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Amendments to FFCRA Regulations Effective September 16, 2020

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On September 11, 2020, the Wage and Hour Division of the Department of Labor (DOL) released unpublished revisions to portions of the Temporary Final Rule published on April 1, 2020, under the Families First Coronavirus Response Act (FFCRA). The September 11, 2020 Amendments are in response to the U.S. District Court for the Southern District of New York's opinion in *State of New York v. U.S. Department of Labor*, which severed and vacated several provisions of the Final Rule. Our commentary on the Court's opinion in *State of New York v. U.S. Department of Labor* is posted in the firm's COVID-19 Toolkit.

The September 11, 2020 Amendments are effective September 16, 2020, through December 31, 2020, in accordance with the FFCRA sunset provision. This alert summarizes several notable portions of the September 11, 2020 Amendments.

An overview of FFCRA benefits and *State of New York v. U.S. Department of Labor*

As we discussed in our August 12, 2020 commentary, the FFCRA provides two types of leave to employees of private employers with less than 500 employees as well as public employers. The Emergency Paid Sick Leave Act (EPSLA) 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 14, 2020, the State of New York filed a complaint in the Southern District of New York (S*tate of New York v. U.S. Department of Labor*) 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. On August 3, 2020, the U.S. District Court for the Southern District of New York issued an opinion that severed and vacated several provisions of the Final Rule, including the definition of "healthcare provider" for purposes of EPSLA and EFMLEA; the work-availability requirement related to paid leave under EPSLA and the EFMLEA; the requirement of employees to obtain the employer's consent to take intermittent leave; and timing for employees to provide documentation to support a request for benefits.

On September 11, 2020, the DOL issued several amendments to the Final Rule in response to the Court's opinion in *State of New York v. U.S. Department of Labor*. Within its commentary related to the September 11, 2020 Amendments, the DOL appears to concede that *State of New York v. U.S. Department of Labor* has national application (a point that was unclear) and that the specified provisions were vacated as of August 3, 2020. This leaves open the question of what regulations were applicable in certain instances between August 3 and September 16, 2020.

DOL limits definition of health care providers exempt from leave

Final Rule

The FFCRA permits employers to exclude healthcare providers and emergency first responders from eligibility for benefits under EPSLA and EFMLEA. Under §826.30(c)(1) of the Final Rule, the DOL

defined “healthcare provider” expansively to include virtually any employee whose employer provides healthcare services.

Southern District of New York ruling

The U.S. District Court concluded that the definition adopted by the DOL was vastly overbroad, and that it incorrectly focused on the identity of the employer rather than the skills, role, duties and capabilities of the employee. The Court held that the DOL’s inclusion of employees “whose roles bear no nexus whatsoever to the provision of health care services” was inappropriate and invalidated the DOL’s definition of healthcare provider.

September 11, 2020 Amendments

The DOL adopted a revised definition of “healthcare provider” to be used when determining whether an employee can be excluded from eligibility for FFCRA leave. Under the September 11, 2020 Amendments, the definition of healthcare providers who may be excluded from FFCRA leave is limited to employees who are healthcare providers under existing Family and Medical Leave Act (FMLA) regulations under 29 CFR 825.102 and 825.125 and employees who “are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care,” as defined in the amended regulations. The definition also includes individuals who are employed to provide services that are integrated with and necessary components to the provision of care but who may not directly interact with the patients, and/or who may not report to or directly assist another healthcare provider, such as laboratory technicians.

The DOL has also identified several classifications of employees who may be considered healthcare providers exempt from FFCRA leave. In addition to traditional healthcare providers permitted to issue certification for the purpose of FMLA leave, such as physicians, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, clinical social workers, advanced practitioners and Christian Science practitioners, the definition includes nurses, nurse assistants, medical technicians and others who directly provide services, as well as laboratory technicians. The DOL has also provided a non-exhaustive list of employees who are not considered healthcare providers for the purpose of determining FFCRA eligibility despite that their work could impact the provision of healthcare services, including IT staff, building maintenance staff, cooks, human resource personnel, billers, records managers, consultants and food service workers.

