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Client Alert: United States Department of Labor Revises FFCRA Leave Rules

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Since it was signed into law on March 18, 2020, confusion surrounding certain provisions of the Families First Coronavirus Response Act ("FFCRA" or the "Act") has left employers concerned about their compliance. The recent federal court decision out of the Southern District of New York added another layer of confusion after the court struck down several provisions of the FFCRA regulations. While unclear from the court's decision, the United States Department of Labor ("DOL") has taken the position that the court's decision applied nationwide. In an effort to un-muddy the waters, the DOL released revisions and clarifications to the regulations effective September 16, 2020.

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The FFCRA contains two key provisions of law: the Emergency Family and Medical Leave Expansion Act ("EFMLA") and the Emergency Paid Sick Leave Act ("EPSLA"). The DOL is charged with administering the FFCRA, and used its rulemaking authority to draft regulations related to the Act's implementation.

Shortly after the DOL issued its regulations implementing the FFCRA, the New York Attorney General filed suit, arguing that the DOL exceeded its rulemaking authority by promulgating certain provisions of the Act that unduly restricted paid leave. The court agreed and vacated four aspects of the DOL's FFCRA regulations finding as follows:

- The regulations improperly denied leave to employees when their employer has no work for

them to do (for example, while on furlough); (commonly referred to as the "work availability" requirement);
- The regulations overly restricted employees' right to take paid leave on an intermittent basis;
- The regulations improperly required that workers must provide supporting documentation for their need for FFCRA leave prior to taking it; and
- The DOL's definition of a "health care provider" employee for whom leave could be denied was overboard and conflicted with the FFCRA's definition.

In response, the DOL has issued revised regulations doubling down on some of its original positions, while providing some regulatory changes in line with the court's ruling. The revised regulations affect employers nationwide and are effective September 16, 2020. Specifically, the revised regulations:

- Reaffirm that EPSLA and EFMLEA leave may be taken only if the employer has work available from which an employee can take leave;
- Reaffirm that intermittent leave under FFCRA can only be taken with employer approval;
- Clarify the "as soon as practicable" timeline for when an employee must provide notice of the need for leave and supporting documentation, which may be after leave has already begun for EPSLA purposes; and
- Amend the definition of "health care provider" for whom leave can be denied to only cover employees who meet the definition of that term under the Family Medical and Leave Act ("FMLA") or 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, which, if not provided, would adversely impact patient care.

While these changes affect all employers covered by the FFCRA, they have significant impact on health care employers. Under the previous regulation, all employees of health care providers could be excluded from taking leave under the FFCRA. The revised regulations require employers to undertake a position-specific analysis of whether a worker meets the definition of health care provider before deciding whether leave is permitted. Under the revised regulations only employees who are employed to perform the following types of health care services can be denied FFCRA leave:

- Diagnostic: Includes taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.
- Preventive: Includes screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.
- Treatment: Includes performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.
- Integrated: Those services that are "integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, including bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples."

The regulations specifically identify types of employees who may continue to be excluded from taking FFCRA leave as defined in the FMLA, including: licensed doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, and chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, nurses, nurse assistants, medical technicians, and others directly providing diagnostic, preventive, treatment, or other integrated services; employees providing such services "under the supervision, order, or direction of, or providing direct assistance to" a health care provider; and

employees who are "otherwise integrated into and necessary to the provision of health care services," such as laboratory technicians who process test results necessary to diagnoses and treatment. Additionally, the revised regulations now expressly prohibit denying FFCRA leave to those employees who ensure that health care providers can function, but do not actually provide such health care services, such as "information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers."

All employers covered by the FFCRA need to promptly review their policies for compliance with the revised DOL regulations. Before denying FFCRA leave to an employee as a "health care provider," employers should consult with legal counsel.

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