department of Labor in regards to Families First Coronavirus Response Act (FFCRA)

Shortly after FFCRA went into effect on April 1, 2020, the State of New York filed a lawsuit against the DOL, challenging multiple conditions of the DOL's final FFCRA rules. The court issued rulings on four FFCRA provisions. The DOL has since confirmed that these clarifications/changes are applicable to all employers who are subject to FFCRA and are effective September 16, 2020.

1. **FFCRA rule: FFCRA benefits are only available when the employer has work available to be performed.**

   Court ruling: Work availability as a condition of FFCRA benefits is problematic.

   The "original" FMLA hinges on the employee actually having work to perform/a work schedule in order for FMLA leave to apply. Said another way, FMLA would not apply if an employee is not otherwise scheduled to work. Similarly, as discussed in the DOL's FFCRA FAQs, questions #23-28, FFCRA benefits are available to employees only when work is available and the employee would otherwise be expected to work. However, the Court ruled that the DOL could not require employees to actually be working in order to take leave under the FFCRA. This creates potential for employees to claim for FFCRA benefits when furloughed; temporarily laid off; whose employers have temporarily closed due to state or local orders; or whose employers have closed due to economic downturn during the pandemic.

   DOL response/final rule: The DOL stood firm that an employee's access to FFCRA is contingent on work being available to the employee, and that the qualifying FFCRA reason is the *sole* reason why the employee is unable to work. The DOL rationalized that a leave of absence "is most simply and clearly understood as an authorized absence from work," meaning that an employee who is not expected, required or scheduled to work would then not be taking a leave of absence. Furthermore, the DOL clarified that the work availability rule applies for any FFCRA-qualifying leave reason.

2. **FFCRA rule: Employer and employee must have mutual agreement to intermittent FFCRA leave. If a mutual agreement cannot be reached, then the employee may not take FFCRA leave intermittently.**

   Court ruling: Employer consent not required in order for employee to take FFCRA leave intermittently.

   In the original FFCRA rules, the DOL delineated between working onsite and teleworking for purposes of intermittent FFCRA leave. When an employee continues to work onsite, the employee is only allowed to take intermittent FFCRA

when he/she is unable to work due to care for his/her child whose school, place of care or childcare provider is unavailable to due COVID-19. Furthermore, the employer and employee must mutually agree on the intermittent leave schedule. This means that employees may not take intermittent leave for any of the other five Emergency Paid Sick Leave (EPSL) reasons. The underlying rationale for limiting intermittent FFCRA leave—while the employee continues to work onsite—was to prevent the spread of COVID-19. If an employee teleworks, the DOL allows FFCRA leave to be taken intermittently for any of the EPSL reasons, but again, the employer and employee must mutually agree on the intermittent leave schedule. The Court agreed that intermittent leave should be limited to the extent that it prevents the potential spread of COVID-19 but argued that the DOL failed to rationalize why an employer's consent is necessary when caring for one's child due to school closure or unavailability of the childcare provider since it does not bear the same public health implications.

DOL response/final rule: The DOL stood firm that the employer and employee must mutually agree on the proposed intermittent leave schedule, but further clarified its stance. The DOL refers to the FMLA, wherein intermittent leave is available when medically necessary or the employer and employee mutually agree on the intermittent leave schedule (e.g., bonding leave on an intermittent basis). The DOL further relied on the FMLA where it already established that an intermittent leave should be scheduled to be as minimally disruptive to the business when the need for leave is foreseeable. The DOL expanded this discussion to include commentary on employees who need FFCRA "intermittently" due to schools offering hybrid learning where schools operate on adjusted schedules. The DOL had previously clarified that a school is considered "closed" if it is physically closed, even if virtual learning is in session. Here, the DOL considers each day of school closure to be separate instances of FFCRA leave, rather than an "intermittent" leave. ***(Refer to questions #21, #22, #98 and #99 on the DOL's FFCRA FAQ, which has been updated to reflect the DOL's revised regulations, effective September 16, 2020).***

3. **FFCRA rule: Employers of "health care providers" may exclude such employees from FFCRA benefits.**

Court ruling: The definition of "health care provider" is excessively broad.

The DOL originally provided a very expansive definition of "health care provider" to include *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 [including] any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions." The Court stated that the DOL overstepped in its definition and included employees whose roles "bear no nexus whatsoever" to the provision and administration of healthcare services. For

example, “an English professor, librarian, or cafeteria manager at a university with a medical school are considered ‘health care providers’ under the FFCRA regulations.” The Court ruled that the definition of “health care provider” be re-established for purposes of FFCRA exemption.

DOL response/final rule: The DOL has since revised its definition of “health care provider” as follows:

i. The term “health care provider” will include employees that fall under 29 CFR 825.102 and 825.125 as defined under FMLA, which would include physicians and others who make medical diagnoses.
ii. The term “health care provider” includes an expanded list of individuals that are “important to combating the COVID-19 public health emergency.” These health care services include diagnostic services, preventative services, treatment services, or other services that are integrated and necessary to the provision of patient care. By way of example, the DOL contemplates a diagnostic technician who may not directly interact with a patient, but whose work is an integrated part of diagnosing the patient and part of the medical treatment process. Similarly, this applies to third party companies who are an integral part of patient care, such as laboratory work.
iii. The term “health care provider” will exclude those employees who are not integrated into the provision of patient care, such as IT staff, maintenance staff, Human Resources, food services, etc.

In essence, the DOL has narrowed its definition of “health care provider” for purposes of FFCRA exemption and defines “health care provider” by the *employee’s* role and responsibilities in the medical determination and diagnostic process, versus the employer institutionally being a health care provider.
(***Refer to question #56 on the DOL’s FFCRA FAQ, which has been updated to reflect the DOL’s revised regulations, effective September 16, 2020).***

4. **FFCRA rule: The employee must provide documentation *before* taking FFCRA leave to substantiate his/her leave request.**

Court ruling: Requiring all documentation to be submitted before FFCRA leave is inconsistent with FFCRA final statutes.

In its original rules, the DOL required employees to submit documentation to their employer *prior* to FFCRA leave that indicated the reason for leave, estimated duration of leave, and—when relevant—the authority issuing isolation or quarantine. The Court ruled that this requirement contradicts other portions of FFCRA’s statutes. The Emergency FMLA (EFMLA) provides that if the need for EFMLA leave is foreseeable, the employee “shall provide employers with notice of the leave as soon as practicable.” Similarly, Emergency Paid Sick Leave (EPSL) provides that “[a]fter the first workday (or portion thereof) an employee receives paid sick time under

[EPSL], an employer may require the employee to follow reasonable notice procedures in order to continue receiving [EPSL]." This means that requiring documentation *before* FFCRA leave is inconsistent with the aforementioned EFMLA and EPSL notification rules. The Court acknowledged that the need for documentation should not be eliminated; simply, the documentation cannot be required as a precondition of taking FFCRA leave and employers should allow an employee to go on leave before all documentation is gathered.

DOL response/final rule: The DOL has since amended and clarified that documentation substantiating FFCRA leave does not need to be provided *before* taking such leave, and instead may be provided as soon as practicable. The DOL reaffirmed, though, that in most cases the employee would provide documentation when the employee provides notice of the need for FFCRA leave considering employees are required to provide reasonable notice of their need for leave. (***Refer to question #16 on the DOL's FFCRA FAQ, which has been updated to reflect the DOL's revised regulations, effective September 16, 2020).***

The DOL has also added questions #101 through #103 on its FFCRA FAQ specifically addressing the Court ruling.