The DOL also provided a non-exhaustive list of locations that may employ healthcare providers, including a “doctor's office, hospital, healthcare center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided.” The DOL cautions,

however, that not all employees at the listed locations fall under the definition of healthcare provider, and employees working at other locations may be a healthcare provider. The lists are provided as guideposts.

DOL retains work-availability requirement

Final Rule

In its Final Rule, the DOL imposed an additional restriction on the receipt of benefits under 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 stated that the work-availability requirement applies to all leave taken under the EPSLA and EFMLEA.

Southern District of New York ruling

The Court invalidated the work-availability requirement because the DOL failed to:

1. Sufficiently explain its reason for limiting the work-availability requirement in its Final Rule to only three of the six qualifying events; and
2. Provide the Court with more than a "terse explanation" for narrowly construing the language of the FFCRA to require the qualifying event to be the sole reason for the employee's inability to work.

September 11, 2020 Amendments

The DOL's September 11, 2020 Amendments reaffirm the work-availability requirement set forth in Section 826.20 and extend the requirement as a prerequisite to eligibility for *all leave* provided under the EPSLA and the EFMLEA (collectively referred to as "FFCRA leave"). The DOL continues to assert that FFCRA leave is available only if the qualifying event necessitating leave is the sole basis for the employee's inability to work and continues to exclude from eligibility for leave employees for whom there is no work available.

The DOL provides the following reasons in support of its interpretation of the FFCRA:

1. Leave under the FFCRA must be interpreted consistently with the mandatory leave requirements under the FMLA (which was amended to include the provisions of the EFMLEA). The DOL generally defines "leave" as an authorized absence from work. Under FMLA

regulations, if an employee is not expected to work due to a temporary cessation of operations, the time during the cessation of the operations is not included as part of the employee's FMLA leave. Analogously, if the employer does not have work for the employee to perform, then an employee is not entitled to leave under the FFCRA.

2. The absence of a work-availability requirement would lead to absurd results and to disparate treatment between employees who are on FFCRA leave and those who are not. For example, in the event of a furlough or temporary shut-down of the business, employees who are on FFCRA leave would continue to be paid while those not on FFCRA leave would not be paid.

3. The work-availability requirement furthers the purpose of discouraging sick employees to stay at home whereas employees would not attempt to go to work if no work is available.

4. The unavailability of work must be based on legitimate, non-discriminatory and non-retaliatory business reasons, and should not be used to deny employees of FFCRA leave because employees are protected by anti-retaliation provisions.

5. The CARES Act provides other relief measures for the benefit of employees who may be laid off or for whom the employer no longer has work available, such as the Payroll Protection Program, expanded unemployment insurance benefits, and a refundable tax credit of up to $2,500 for eligible joint filers and $500 per qualifying child.

DOL retains consent requirement but reconstrues application of intermittent leave

Final Rule

The Final Rule permits intermittent leave for certain qualifying conditions under the EPSLA and EFLMLA, but only with the employer's consent. Teleworking employees are permitted to take intermittent leave for any qualifying condition with the employer's consent. Employees who work on-site are permitted to take intermittent leave only to care for a son or daughter whose school or childcare service is closed or unavailable due to COVID-19 and only with the employer's consent.

Southern District of New York ruling

The U.S. District Court upheld the ban on intermittent leave as to employees seeking to return to the worksite and who take leave for qualifying events resulting from an isolation order, quarantine or infection (items 1-4 above) because the ban is based on reasonable health considerations and prevents transmission of the virus at the worksite. However, the Court concluded that the requirement that employers consent to intermittent leave was "entirely unreasoned" and vacated the DOL consent restriction.

September 11, 2020 Amendments

The DOL's September 11, 2020 Amendments reaffirm the DOL's position that employees must obtain consent from the employer to take intermittent leave under the FFCRA. To comply with the District Court order, the September 11, 2020 Amendments clarify several significant aspects of the intermittent leave provisions.

