"Health Care Providers" Under the FFCRA: Department of Labor Revises the Regulation and Focuses the Field of Employees Eligible for Leave

Article
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On September 11, 2020, the Department of Labor (DOL) released its second interpretation of the Families First Coronavirus Response Act (FFCRA). The new DOL rule, which took effect on September 16, revised the original rule's definition of "health care provider" to provide up to twelve weeks of paid leave to an expanded field of workers.

Previously, the definition of "health care provider" hinged on the business of the employer. For example, a hospital was considered to be a "health care provider" and, therefore, all of the hospital's employees would be exempt from the FFCRA expanded leave benefit. Even some employers who provided services related to health care, e.g., by manufacturing or distributing health care supplies or equipment, fit under the initial interpretation of the definition.

Now, the definition of "health care provider" is based on a role-specific determination that must be made on an individual basis if or when an employee requests leave under FFCRA, with the focus being more toward actual patient diagnosis and treatment services. Under the new interpretation, a "health care provider" means "[a] doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices" or "[a]ny other person determined by the Secretary to be capable of providing health care services," including licensed professionals such podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and Christian Science Practitioners.

In addition, the new interpretation identifies additional employees who are health care providers based on their roles and duties. To qualify as health care providers, such employees must be "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with

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and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care." These health care services encompass a broader range of services than those medical professionals who are licensed to diagnose serious health conditions.

The DOL advised that this second group of health care providers fall outside the specified regulations but are nonetheless included in the revised § 826.30(c)(1). Members of this second group include:

- Nurses, nursing assistants, medical technicians, and any other persons who directly provide diagnostic, preventive, treatment services or other services that are integrated with and necessary to the provision of patient care;
- Employees providing such services under the supervision, order, or direction of, or providing direct assistance to nurses, nurses assistants, and other persons who directly provide services; and
- Employees who may not directly interact with patients and/or who might not report to another health care provider or directly assist another health care provider, but nonetheless provide services that are integrated with and necessary components of the provision of patient care.

Specifically, preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems. As with diagnostic services, preventive services are integrated and necessary because they are an essential component of health care.

Treatment services include performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments.

Finally, other integrated and necessary services that, if not provided, would adversely affect the patient's care include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures and transporting patients and samples.

This new interpretation of "health care provider" is a significant change, and employees who previously did not qualify for FFCRA leave may now so qualify. For many employers, their entire organization was likely excluded from FFCRA leave under the initial interpretation, but potentially not anymore. Thus, employers should evaluate the roles and duties of each of their employees to determine such employees are eligible for FFCRA leave.