Patterson Belknap Webb & Tyler LLP

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Federal Judge in SDNY Strikes Down Key Limitations on Leave Under the FFCRA

This past Monday, a federal district court in New York struck down several portions of the regulations issued by the U.S. Department of Labor ("DOL") implementing the emergency family leave and paid sick leave provisions of the Families First Coronavirus Response Act ("FFCRA"). The court's ruling resolved a legal challenge by the New York State Attorney General ("NYAG") against the DOL.

Filed on April 14, 2020, the NYAG lawsuit challenged several aspects of the DOL's April 1, 2020 final rule implementing the FFCRA. The NYAG argued that the DOL violated the Administrative Procedure Act by exceeding the authority delegated to it under the FFCRA. Specifically, the NYAG challenged: (1) the work-availability requirement, under which employees are not eligible for FFCRA leave if their employer "does not have work" for them to perform; (2) the definition of "health care provider"; (3) the restrictions on intermittent leave; and (4) the documentation requirements imposed by the regulations.

In *State of New York v. United States Department of Labor*, decided on August 3, 2020, S.D.N.Y. Judge Paul Oetken largely agreed with the NYAG, concluding that virtually all of the challenged aspects of the regulation were invalid.[1]

Work-Availability Requirement: Judge Oetken held that the work-availability requirement—which excludes employees from eligibility if their employers do not have work available for them, and which the court described as "hugely consequential" for employees and employers—was invalid, because the DOL had offered nothing more than an "ipse dixit" in support of its position.[2] The DOL's explanation for the exclusion is that employees whose employers do not have work available are unable to work due to that lack of availability, and not due to their own qualifying COVID-19-related reason. Judge Oetken explained that the relevant language in the FFCRA was ambiguous as to the degree of causal relationship between the need for leave and the qualifying COVID-19-related reason, but concluded that the DOL's "barebones" justification of its narrow interpretation was not enough to support its "monumental policy decision." He also criticized the DOL's "terse, circular" reasoning as being insufficient to pass the "minimal requirement of reasoned decision-making."

Definition of "Health Care Provider": Judge Oetken concluded that the DOL's interpretation of the term "health care provider"—with respect to the provision of the FFCRA that permits employers not to provide paid leave to employees who qualify as "health care providers"—was "vastly overbroad." Judge Oetken explained that the DOL's definition of "health care provider" would encompass virtually anyone who works for an entity even tangentially connected to the health care system, regardless of whether or not that individual had any role in providing health care services. For example, the DOL's definition would encompass "an English professor, librarian, or cafeteria manager at a university with a medical school," all of whom the DOL conceded would fall within its definition. But Judge Oetken explained that the relevant statutory text squarely foreclosed the DOL's "expansive" definition. According to Judge Oekten, the FFRCA requires that it be the *employee*—not the employer—that is capable of providing healthcare services in order to be exempted from the FFCRA. But the DOL's definition did the opposite, including employees

[1] Judge Oetken also rejected the DOL's challenge to New York's standing to bring suit, concluding that New York would be injured due to the diminution of taxable income as a result of the regulations. He explained that in the absence of paid leave, impacted employees will either continue to work, thereby escalating the spread of the virus and increasing the state's healthcare costs, or take unpaid leave, thereby diminishing their taxable income and the state's tax revenues.

[2] Under the DOL's Final Rule, the work-availability requirement applied to only three of the six qualifying reasons under the Emergency Paid Sick Leave Act, and the Court declined to apply the requirement to the other three remaining reasons under the Emergency Paid Sick Leave Act.

whose positions have "no nexus whatsoever" to the healthcare system. And for that reason, Judge Oetken concluded that the DOL's definition was invalid.

Intermittent Leave: Judge Oetken rejected in part the regulations relating to intermittent leave. The DOL's final rule permits employees to take leave on an intermittent basis only with the employer's permission and only for a subset of qualifying conditions.[3] Judge Oetken upheld the portions of the regulation that prohibited intermittent leave for certain qualifying conditions, explaining that the DOL reasonably concluded that intermittent leave should not be permitted for qualifying reasons most likely to lead to a higher risk of viral infection.[4] However, he held that the requirement of employer consent for intermittent leave for the remaining qualifying conditions was "entirely unreasoned," given that those conditions do not implicate the same public health considerations, as the DOL itself acknowledged.

Documentation Requirement: Judge Oetken rejected the DOL's requirement that employees provide documentation supporting their reason for leave "prior to taking [FFCRA] leave." Judge Oetken explained that the blanket requirement to provide documentation *before* taking leave was inconsistent with the statutory provisions regarding notice, which contemplate that prior notice of the planned leave may not be required in all circumstances but only where the leave is foreseeable. Accordingly, because the documentation requirement "imposes a different and more stringent precondition to leave," Judge Oetken held that it was inconsistent with the unambiguous language of the statute and therefore invalid.

Severability: Judge Oetken concluded that the four invalid provisions were severable from the remainder of the regulatory scheme. Accordingly, he vacated the work availability requirement; the definition of health care provider; the requirement that an employee consent to intermittent leave; and the temporal aspect of the documentation requirement. The remainder of the DOL's regulations—including the prohibition on intermittent leave for certain qualifying reasons and the substance of the documentation requirement (as opposed to its timing)—remains in force.

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The DOL has thirty days to appeal the decision. In the meantime, employers should review their FFCRA policies in light of the district court's ruling.

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[3] This includes where an employee: (i) reports to a worksite but must stay home to care for the employee's son or daughter whose school or place of care is closed or whose childcare provider is unavailable because of reasons related to COVID-19; and (ii) unable to tele work because of a COVID-19 related reason.

[4] These include leave given because employees are: (i) subject to government quarantine or isolation orders related to COVID-19; (ii) advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; (iii) experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis; (iv) taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; and (v) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

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