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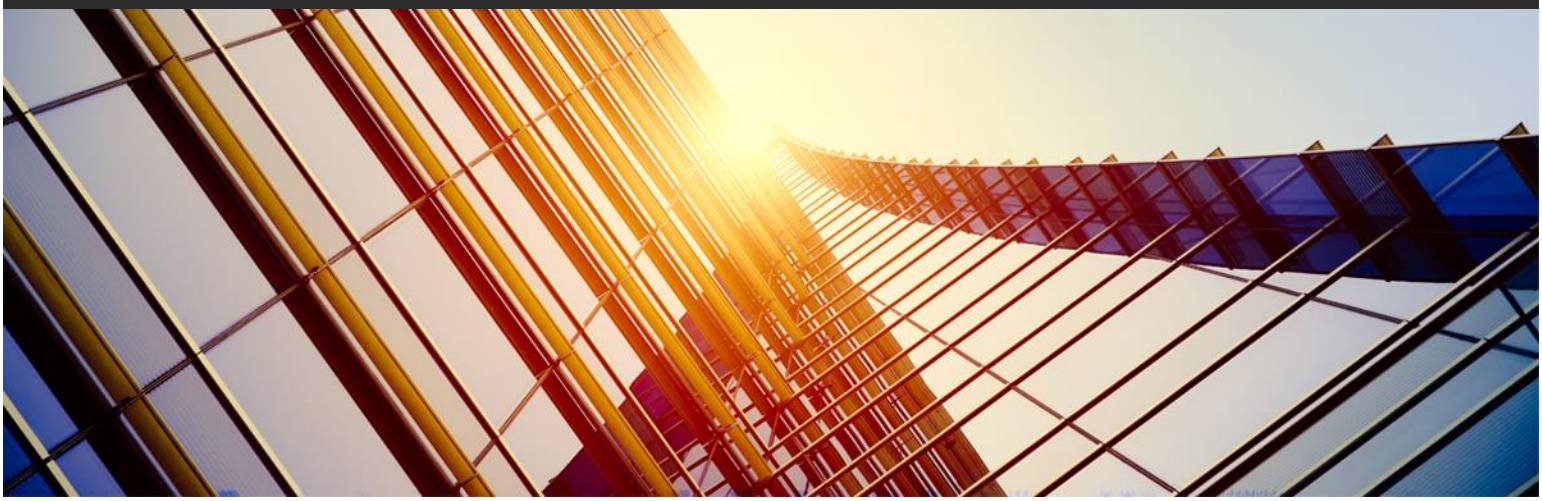
Alert | Health Emergency Preparedness Task Force: Business Continuity Amid COVID-19



August 2020

Federal Judge Grants NY's Motion to Vacate FFCRA's 'Work Availability' Requirement, Other Important Provisions of DOL's 'Final Rule'

Shortly after the United States Department of Labor (DOL) issued its Final Rule implementing provisions of the Families First Coronavirus Response Act (FFCRA), the state of New York filed suit under the Administrative Procedure Act contending that certain aspects of the Final Rule exceeded the DOL's authority. By Opinion and Order dated Aug. 3, 2020, Southern District of New York Federal Judge J. Paul Oetken largely granted the state of New York's challenge.

By way of background, Congress passed the FFCRA at the outset of the Coronavirus Disease 2019 (COVID-19) health crisis to, among other things, provide paid leave to various pandemic-affected employees who found themselves unable to work. Since its passage, employment lawyers and human resources professionals have relied heavily on the DOL's FAQs and Final Rule to advise employers on FFCRA leave issues. On April 14, 2020, the state of New York filed suit against the DOL, claiming the agency's Final Rule exceeded its authority.

The FFCRA, which applies to certain public employers and private employers with fewer than 500 employees, has two central components.

The **Emergency Paid Sick Leave Act (EPSLA)** provides paid sick leave to employees unable to work or telework in six different scenarios. Leave is available if the employee is:

1) subject to governmental quarantine or isolation order;

2) advised by a health care provider to self-quarantine;

3) experiencing COVID-19 symptoms and seeking a diagnosis;

4) caring for an individual subject to quarantine under reasons (1) or (2);

5) caring for a child whose school or place of care is closed; or

6) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

It is helpful to remember these scenarios by their associated numbered paragraph, as the Final Rule and related guidance connect certain provisions to the precise reason necessitating EPSLA leave.

The **Emergency Family and Medical Leave Expansion Act (EFMLEA)** provides paid sick leave to employees unable to work due to a *bona fide* need to care for a child whose school or day care provider is closed or unavailable for reasons related to COVID-19.