According to the DOL, the consent requirement is adopted from and consistent with the provisions of the FMLA that require employers to consent to intermittent leave requests related to the care of a newborn or adopted child. The DOL clarified that the purpose of the consent prerequisite is to achieve a balance between the employee's need for leave and the employer's need to avoid disruption of business operations. The DOL noted that the intermittent leave consent requirement for teleworkers is consistent with the FFCRA's general requirement that employees obtain an employer's consent to perform work remotely.

Under the September 11, 2020 Amendments, employer consent is required if an employee who is teleworking desires to take intermittent leave for any qualifying event or if an employee working on-site desires to take intermittent leave to care for a child whose school or childcare service is closed or unavailable under the EPSLA (condition number 5, above) and EFMLEA. The September 11, 2020 Amendments continue to prohibit on-site employees from taking intermittent leave under the EPSLA for all other qualifying conditions (1-4, above).

While reaffirming its requirement that employers consent to intermittent leave, the DOL distinguished between blocks of leave taken intermittently that are related to a *single qualifying event* and a resumption of leave taken over a non-consecutive period of time related to *new qualifying events*. The former is defined as intermittent leave while the latter is simply considered "a separate reason for FFCRA leave." To illustrate, if an employee takes leave on certain days during the week when a school operating on a hybrid basis is closed, each day that leave is requested is a separate and new qualifying event. The qualifying event ends when the school reopens even if it reopens on the next day. The DOL emphasized that leave may be taken in small increments (less than a full day) and is not forfeited if the leave is not entirely used during one consecutive period of time.

DOL revises timing requirement related to FFCRA leave notice and documentation

Final Rule

Section 826.100(a) of the Final Rule requires employees seeking FFCRA leave to submit documentation that describes the requested duration of the leave and the qualifying event necessitating leave *before taking leave*. Subsections (b) through (f) of §826.100 address additional documentation that must be provided based on the specific qualifying event that necessitates the leave request.

Southern District of New York ruling

The U.S. District court held that the requirement to provide documentation prior to taking leave is inconsistent with the FFCRA's unambiguous notice provisions. The court invalidated that portion of the regulation that conditioned access to leave benefits on an employee's provision of documentation before taking leave.

September 11, 2020 Amendments

The September 11, 2020 Amendments clarify that employees do not need to provide documentation prior to taking FFCRA leave, but documentation must be given "as soon as practicable, which in most cases will be when the employee provides notice [of the need for leave] under §826.90."

The Department also clarified the timing and delivery of notice of the need for FFCRA leave, which must occur "as soon as practicable." For EPSLA leave, notice may not be required in advance and may only be required after the first workday (or portion thereof) for which the employee takes paid sick leave. In contrast, if the need for EFMLEA leave is foreseeable, prior notice may be required.

What this means to you

At this time, employers should adjust written policies to reflect the changes in the September 11, 2020 Amendments. The following points should be considered when making changes to ensure compliance:

Employers of healthcare providers should carefully review all requests for FFCRA leave using the limited definition set forth in the September 11, 2020 Amendments. We encourage healthcare employers to consult with counsel to review determinations regarding healthcare employees' entitlement to FFCRA leave and to assess whether past determinations should be reevaluated.

With respect to the work-availability requirement and the intermittent leave consent requirement, the DOL maintained its requirements and provided additional explanations of the restrictions. At this stage, employers can continue to provide FFCRA leave only when there is work available for employees and can require approval for intermittent leave. Employers should follow a consistent policy in approving intermittent leave requests.

The DOL provided much needed clarification as to how FFCRA leave should be applied as schools open virtually or on a hybrid basis and parents attempt to plan for childcare on days that classes are held online. The DOL's website includes additional helpful information on these issues. Employers

should ensure compliance with the DOL's regulations and guidance when evaluating requests for leave related to school closures or virtual learning.

Employers should review and revise FFCRA leave policies to require employees to provide notice and documentation related to FFCRA leave requests as soon as practicable.

Contact us

If you have questions about your obligations regarding the FFCRA benefits or require assistance to determine eligibility for benefits given the September 11, 2020 Amendments, contact Kate Leveque, Barbara Grandjean 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.