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Federal Judge Strikes Down Key Limitations on FFCRA Paid Leave

In response to the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act ("FFCRA") which created emergency paid sick leave ("ePSL") and emergency FMLA ("eFMLA") leave for those suffering from COVID-19 or its effects. Shortly after the passage of FFCRA, the Department of Labor ("DOL") finalized temporary regulations interpreting and implementing the FFCRA's provisions (the "Final Rule"). On Monday, a federal district court judge struck down four significant aspects of the Final Rule.

For a refresher on the FFCRA, ePSL and eFMLA leave, read our earlier Client Alert.

The FFCRA and the Final Rule

Anticipating the stress COVID-19 would put on our nation's healthcare system, Congress made certain types of employees—healthcare providers and emergency responders—ineligible for FFCRA paid leave. If an employee falls into either category, the employer may decline to authorize requested leave. The FFCRA generally defines a healthcare provider as:

- A doctor of medicine or osteopathy who is authorized to practice medicine; or
- Any other person determined by the Secretary of Labor to be capable of providing health care services.

The DOL drastically expanded the definition of healthcare provider under the Final Rule. For purposes of the Final Rule, a "health care provider" includes *anyone* employed at a:

- "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 other similar institution, Employer, or entity."
    - For example, an English professor, librarian or cafeteria worker at a university with a medical school would all be "health care providers."
- In addition, the definition includes anyone employed by an entity that contracts with an aforementioned institution to provide services that support or maintain the institution's operation.

The Final Rule also provided that employers do not need to provide employees with paid leave when the employer does not have work for them (the "work availability" requirement); employees must receive employer consent before taking intermittent leave; and prior to taking leave, an employee must provide documentation to the employer outlining, among other things, the reason for and duration of the leave.

Four Key Aspects of the Final Rule the Court Struck Down

1. *Definition of Health Care Provider* – The court struck down the DOL's definition of health care provider, finding that it was "vastly overbroad" and did not focus on whether an employee's duties have a nexus to the provision of healthcare. Rather than exempting entire companies from providing paid leave, the court held that only employees who are capable of providing healthcare services should be excluded. Employers will need to consider, on a role-specific (if not case-by-case) basis, that the "skills, role, duties, or capabilities

of a class of employees" render those individuals "capable of providing healthcare services," before they can be excluded from FFCRA paid leave.

2. *Work Availability Requirement* – The Final Rule applied the work availability requirement to eFMLA leave and three of the six reasons an employee may take ePSL. The court found that the Final Rule lacks an explanation as to why the work availability requirement only applies to half of the ePSL qualifying absences. As a result, the court noted that the requirement was unreasonable. Thus, employers may not deny FFCRA paid leave to an employee simply because the employer has no work for the employee.

3. *Employer Consent for Intermittent Leave* – The Final Rule distinguishes between eFMLA leave that may be taken intermittently and ePSL that may not be taken intermittently (unless the employee is teleworking). Employer consent is required in order to take intermittent leave. While the court did not object to limiting intermittent leave to certain types of absences, it did find that the DOL failed to explain why employer consent should be required. As a result, employers should allow intermittent eFMLA and ePSL teleworking arrangements leave upon request. (Note that the prohibition on intermittent leave for certain qualifying absences remains in effect.)

4. *Documentation Requirements* – Under the FFCRA, employees wishing to take ePSL must provide notice to their employer after the first day they are on leave, and employees wishing to take eFMLA leave must provide notice as soon as practicable. The Final Rule requires employees to submit documentation regarding their need for leave *prior* to taking leave. The court found that the timing of the Final Rule's documentation requirement is inconsistent with the FFCRA's notice provisions. As a result, employers cannot require that employees provide documentation *as a condition* for taking leave. (Note that employers still may require documentation.)

We anticipate the DOL will appeal the judge's ruling. However, in the interim, employers that do not follow the court's interpretation of these four provisions are at risk of noncompliance and associated penalties. Outside of the four provisions the judge struck down, the Final Rule remains in effect. If you have any questions about the FFCRA or paid leave laws in general, please contact a member of the Kutak Rock Employee Benefits Practice Group.

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