LEGAL UPDATES

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COVID-19-related FFCRA Employee Leave Scrutinized in U.S. District Court Opinion

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U.S. DISTRICT COURT INVALIDATES PORTIONS OF EMPLOYEE LEAVE WITHIN FFCRA

Last week, the U.S. District Court for the Southern District of New York issued an opinion in *State of New York v. U.S. Department of Labor*, which declared that Department of Labor (DOL) exceeded its authority and failed to act in accordance with the law when it issued its Temporary Final Rule under the Families First Coronavirus Response Act (FFCRA). The FFCRA entitles employees to federally subsidized paid leave if they are unable to work due to a specified COVID-19-related reason. The Southern District of New York's order severed and vacated several portions of the challenged provisions of the DOL's Final Rule while allowing the balance of the regulations to remain in force.

While the decision could expand the number of employees entitled to paid leave under the FFCRA, the effect and geographic impact of the Court's decision is less certain outside of the Southern District of New York.

General overview of the FFCRA

The FFCRA, which is in effect until December 31, 2020, applies to private employers with less than 500 employees as well as public employers. It requires covered employers to provide 80 hours of COVID-19-related emergency paid sick leave if an employee:

1. Is subject to any federal, state or local quarantine or isolation orders related to COVID-19;

2. Has been advised by a healthcare provider to self-quarantine due to COVID-19-related concerns;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an individual who is subject to a quarantine order or advised to self-quarantine;
5. Is caring for their child whose school, place of care or childcare provider is closed or unavailable, due to COVID-19 precautions; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

In addition, covered employers are required to provide 12 weeks of job-protected leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) for employees who have worked for their employer for at least 30 days and are unable to work in order to care for a son or daughter whose school or childcare provider is closed or unavailable due to COVID-19.

On April 1, 2020, the DOL Wage and Hour Division published its Final Rule to implement regulations under the FFCRA. Due to exigent circumstances presented by the pandemic, the DOL issued the Final Rule under the Administrative Procedure Act's (APA) "good cause" exception, which permits federal agencies to dispense with the APA's protracted rulemaking procedures that require notice to the public and an opportunity for the public to comment on a proposed rule.

Husch Blackwell's previous commentary regarding the FFCRA and the DOL's Final Rule are posted in the firm's COVID-19 Toolkit.

Which provisions of the Final Rule were challenged?

On April 14, 2020, the State of New York filed a complaint in the Southern District of New York alleging that the DOL unlawfully limited workers' eligibility for paid sick leave and emergency paid family leave benefits under the FFCRA and imposed burdens and obligations on employees that the agency either lacked the authority to impose or imposed contrary to law. New York requested the Court vacate and set aside the following four provisions:

1. The work-availability requirement related to paid leave under the Emergency Paid Sick Leave Act (EPSLA) and the EFMLEA;
2. The definition of "healthcare provider" for purposes of the EPSLA and EFMLEA;

3. The restrictions on intermittent leave provided under the EPSLA and EFMLEA that require employees to obtain the employer's consent to take intermittent leave; and

4. The documentation requirements imposed on employees who request leave benefits under the FFCRA.

What portions of the regulations did the Court sever and void?

The District Court evaluated the challenged provisions and applied the *Chevron* doctrine to determine whether the terms of the FFCRA were ambiguous and whether the DOL's interpretation of the statute was entitled to deference. Under the *Chevron* doctrine, Courts are required to defer to an administrative agency's reasonable interpretation of statutes that are within their regulatory authority to issue regulations and interpret the law. Even after affording the DOL deference under the broad *Chevron* doctrine, however, the Court found that the following portions of the Final Rule violated the APA and held that the offending provisions should be severed from the Final Rule.

Work-availability requirement

In its Final Rule, the DOL imposed an additional restriction on the receipt of benefits under the EPSLA and EFMLEA, by requiring the employer to have work available for the employee in order for the employee to receive leave under the FFCRA (the work-availability requirement). According to the express terms of the Final Rule, the work-availability requirement limited employee's entitlement to paid leave for three of the qualifying reasons for leave under the EPSLA (reasons 1, 4 and 5, above) and limited employees from receiving any leave benefits under the EFMLEA. However, the DOL's published guidance states that the work-availability requirement applies to all leave taken under the EPSLA and EFMLEA.

In reviewing the work-availability requirement, the Court noted that the requirement was "hugely consequential" because it excluded employees from receiving benefits who were unable to work because the pandemic caused a widespread shutdown resulting in unemployment or a decrease in work. Ultimately, after reviewing the text of the Final Rule and the rational provided by the DOL, the Court struck the work-availability requirement and determined that the agency's "barebones explanation" was "patently deficient" and its interpretation was not in accordance with the law.

