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NEW YORK FEDERAL COURT INVALIDATES PORTIONS OF DOL RULE CONCERNING WHO QUALIFIES FOR LEAVE UNDER THE FFCRA

August 13, 2020

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Last week, the Southern District of New York[1] invalidated portions of the U.S. Department of Labor (DOL) final rule[2] (Final Rule) concerning who qualifies for coronavirus-related emergency paid sick and family leave and the requirements for intermittent leave under the Families First Coronavirus Response Act (FFCRA).[3] New York challenged the Final Rule in four key areas: (1) provisions excluding employees from leave benefits when their employers do not have work for them; (2) the DOL's interpretation of the FFCRA's exclusion of health care providers from emergency paid sick leave and family leave; (3) restrictions on taking intermittent leave; and (4) documentation requirements for intermittent leave. The New York federal court found that the Final Rule exceeded the bounds of the FFCRA in nearly all four challenged areas, thereby making COVID-related leave available to more employees under the FFCRA.

The Final Rule's Work-Availability Requirement Is Beyond the Scope of the FFCRA

The FFCRA has two key employee leave components, the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).[4] Under the Final Rule, these leave benefits are not available to an employee who does not have work to perform, despite meeting all of the other criteria set forth under the EPSLA or EFMLEA. In addition, the Final Rule applies the work-availability requirement to only three of the six qualifying conditions under the EPSLA. Applying the Chevron two-step framework[5], the court found that the Final Rule is not consistent with the FFCRA and exceeds the DOL's authority under the EPSLA and EFMLEA. As a result, the court vacated the DOL's work-availability requirements in the Final Rule.

The Final Rule's Definition of Health Care Provider Is Too Broad

Under the Final Rule, an employer may deny COVID-related emergency paid sick and family leave to an employee who is "a health care provider or an emergency responder." The EFMLEA is an amendment to the Family and Medical Leave Act (FMLA), which defines a "health care provider" as "a doctor of medicine or osteopathy who is authorized to practice

medicine or surgery (as appropriate) or "any other person determined by the Secretary [of the DOL] to be capable of providing health care services." The EPSLA uses this same definition.

The court concluded that the Final Rule's definition of "health care provider" far exceeds the definition provided under the FMLA.[6] Indeed, the DOL conceded that *any* employee of a medical school, including an English professor or cafeteria manager, would fall under its definition. The court found that the FFCRA focuses on the employee and requires that the employee be capable of providing health care services, whereas the Final Rule hinges on the identity of the employer and includes employees who have "*no nexus whatsoever* to the provision of [health care] services, except the identity of their employers." As a result, the court struck down the DOL's definition of "health care provider" for purposes of the EPSLA and EFMLEA, thus broadening the number and types of employees who can seek COVID-related leave.

Intermittent Leave Under the FFCRA Does Not Require Employer's Consent

The Final Rule allows paid sick leave or expanded family and medical leave on an intermittent basis where the employer and employee agree and only for a subset of qualifying conditions. The FFCRA is silent regarding intermittent leave so the court noted that the DOL's intermittent leave rules are entitled to deference, if they are reasonable. The court found that the need for a qualifying reason for leave "advances Congress's public-health objectives by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus." Accordingly, the court ruled this portion of the Final Rule should survive to the extent it prohibits "intermittent leave based on qualifying conditions that implicate an employee's risk of viral transmission."

However, the provision requiring an employer's consent did not survive the court's review. The court noted that the Final Rule fails to explain why blanket employer consent is needed, and as a result, concluded that the rule "is entirely unreasoned" and fails a Chevron analysis. Accordingly, the court struck down the employer consent requirement of the Final Rule.

Documentation for Leave Under the Final Rule Is Inconsistent with the FFCRA's Notice Requirements

Under the Final Rule, before taking leave under the FFCRA, an employee must provide her employer with documentation indicating, among other things, the qualifying reason for leave, the dates of the requested leave, and the name of the governmental authority or healthcare provider who ordered or advised the employee to isolate or quarantine. The FFCRA is silent, however, about any specific documentation requirement but does have certain notice requirements for employees seeking leave.[7] The court ruled that the DOL's documentation requirements were inconsistent with the FFCRA notice requirements and therefore vacated this portion of the Final Rule as well.

Looking Forward

Technically, the court's ruling applies only in the Southern District of New York (and arguably the Second Circuit) and does not have nationwide application. As a result, employers covered by the FFCRA who operate in New York and other states will need to apply different standards to employee leave related to COVID-19, if the ruling is not stayed pending a probable appeal by the government. In addition, other states might file copycat lawsuits against the DOL and a patchwork of varying rulings could develop. Our lawyers are ready to help you navigate these and all other employment issues arising from the current public health crisis.

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[1] The decision was issued on August 3, 2020 in State of New York v. United States Department of Labor, No. 20-CV-3020 (S.D.N.Y.) and the court's opinion can be found here.

[2] The DOL's temporary rule became operational on April 1, 2020 and is effective from April 2, 2020 through December 31, 2020. The final rule was officially published in the Federal Register on April 6.

[3] The FFCRA generally applies to employers with 500 or fewer employees.

[4] Under the EPSLA, employers are required to provide paid sick leave to employees who are unable to work or telework "due to a need for leave because of" one of six qualifying COVID-19-related conditions. The EFMLEA allows paid leave for employees who are unable to work or telework to care for a dependent child due to the public health emergency.

[5] Under Chevron U.S.A. Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984), "if the statute is silent or ambiguous with respect to the specific issue," courts will defer to an agency's reasonable interpretation.

[6] The Final Rule's definition of a "health care provider" includes, in part:

> 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, [e]mployer or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

[7] Under the EPSLA, the employer may require the employee to follow reasonable notice procedures to keep receiving paid sick time after the first workday (or portion thereof) that the employee receives paid sick time. In addition, the EFMLEA allows an employer to require an employee to provide "such notice of leave as is practicable."