New York v. United States: S.D.N.Y. Vacates Key Provisions in DOL's Final Rule Limiting Paid Leave Under the FFCRA

Barbara E. Hoey, Maria Biaggi

August 13, 2020

On August 3, 2020, New York federal Judge Paul Oetken, vacated several significant provisions of the U.S. Department of Labor's April 1, 2020 Final Rule, which construes the Families First Coronavirus Response Act ("FFCRA" or the "Act"), finding that the DOL exceeded its rulemaking authority. *State of New York v. United States Department of Labor et al.*, 20-cv-03020-JPO (S.D.N.Y. August 3, 2020).

Particularly significant for New York employers, this decision changes how they determine which employees are entitled to FFCRA leave and how they can administer those leaves. The question remains, however, whether the vacated provisions of the DOL's regulations are still valid in states outside of New York.

BACKGROUND

As summarized in prior posts, and as most employers should know by now, the FFCRA provides two types of COVID-19-related paid leave to employees of businesses with fewer than 500 employees.

(1) Emergency Paid Sick Leave (EPSL)—two weeks of paid leave for employees with one of six qualifying COVID-19-related reasons, including if an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, or is subject to an order of quarantine or isolation related to COVID-19; and

(2) Emergency Family and Medical Leave (EFML)—12 weeks of leave to care for a child if a school is closed, or a childcare provider is unavailable, due to COVID-19.

Significantly, under the FFCRA, employers may elect to exclude "health care providers" from these leave benefits.

In April, the DOL published regulations under the FFCRA, which provided, in part, that:

- An employer can exclude from leave employees whose employers do not have work for them (e.g., due to temporary shutdowns or other lack of work).
- A "health care provider," whom employers may also exclude from leave, is defined 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."

- Employees may only take leave intermittently for a subset of the qualifying reasons, and only then, if the employer and employee agree that such leave may be taken intermittently.
- Prior to taking leave, employees must submit to their employer documentation indicating, among other things, their reason for leave, the duration of the requested leave, and when relevant, the authority for the isolation or quarantine order qualifying them for leave.

The New York Attorney General challenged these provisions as exceeding the DOL's authority under the statute and unduly restricting an employee's right to take leave under the Act.

THE DECISION

The court agreed that the DOL had gone too far in implementing these regulations.

- First, the court found that the DOL's "barebones explanation" for imposing the work availability requirement was "patently deficient" and "an enormously consequential determination that may considerably narrow the statute's potential scope." So, that rule is quashed.
- It also held that the DOL's definition of "healthcare provider" was overbroad insofar as it included employees whose role bore no nexus to the provision of health care services.
- Judge Oetken also invalidated the employer consent requirement for intermittent leave. While the court agreed with the DOL that intermittent leave is only allowed for certain qualifying leave conditions, he found that the DOL failed to explain why employer consent was necessary for the remaining qualifying conditions, which do not implicate the same public health considerations.
- Lastly, the court held that the requirement to provide documentation ***before*** taking leave is inconsistent with the statute's unambiguous notice provisions and renders the statutory notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice "completely nugatory."

With respect to EFML, the statute provides that, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." FFCRA § 3102(b).

With respect to EPSL, the statute provides that "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." FFCRA § 5110(5)(E).

At least in New York, this decision means that these DOL regulations are NO LONGER VALID.

HOW DOES THIS DECISION AFFECT AN EMPLOYER'S OBLIGATION TO PROVIDE LEAVE UNDER THE FFCRA?

- **"Work availability requirement"—**Employers can no longer exclude employees from leave under the FFCRA because the employer "does not have work for them."
- **Definition of "health care provider"—**The definition of a "health care provider," is now

more limited.

The safest course is to look at the definition under the FMLA, which defines “health care provider” as “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 “any other person determined by the Secretary to be capable of providing health care services.” If the employee provides direct care to patients, you can exclude them from FFCRA leave.

- **Employer consent for intermittent leave—**An employee is no longer required to obtain employer consent in order to take intermittent leave under the FFCRA.

However, employers can look a FMLA regulations, and still require employees to document the need for the leave and to obtain proper clearance before taking it.

- **Temporal aspect of the documentation requirement—**An employee is no longer required to provide the requisite documentation in support of their leave request *prior to* taking the leave.

The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement (as distinguished from its temporal aspect), still stands.

DOES THE NEW YORK FEDERAL COURT DECISION APPLY TO EMPLOYERS IN OTHER STATES?

It is not yet clear. The order itself is silent as to whether the regulations are invalid in other states, and no appeal or stay has been filed. So, for now, assume that the reach of the decision is technically limited to New York. However, multi-state employers and employers with operations outside of New York should proceed with caution, as other states may file identical lawsuits. Indeed, litigation over the DOL’s interpretation of the FFCRA will likely continue, and could include an appeal of the district court’s decision by the Department of Labor and a motion to stay the district court’s order pending appeal.

To take a more cautious approach and avoid conceivable violations of the FFCRA, employers may want to assume that the decision has a nationwide impact.

We will remain on top of developments and watch for any new regulations issued by the DOL.

Given the ever-evolving legal landscape at both the federal, state and local level, it is important for businesses to consult with counsel to navigate these and other important issues.