As a result, under the Court's interpretation, employees may be entitled to leave under the FFCRA even if their employer has no work for them to perform.

Definition of "healthcare provider"

Under the FFCRA, employers may elect to exclude healthcare providers from receiving leave. The DOL's Final Rule defined "healthcare providers" as:

> anyone employed at any doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,
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> as well as
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> any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The DOL agreed that its expansive definition would allow an "English professor, librarian, or cafeteria manager at a university with a medical school" to be classified as healthcare providers under the Final Rule. However, the DOL argued that its expansive definition was required to ensure that non-caregivers who are essential to maintain the functioning of the healthcare system remained working during the pandemic.

After weighing the *Chevron* factors, the Court described the DOL definition as "vastly overbroad" and determined that the agency inappropriately focused on the identity of the employer instead of the role of the employee. The Court held that the DOL's inclusion of employees "whose roles bear no nexus whatsoever to the provision of healthcare services" was inappropriate and struck down the DOL's definition of "healthcare provider."

Intermittent leave

The Final Rule permits employees to take paid sick leave under the EPSLA and EFMLEA intermittently only for certain qualifying reasons *and* only if the employer consents to the employee's request for intermittent leave. Specifically, the Final Rule permits teleworking employees to take intermittent leave with employer consent for any leave reason but restricts employees working on-site from taking intermittent leave for any reason other than to care for a child whose school or childcare provider is closed or unavailable due to COVID-19.

The Court concluded that DOL regulations that ban employees from taking intermittent leave for certain qualifying reasons that may indicate that an employee is at higher risk of viral infection were reasonable and entitled to deference. As a result, the Court upheld those restrictions in the Final Rule.

However, the Court concluded that the requirement that employers consent to intermittent leave was "entirely unreasoned" and not entitled to deference. The Court vacated the DOL consent restriction on intermittent leave related to family leave and sick leave requests to care for a child whose school is closed, or childcare provider is unavailable.

Documentation requirement

In addition to the notice requirements contained in the FFCRA, the DOL regulations require employees to provide documentation regarding their leave request prior to taking leave under the EPSLA and EFMLEA.

The Court determined that the documentation requirements imposed by the DOL were more onerous than the unambiguous notice requirements mandated by the FFCRA and unlawfully conditioned leave on the requirement of providing additional documentation. The Court invalidated that portion of the regulation that conditioned access to leave benefits on an employee's provision of supporting documentation *before taking leave*.

What is the impact of Court's opinion?

The impact of the decision is, unfortunately, not yet clear and depends on how the DOL responds to the Court's order. If the DOL decides to abide by the Court's order, it may amend its Final Rule to comply with the opinion. In the alternative, the DOL may choose to appeal the Court's order to the U.S. Court of Appeals for the Second Circuit and may seek a stay of the order pending appeal. Until the DOL responds to the opinion, the situation remains in legal limbo.

If the Court's order were to be upheld (or if the DOL abides by the opinion and amends the Final Rules in compliance), there would likely be a substantial increase in the number of employees entitled to leave under the FFCRA. Tax credits received for leave provided to employees should not be affected.

What this means to you

While the order does not appear on its face to have immediate national application, employers should assess how to administer leave requests under the FFCRA in light of this Southern District of New York's opinion. It is conceivable that other Federal Courts may disagree with the Southern District of New York's decision, which would leave employers with additional uncertainty.

The geographic impact of the Court's ruling outside of New York is unknown. Employers should monitor the DOL's response to the Court's order, which could include an appeal, a stay, or amended rules and guidance. We will continue to monitor the DOL's response to this opinion and will continue to update clients as necessary.

In the meantime, please seek legal assistance to discuss what, if any, changes your organization should consider to reduce the organization's risk of legal liability. Such changes may include:

Analyze the risks associated with denying FFCRA leave to employees who have been furloughed or for whom the organization does not have work.

When determining which employees are healthcare providers and may be excluded from benefits under the FFCRA, be judicious in denying leave to employees who provide healthcare services. Additional caution should be used if an employer is considering denying leave to an individual who is not involved in maintaining the provision of healthcare.

Consider providing intermittent FFCRA leave upon request to employees who work remotely and to on-site employees who require leave to care for a child whose school or childcare provider is closed or unavailable due to COVID-19.

Avoid denying leave to employees who do not provide the required documentation prior to the date that leave is required. Consider implementing policies that provide employees a reasonable period of time to provide the required documentation after a request for leave is made.

Contact us

If you have questions about your obligations regarding the FFCRA benefits or require assistance to determine eligibility for benefits given the Court's decision, contact Kate Leveque, Kayla Loveless or your Husch Blackwell attorney.

Tracey Oakes O'Brien, Knowledge Manager, is a co-author of this content.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.