BURR ALERT

Was the Health Care Provider Exception in the Families First Coronavirus Response Act Just Struck Down?

By Matthew Scully and Caroline Page August 2020

New York District Court

On August 3, 2020 a district court judge for the Southern District of New York issued an opinion striking down certain portions of the Department of Labor's Final Rule interpreting the Families First Coronavirus Response Act ("FFCRA").

For background, the FFCRA has two portions that provide certain leave to eligible employees who cannot work or telework due to certain circumstances related to COVID-19. The Emergency Family and Medical Leave Expansion Act ("EFMLA") provides paid (except the first week) leave to eligible employees who cannot work or telework because they must care for a child whose school or place of care is closed due to COVID-19. The Emergency Paid Sick Leave Act ("EPSLA") provides up to 80 hours of paid leave for eligible employees who cannot work or telework due to certain specified circumstances related to COVID-19. Shortly after the passage of the FFCRA, the Department of Labor ("DOL") issued interpretative guidance of the law, called its Final Rule.

The State of New York brought suit against the DOL under the Administrative Procedure Act, claiming that certain portions of the Final Rule exceed the DOL's authority under the Act. Both the State of New York and the DOL filed motions for summary judgment. The district court sided with the State of New York, granting the majority of its motion for summary judgment.

First, the district court's ruling rejected the Final Rule's definition of the term "health care provider" as used in the EFMLA and the EPSLA. Both leave provisions allow employers to exclude "health care providers" from the FFCRA's leave provisions. The district court judge deemed the Final Rule's definition too "expansive." The court found that the Final Rule's definition should be more narrowly tailored to those furnishing healthcare services and not on any person whose work is "remotely related to someone else's provision of healthcare services."

In addition to the Final Rule's definition of "health care provider," the Southern District of New York also struck down several other portions of the Final Rule. First, the court granted summary judgment on New York's challenge to the "work availability" requirement. Both the EFMLA and the EPSLA only extend leave to those who cannot work or telework due to specific reasons. The Final Rule clarifies that EFMLA and EPSLA leave does not apply where the employer does not have work for the employee to perform. The Southern District of New York agreed with the State and struck down the requirement.

Second, the court struck down the Final Rule's requirement that the employer must consent to the use of intermittent leave but preserved the Final Rule's intermittent leave ban based on qualifying conditions that implicate an employee's risk of viral transmission of COVID-19. Finally, the Southern District of New York struck down the Final Rule's requirement that employees submit documentation prior to taking FFCRA leave, stating the new law only requires notice prior to taking leave.

Understandably, many employers may question the implications of the Southern District's ruling. First and most importantly, this decision only strikes down the stated provisions of the Final Rule within the Southern District of New York. The court's ruling does not displace the Final Rule for the rest of the country. However, employers should carefully monitor for updated guidance or rules that the DOL may issue, whether the DOL appeals the decision and also whether other courts follow the Southern District of New York interpretation of the DOL's Final Rule.

However, while employers wait for additional guidance, there are a few practical issues to keep in mind:

- Carefully consider employee requests to take intermittent FFCRA leave. The court's decision suggests, for example, employees should be able to use intermittent leave where they need to care for a child whose school or place of care is closed due to COVID-19. While there is nothing wrong with agreeing with an employee's request to use intermittent leave, employers who deny such requests are potentially susceptible to litigation.
- Carefully consider that employees not working due to a lack of work may be entitled to FFCRA leave if they otherwise meet the eligibility requirements to be entitled to benefits.
- Carefully consider employment actions or the denial of benefits if an employee does not turn in paperwork supporting leave before the leave. Under the court's decision, rigid requirements that employees must turn in supporting paperwork before being eligible for leave could potentially violate the FFCRA.
- Entities that have used the "health care provider" exemption should carefully consider the position being exempt going forward and whether that position is actually providing health care services.

For questions about FFCRA compliance:

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