August 5, 2020

Ruling Invalidates Portions of the Families First Coronavirus Response Act Regulations

On August 3, the U.S. District Court for the Southern District of New York invalidated four portions of the U.S. Department of Labor's (DOL) final rule implementing the Families First Coronavirus Response Act (FFCRA).

Enacted in March, the FFCRA requires certain employers with fewer than 500 employees to provide employees with paid sick leave, or expanded family and medical leave, for specified reasons related to COVID-19 between April 1 and December 31, 2020. On April 1, the DOL issued a final rule implementing and interpreting the FFCRA. The state of New York sued to invalidate portions of the DOL's final rule. After concluding that the state had standing to sue, on August 3 the court found that the following portions of the final rule were invalid and therefore vacated:

1. the requirement that, in certain circumstances, employees cannot take paid leave unless there is work available for them;

2. the definition of "health care provider" exempting certain employees from paid leave;

3. the requirement that employees obtain their employer's consent if they wish to take paid leave intermittently; and

4. the requirement that employees submit certain documentation before taking paid leave (rather than after the leave has begun).

With regard to the first provision found to be invalid, the FFCRA grants paid sick leave to employees who are "unable to work (or telework) due to a need for leave because" of any of six COVID-19-related reasons. The DOL's final rule excluded employees whose employers "do … not have work" for them, reasoning that such employees are unable to work because no work is available, not because of COVID-19. The court found the FFCRA ambiguous on this point and the DOL's explanation "unreasoned." As such, employees on furlough, who have qualifying reasons for leave under the FFCRA, may be entitled to its benefits.

With regard to the second provision found to be invalid, the FFCRA permits employers to deny paid leave to healthcare providers. The DOL's final rule broadly defined "health care provider" based on the identity of the employer rather than the role of the employee in particular. As the court noted, the DOL's definition of "health care provider" would include a librarian employed by a university with a medical school. Instead, the court found that healthcare providers under the FFCRA must be limited to people capable of providing healthcare services. In the absence of a definition, it is not clear which employees fall within the potential exemption for healthcare providers.

With regard to the third provision found to be invalid, the DOL's final rule permits employees to take paid sick leave or expanded family and medical leave intermittently (i.e., in separate periods of time rather than one continuous period) only if the employer agrees and only for certain of the qualifying reasons. The court found the rule valid with respect to its ban on intermittent leave based on qualifying conditions that implicate an employee's risk of virus transmission, such as when an employee or an employee's family member suffers from COVID-19. However, with respect to the other qualifying reasons,

such as to care for children whose school or other childcare facility is closed for COVID-19, the court vacated the requirement that employees obtain their employer's consent to take intermittent leave.

With regard to the fourth provision found to be invalid, when the need for leave is foreseeable, the FFCRA requires employees to provide their employers with "such notice of leave as is practicable." With respect to paid sick leave, the FFCRA permits employers to require employees to provide notice "after the first workday" of paid leave. The DOL's final rule, however, required employees to provide their employers with documentation before taking paid leave. The DOL tried to distinguish "documentation" from "notice," but the court vacated the advance documentation requirement because it found it to be inconsistent with the statute's notice provisions. However, the court invalidated only the temporal aspect of that requirement—i.e., the requirement that the documentation be provided before taking leave. As such, employees must be provided the leave if they provide requisite notice, and they will be entitled to pay for such time upon the submission of appropriate documentation.

The August 3 decision vacated only the specific provisions of the DOL's final rule set forth above. The remainder of the rule, including the ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, remains in effect, as does the FFCRA itself, until December 31.

Employers subject to the FFCRA should carefully consider all employee requests for leave relating to COVID-19 and childcare responsibilities associated with COVID-19 closures of schools, camps and daycares to ensure compliance with the evolving guidance. Day Pitney lawyers are available to assist employers in complying with the FFCRA and other state and federal leave laws.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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