



## Labor & Employment ADVISORY ■

**AUGUST 4, 2020**

### Certain FFCRA Paid Sick Leave Regulations Struck Down by New York Federal Court

On August 3, 2020, a New York federal judge voided important parts of the U.S. Department of Labor's (DOL) final rule adopted to implement the [Families First Coronavirus Response Act](#) (FFCRA). The judge struck down (1) the work availability requirement, which made employees ineligible for paid sick leave if the inability to work was due to lack of work from the employer, and not due to the employee's inability to work due to a qualifying reason under the FFCRA; (2) the definition of "health care provider"; (3) the requirement that employees obtain employer consent for intermittent leave; and (4) the requirement that documentation be provided before taking leave.

The FFCRA requires private employers with fewer than 500 employees, and certain public employers, to provide employees with paid sick leave and expanded family medical leave related to COVID-19. Two of its components providing emergency leave to employees are the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). The EPSLA grants up to 80 hours of paid sick leave to employees who are unable to work (or telework) because of any of six COVID-19-related criteria. The EFMLEA grants paid Family and Medical Leave Act (FMLA) leave to employees who need to care for a child under 18 years old because of a school closure or other lack of childcare caused by COVID-19. The FFCRA also provides refundable tax credits to employers to offset the costs of paid leave.

The court concluded that the challenged portions of the rule either were not properly explained and justified by the DOL and, therefore, are not a permissible interpretation of the FFCRA, or were inconsistent with the statute. The decision thus leaves open the possibility that, in addition to likely appealing the decision, the DOL may issue new regulations that are responsive to the issues that drove the court's decision.

#### **The Work Availability Requirement**

Southern District of New York Judge Paul Oetken struck down a provision of the rule excluding from paid sick leave benefits employees whose employers do not have work for them, including circumstances when the employer's operations were shut down due to the pandemic. The court rejected the DOL's reasoning that the work-availability requirement is justified because the employee would be unable to work even if he or she did not have a qualifying condition and held that the DOL's "barebones explanation for the work-availability requirement is patently deficient."

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## The Definition of Health Care Provider

The court also vacated the DOL's definition of "health care provider," finding it exceeded the department's authority and was "vastly overbroad." At issue were the provisions of the FFCRA allowing covered employers to exclude health care providers from the statute's paid leave requirements, and the related provisions giving the Secretary of Labor authority to define the term "health care provider." The court focused on the statutory requirement that the Secretary determine that an employee is capable of furnishing health care services, and concluded that by defining a health care provider based on the identity of the employer, rather than the skills, role, duties, or capabilities of a class of particular employees, the rule "includes employees whose roles bear no nexus whatsoever to the provision of healthcare services ... and who are not even arguably necessary or relevant to the healthcare system's vitality."

## The Requirement for Employer Consent for Intermittent Leave

Further, the court vacated the section of the rule mandating employees receive employer consent for taking intermittent leave. Under the rule, employees can take leave only if the employer and employee have agreed to intermittent leave, and even then, only for qualifying conditions. Oetken rejected the requirement, holding that the DOL "utterly fails to explain why employer consent is required for the remaining qualifying conditions." The court also clarified that the regulations forbid intermittent leave only for any single qualifying reason. Accordingly, an employee taking intermittent leave must take leave consecutively until the need for leave abates. Once the need for leave abates, the employee retains any remaining paid leave and may resume leave if and when another qualifying condition arises.

## The Documentation Requirement

Finally, the court rejected the requirement that employees submit to their employer documentation before taking leave. Oetken held that the rule was in "unambiguous conflict" with the statutory notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave.

## What Should Employers Do Next

The DOL will probably appeal the court's decision, and it may also ask the court to stay its order pending appeal. The DOL also might seek to revise its final rule to address the grounds the court based its decision on. In the meantime, employers subject to the FFCRA should not rely on the provisions of the final rule that the court invalidated and watch for additional developments from the DOL in response to the ruling.

Alston & Bird has formed a multidisciplinary [response and relief team](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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