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Department of Labor Revises Families First Coronavirus Response Act Regulations

September 21, 2020

In response to the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act ("FFCRA") which created emergency paid sick leave and emergency FMLA leave for those suffering from COVID-19 or its effects. The FFCRA applies to certain public employers, and private employers with fewer than 500 employees.

Shortly after the passage of FFCRA, the U.S. Department of Labor ("DOL") finalized temporary regulations interpreting and implementing the FFCRA's provisions (the "Rule"). For a refresher on the FFCRA, emergency paid sick leave and emergency FMLA leave, read our Client Alert found here.

On August 3, 2020, a federal district judge struck down four aspects of the Rule. A summary of this ruling may be found in the Client Alert found here. In short, the court found several aspects of the Rule invalid, including the definition of a health care provider, the work availability requirement, employer consent for intermittent leave, and parts of the documentation requirement.

In response to this ruling, on September 16, 2020, the DOL reaffirmed portions of the Rule and made revisions. The most noteworthy of these revisions is the DOL's revised definition of "health care provider." The DOL summarized the changes and reaffirmations of the Rule as follows:

- The Department reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave.

- The Department reaffirms that, where intermittent FFCRA leave is permitted by the Department's regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently.

- The Department revises the definition of "health care provider" . . . to mean employees who are health care providers under [the FMLA] and other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care.

- The Department revises [the Rule] to clarify that the information the employee must give the employer to support the need for his or her leave should be provided to the employer as soon as practicable.

- The Department revises [the Rule] to correct an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to his or her employer.

As mentioned, a significant change to the Rule is the revised definition of "health care provider." Before the revised definition, a health care provider under the Rule was much broader. The DOL now has narrowed the definition to mirror the definition contained in the FMLA. Under the FMLA, a "health care provider" is defined, in part, as a "doctor of medicine or osteopathy" or "[a]ny other person determined by the Secretary to be capable of providing health care services." 29 C.F.R. § 825.125. The FMLA provides that those "capable of providing health care services" include, but are not limited to, "[p] odiatrists, dentists, clinical psychologists, optometrists, and chiropractors" and "[n]urse practitioners, nurse-midwives, clinical social workers and physician assistants." *Id.*

Employers should take note of these changes and ensure compliance with them. If you have any questions related to how this revised Rule affects your enterprise, please contact your Kutak Rock attorney, or any of the attorneys in the Employment Law Group.