

DOL Revises FFCRA Paid Leave Rules

The Department of Labor has issued a revised final rule (the “Revised Rule”) under the Families First Coronavirus Response Act. The Revised Rule, issued in response to a recent ruling by the U.S. District Court for the Southern District of New York, reaffirms, clarifies and revises parts of the Department’s August 1, 2020, rule interpreting the paid leave provisions of the FFCRA. Specifically the Revised Rule:

- reaffirms the work availability requirement for paid FFCRA leave;
- reaffirms the requirement that an employer consent to intermittent leave under the Emergency Family and Medical Leave Expansion Act (the “EFMLEA”) of the FFCRA;
- clarifies the notice and documentation requirements for paid FFCRA leave; and
- revises the definition of “health care provider” for purposes of the exception to provide paid FFCRA leave.

The Revised Rule is effective September 16, 2020 and continues in effect until December 31, 2020 when the FFCRA paid leave provisions are set to expire.

Background

The Families First Coronavirus Response Act (the “FFCRA”) created two (2) emergency paid leave requirements: the Emergency Paid Sick Leave Act (“EPSLA”) which provides up to 80 hours of paid sick leave if an employee is unable to work (or telework) for one of six specified reasons; and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) which provides up to 10 weeks of **paid** leave to employees to care for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 related reasons.

On April 1, 2020, the Department of Labor issued a final rule (the “Final Rule”) implementing the paid leave provisions of the FFCRA. The Final Rule established eligibility criteria, exemptions and administrative requirements governing FFCRA paid leave. On August 3, 2020, the U.S. District Court for the Southern District of New York issued a ruling striking certain provisions of the Final Rule; specifically the four (4) provisions listed above.

Revised Rule FFCRA Paid Leave

In response to the New York district court ruling, the Department of Labor has issued the Revised Rule addressing the following provisions that were challenged by the district court.

1. **Work Availability Requirement.** Under the Final Rule employees are not eligible for paid leave if the employer does not otherwise have work available. For example, if the employer lost business or had to close due to a government shutdown order, employees who were furloughed or laid-off due to the slowdown or closure would not be eligible for paid FFCRA leave.

The New York district court acknowledged that the Department of Labor had authority to interpret the FFCRA paid leave provisions, but concluded that the work availability requirement was invalid because the Department didn’t sufficiently explain its reasons for imposing a requirement that was not specifically set forth in the FFCRA.

In the Revised Rule the Department of Labor reaffirms the work availability requirement stating that if an employee is not expected or required to work, he or she is not eligible for paid leave under FFCRA. The practical result is that employees who have been furloughed or laid-off because the employer does not have work for them are not eligible for paid leave even if the employee has a COVID-19 related qualifying reason under the EPSLA or the EFMLEA.

2. Intermittent EFMLEA. The Final Rule permits employees to take intermittent leave to care for a child whose school or place of care is closed provided, however, that the employer agrees. Similar to the work availability rule, the New York district court struck down the employer consent requirement finding that the Department of Labor didn't provide sufficient basis or explanation for the requirement.

The Department of Labor reaffirmed the employer consent requirement for in the Revised Rule. In doing so the Department relied on the rules governing intermittent leave under the FMLA. However, the Department also noted that FFCRA leave needed due to hybrid school schedules is not "intermittent" leave. Thus, an eligible employee can take FFCRA paid leave to care for a child on alternate virtual learning days without the employer's consent.

3. Notice and Supporting Documentation. The Revised Rule clarifies an inconsistency in the Final Rule related to the timing of notice of a need for paid FFCRA leave and the provision of supporting documentation. Specifically, consistent with the FFCRA the Final Rule provides that an employee may furnish notice to the employer after the first day of FFCRA leave. However, the Final Rule also requires that an employee must provide supporting documentation prior to paid FFCRA leave. The Revised Rule corrects the inconsistency by providing that notice and the required documentation must be provided as soon as practicable.
4. Definition of Health Care Provider. The most significant change arising from the Revised Rule is the narrowing of the "health care provider" exclusion. The New York district court struck down the definition of "health care provider" in the Final Rule finding that it was vague and overly broad. The Department of Labor conceded and in the Revised Rule provided a more narrow definition.

Under the Revised Rule a "health care provider" that may be excluded from FFCRA paid leave is limited to individuals who qualify as a health care provider under the FMLA regulations including physicians, osteopaths, nurse practitioners and some chiropractors. For purposes of the exclusion a "health care provider" also includes individuals employed to provide diagnostic, preventive, or treatment services or other services that are "integrated with and necessary to" patient care. Individuals whose work is administrative, related to food services (as opposed to feeding patients) or building maintenance are specifically excluded from the definition of "health care provider" under the Revised Rule.

Given the narrowing of the "health care provider" exclusion, health care employers can no longer presume their entire workforce is ineligible and must take steps to ensure eligible employees are permitted paid FFCRA leave consistent with the Revised Rule.

Vizance will continue to monitor the impact of the COVID-19 pandemic on employee benefit plans and employment policies and practices and provide updates as appropriate. If you have questions or would like more information please contact Beth Ward, Compliance Attorney, at bward@vizance.com.