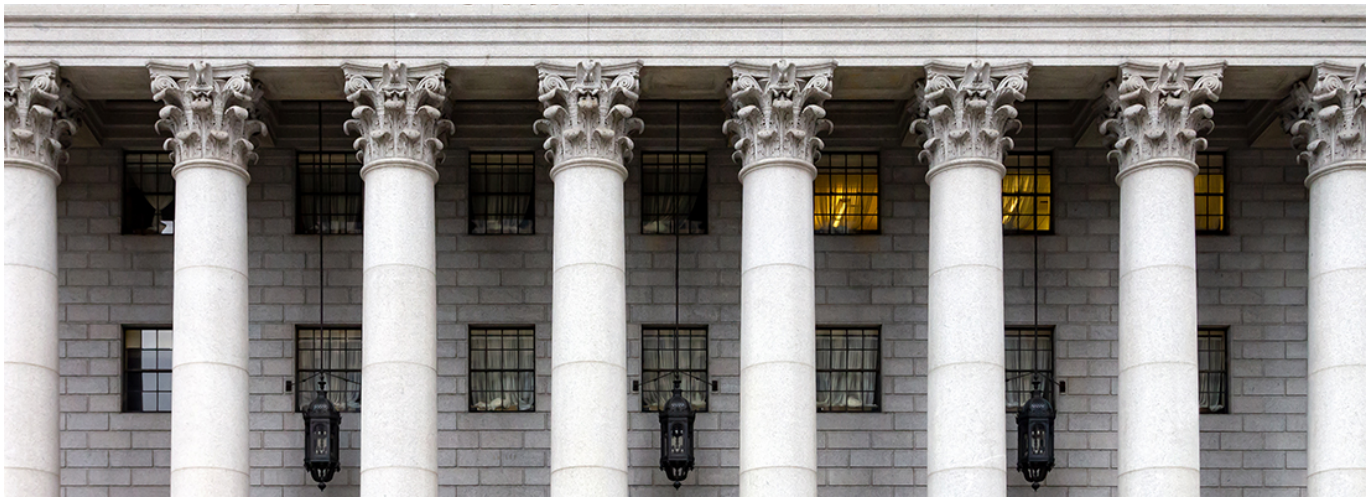
New York Federal Court invalidates department of labor FFCRA regulations creating potential nationwide ramifications



By [Phoebe B. Mitchell]

On August 3, 2020, the United States District Court for the Southern District of New York invalidated multiple Department of Labor (DOL) regulations interpreting the Families First Coronavirus Response Act (FFCRA), Congress' response to the COVID-19 pandemic. The FFCRA provides paid leave to employees unable to work during the coronavirus crisis. Congress charged the DOL with issuing FFCRA regulations, with the final regulations being published on April 1, 2020 (85 Fed. Reg. 19,326) ("Final Rule"). Shortly after, the State of New York sued the DOL, claiming it exceeded its statutory authority and unlawfully denied leave to eligible employees. The Southern District of New York agreed with the State of New York, voiding four FFRCA regulations:

1) "Work-availability" requirement

2) Definition of "health care provider"

3) Intermittent leave

4) Documentation requirements

"Work-Availability" Requirement

The two major provisions of the FFCRA, the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), apply to employees who are unable to work due to the COVID-19 pandemic. However, the DOL's final rule implementing the FFCRA excludes employees who are unable to work because their employers do not have work for them.

The court stated that this limitation is "hugely consequential" for employees whose employers have temporarily shut down due to the pandemic, and thus, have no work for their employees. By invalidating this DOL regulation, the court held the DOL cannot require that employees actually be working in order to take FFCRA leave. In turn, this could subject employers, including employers who were forced to temporarily cease operations due to state or local orders, to claims by furloughed or laid-off employees.

Definition of "Health Care Provider"

Under the FFCRA, an employer may elect to exclude "health care providers" from leave benefits. Thus, the DOL's definition of "health care provider" could have large ramification for many employers. In its final rule, the DOL defined "health care provider" as:

> "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local

> health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions"

and

> "any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

Final Rule at 19,351 (§ 826.25).

The court noted, and the DOL conceded, that this expansive definition, in practice, could include even an English professor, librarian or cafeteria manager at a university with a medical school. Thus, the court held that this definition could not stand. In so deciding, the court reasoned that even employees with "no nexus whatsoever" to healthcare services would be exempt from FFCRA leave.

Intermittent Leave

The DOL's Final Rule significantly limited intermittent leave under the FFCRA. Intermittent leave means leave taken in separate periods of time, rather than one continuous period. Under the rule, an employee could only use intermittent leave if: (1) the employee and employer agree to the use of intermittent leave; and (2) the use is limited to the

employee's need to care for a child whose school or place of care is closed, or where child care is unavailable.

The court agreed that intermittent leave should not be allowed in situations where the employee is at high risk for spreading the virus to other employees. For example, if an employee is showing symptoms of COVID-19, or caring for a family member showing symptoms of COVID-19, the employee should not be allowed to take intermittent leave, but rather must take continuous paid sick leave until that leave is exhausted or the employee no longer has a reason to be on leave.

However, the court disagreed with the DOL's interpretation that the employer and employee must agree to the use of intermittent leave. The court held that the regulation "utterly fails to explain why employer consent is required" for an employee to take intermittent leave. Thus, the court ruled that an employer's consent is not required for an employee to take intermittent leave under the FFCRA.

Documentation Requirement

The DOL's Final Rule requires employees to submit documentation to their employer prior to taking leave indicating the reason for leave, the duration of the requested leave, and, when applicable, the authority for the isolation or quarantine order qualifying them for leave.

In contrast, the FFCRA states that an employer may require an employee taking leave under the EPSLA to provide reasonable documentation after the employee's first day of leave. Further, the statute provides that an employee taking leave under EFMLA must provide the employer with notice of leave as is practicable under the circumstances.

The New York court held that, due to the specific notice requirements set out in the statute, the DOL exceeded its authority in requiring that an employee provide documentation

before taking leave. Striking down this regulation, however, did not affect the FFCRA's original notice requirements mandating documentation *after* an employee takes leave under the statute.

While this decision came from a federal New York court, it could have nationwide ramifications. The decision could prompt the DOL to issue new regulations, which, of course, would be implemented across the United States. Alternatively, the DOL could choose to appeal the decision. Currently, it is unclear if this decision will be applied retroactively. As always, but especially In light of this decision, employers must be vigilant when making decisions regarding employee leave under the FFCRA.

Phillips Murrah's labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients during the current COVID-19 pandemic.

Keep up with our ongoing COVID-19 resources, guidance and updates at our RESOURCE CENTER.

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