

FEDERAL DISTRICT COURT STRIKES DOWN PORTIONS OF U.S. DEPARTMENT OF LABOR'S FFCRA REGULATIONS

Hodgson Russ Labor & Employment Alert
August 6, 2020

On August 3, 2020, the United States District for the Southern District of New York issued a decision vacating several important aspects of the United States Department of Labor's ("DOL") regulations implementing the paid leave provisions of the Families First Coronavirus Response Act ("FFCRA"). *State of New York v. U.S. Department of Labor*, No. 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020).

This case stemmed from a suit filed by the State of New York challenging four features of the DOL's regulations: (i) the requirement that employees have work available in order to be eligible for leave; (ii) the broad definition of "health care provider" for purposes of excluding employees from leave eligibility; (iii) the intermittent leave provisions; and (iv) the documentation requirements. New York argued that each of these aspects of the regulations were inconsistent with the terms of the FFCRA and unduly restricted employee access to emergency paid leave benefits.

The "Work Availability" Requirement

New York's first challenge was to the "work availability" requirement—a DOL rule stating that paid leave for certain specified reasons under the FFCRA is not available to employees where the employer does not have work for the employee to perform (e.g., where the employee is on layoff or furlough). The DOL argued that the FFCRA supported its interpretation because employees are not "unable to work (or telework)" due to a qualifying reason for leave if their employer had no work available for them to perform.

The court concluded that the work availability requirement exceeded the DOL's authority because it applied only to three of six qualifying conditions for EPSLA leave, which the court found to be "entirely unreasoned" and contrary to the language of the FFCRA. The court also found that the DOL's "barebones" explanation for the work availability requirement was "patently deficient" given its enormously consequential impact of considerably narrowing the scope of the FFCRA.

Attorneys

Luisa Bostick
Joseph Braccio
Glen Doherty
Andrew Drilling
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Charles H. Kaplan
Christopher Massaroni
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Jeffrey Swiatek
Michael Zahler

Practices & Industries

Labor & Employment

FEDERAL DISTRICT COURT STRIKES DOWN PORTIONS OF U.S. DEPARTMENT OF LABOR'S FFCRA REGULATIONS

Definition of “Healthcare Provider”

Under the FFCRA and DOL regulations, employers may deny leave to an employee with a qualifying condition if the employee is a “health care provider or emergency responder.” The State of New York took issue with the expansiveness of the DOL’s definition of the “health care provider” term, which the DOL conceded was broad enough to encompass an English professor, librarian, and cafeteria manager at a university with a medical school. The court concluded that the FFCRA unambiguously foreclosed the DOL’s definition, which the court found to be “vastly overbroad” because it included individuals whose roles bore no nexus to the provision of healthcare services and who were not even arguably necessary or relevant to the healthcare system’s vitality.

Intermittent Leave Requirement

The DOL regulations permit employees to take leave intermittently only if the employer and employee agree and, even then, only for a limited subset of qualifying conditions. New York challenged both of these aspects of the DOL’s regulations. The court upheld that portion of the DOL’s regulations that limited leave to qualifying reasons that are not logically correlated with a higher risk of viral infection (i.e., leave to care for the employee’s child whose school or place of care is closed, or child care provider is unavailable, because of reasons related to COVID-19). However, the court determined that the DOL failed to offer an appropriate justification for the blanket requirement of employer consent. Accordingly, the court vacated the DOL’s regulations to the extent they required employer consent to take intermittent leave.

Documentation Requirements

New York also challenged the DOL’s regulations to the extent that they required employees to provide their employer with documentation supporting the need for leave *in advance* of taking leave.

After noting that the FFCRA is silent with regard to a documentation requirement, the court concluded that the DOL’s requirement that employees provide documentation in advance imposed different and more stringent preconditions to leave that were inconsistent with the FFCRA’s unambiguous notice provisions to the extent that it required documentation to be provided *before* taking leave. The court was careful to indicate that the substance of the documentation requirements, as distinguished from its “temporal aspect,” remain intact.

Implications and Next Steps

The DOL has the ability to appeal the district court’s decision to the Second Circuit, which could reinstate the invalidated provisions of the regulations pending its review of the district court’s decision. As of this writing, the DOL has not publicly indicated how it plans to proceed. For that reason, employers should continue to monitor developments in this case. Until further guidance is forthcoming, however, employers should reexamine their practices and determine whether they will comply with the FFCRA regulations as modified by the district court’s decision. For example, employers that have denied FFCRA leave to an employee because he or she was on layoff or furlough will want to reexamine this position in view of this decision. Likewise, employers that sought to rely on the “health care provider” exception to exclude broad categories of workers should revisit this issue as the exception may no longer apply to many of the employees to which it was initially understood to apply. Employers should also prepare for how they will handle requests for documentation of the need for

FEDERAL DISTRICT COURT STRIKES DOWN PORTIONS OF U.S. DEPARTMENT OF LABOR'S FFCRA REGULATIONS

leave to ensure they are not requiring employees to provide FFCRA documentation under a timeframe not consistent with law.

All employers are encouraged to review their current practices that relate to the vacated portions of the U.S. DOL's regulations and consult with experienced employment counsel regarding the options for moving forward. For assistance, please contact Lura Bechtel (416.595.2693), John Godwin (716.848.1357) or any member of our Labor & Employment team.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to our Labor & Employment alert mailing list or any other of our mailing lists, please visit us [HERE](#).