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U.S. Department of Labor Issues New Regulations for the Families First Coronavirus Response Act

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On September 11, 2020, the U.S. Department of Labor ("DOL") issued a new temporary rule interpreting and clarifying the employee leave provisions under the Families First Coronavirus Response Act ("FFCRA"). The new rule, which arose from a decision by a New York federal district court striking down portions of the "old" rule, revises and supersedes the DOL's previous rule limiting eligibility of certain employees.

Work Must Be Available.

The new rule, effective September 16, reaffirms the DOL's stance that employees are eligible for FFCRA leave "only if the employee has work from which to take leave." However, the DOL continues to defend its April rule, and offered a "fuller explanation for its original reasoning regarding the work-availability requirement", albeit with clarifications to the rule's regulatory language.

The FFCRA, which took effect April 1, 2020, requires most employers with under 500 employees to provide up to 80 hours of leave at full pay to employees who are sick or have to quarantine, and up to 80 hours of partial pay if the employee has to care for sick family members or children whose school or daycare is closed due to COVID-19. The FFCRA also requires covered employers to provide up to 2 weeks of unpaid leave, followed by 10 weeks at partial pay, to employees who are unable to work due to a child's school or daycare being closed due to COVID-19.

Intermittent Leave.

The DOL also reaffirmed its stance on intermittent leave under the FFCRA with the new rule, allowing employees to take it only with permission from their employer, and provided an explanation of its position, intended to supplement its earlier stance:

> "The Department believes the employer-approval condition for intermittent leave under its [Family and Medical Leave Act]["FMLA"] regulation is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate risk of COVID-19 contagion. It is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid 'unduly disrupting the employer's operations.' It best meets the needs of businesses that this general principle is carried through to the COVID-19 context, by requiring employer approval for such leave."

Health Care Provider.

The new rule further revises the definition of "health care provider", which was initially excluded from FFCRA coverage in response to at least one New York federal court's holding that the DOL's previous definition – i.e., anyone employed by hospitals, medical schools and a range of additional facilities "where medical services are provided" - was determined to be overly broad, and potentially excluded too many employees from coverage. The previous definition also encompassed any employees of contractors at such facilities, and anyone employed by a business that produces medical equipment.

Under the revised definition, an employee is a health care provider if he or she is "capable of providing health care services," including "diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care" or otherwise meets the FMLA's definition of the term.

The Future.

In the rush to pass legislation to protect employees from the ravaging economic effects of the COVID pandemic, numerous questions were naturally left unanswered, and eligibility coverage assumed the form of many interpretations. The Wage Hour Division (WHD) continues to provide updated information through extensive outreach efforts "to ensure that workers and employers have the information they need about the benefits and protections of the FFCRA." Only time will tell if the DOL's new rule will be in need of further revision as the pandemic continues to impact the nation's business community.

KD's Labor & Employment Practice Group attorneys remain available to guide employers through these treacherous times and ensure compliance with the myriad of state and federal workplace laws.

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