In response to the state's challenge, the DOL asserted that New York lacked standing to sue. The District Court, in a detailed analysis, found the state's "proprietary injury to its tax revenue" afforded standing and thus proceeded to address the merits.

The state challenged four specific "Final Rule" provisions in its complaint, asserting the DOL lacked authority to issue the following: (1) the requirement – which applies only to certain reasons for leave – that an employer actually have available work for the employee to perform; (2) the broad definition of "healthcare provider" that includes those who do not themselves provide health care but merely support those who do; (3) certain requirements of and limitations on intermittent leave; and (4) documentation requirements as a precondition to leave. The court granted summary judgment to the state on three of its challenges, and granted it in part on the remaining one concerning intermittent leave. Each ruling is addressed below.

Leave Eligibility Cannot be Contingent on 'Work Availability'

The DOL's Final Rule made clear that for an employee to be eligible for FFCRA paid leave, the employee requesting paid sick leave (depending upon the reason for leave) had to show that work was in fact available for the employee to perform. Before the Final Rule, employers questioned whether their employees could be eligible for FFCRA paid leave if, regardless of the personal reasons for requiring paid sick leave, their services were no longer needed due to business stoppage or slowdown resulting from the pandemic. Employees working for companies with no available work still wanted the benefit of paid leave consistent with the law's remedial purpose.

In analyzing the state's challenge, the court observed that the Final Rule's work availability requirement illogically applies to only three of the six enumerated reasons for ESPLA leave (reasons (1) (subject to quarantine order), (4) (caring for an individual subject to quarantine order), and (5) (caring for a child whose school or day care closed), as well as EFMLEA family leave. Conversely – and according to the court, illogically – the work availability requirement does not apply to employees seeking FFCRA paid leave due to their own illness (reasons (2), (3), and (6)).

Finding that this differential requirement did not pass the legally required "reasoned decision-making" standard, the court vacated the work availability requirement.

Workers Who Do Not Provide Health Care Cannot be Considered 'Healthcare Providers'

The FFCRA provided health care employers the option to exclude their employees who are "healthcare providers" and emergency responders from eligibility for FFCRA leave rights. The DOL in its interpretive Final Rule defined "healthcare provider" broadly. The definition encompassed not only those who personally provide health care, such as doctors or nurses, but also those who provide services for a facility that employs such workers.

The Final Rule explains that health care providers "include not only medical professionals, but ***also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational***. The term further includes, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID–19 public health emergency." (Emphasis added.)

Finding the DOL's definition was so expansive as to cover individuals who are not themselves health care providers, but who merely provide services to those who are, the court ruled "[t]he DOL's definition cannot stand."

Reasonable to Restrict Intermittent Leave for Teleworking Employees or Those with Child Care Needs, but No Reason to Require Employer Consent

The Final Rule explains that intermittent leave is available for employees unable to telework for any of the six enumerated reasons under the EPSLA, provided the employer and employee agree to such leave. Intermittent leave is also available under the EFMLEA, but also subject to the mutual consent of the employer and employee.

The DOL created a different rule for employees working on-site at their normal place of business. For these on-site employees, intermittent leave is only available under reason (5), that is, if the employee requires leave because his or her child's school or day care is closed, and only if the employer and employee agree on a schedule.

If an employee requires paid sick leave for any other enumerated reason (reasons (1), (2), (3), (4), or (6)), the employee must take leave in "full-day" increments only, and the leave must continue until the need for leave ceases. The DOL's stated rationale was that the very reason necessitating leave requires that the leave extend without interruption until the qualifying condition ceases.

New York's challenge to these DOL-created provisions (intermittent leave was not addressed at all in the FFCRA) were threefold. The state took issue with the DOL's explanation of: (1) how intermittent leave could be taken (i.e., in separate time periods as opposed to one uninterrupted period); (2) the subset of conditions for which intermittent leave could be taken; and (3) whether employer consent could be required.

Here, the court granted the state's challenge only in part. The court vacated the Final Rule's "blanket requirement" of employer consent, finding that aspect of the Rule "entirely unreasoned." To the extent the DOL restricted intermittent leave to certain qualifying conditions – to prevent potentially infected employees from spreading the virus – the court concluded the DOL's reasoning on that issue was sound

and permissible. The court likewise upheld the provision requiring leave to be taken consecutively for such reasons until the need for leave abates.

Documentation Requirements Cannot Stand Where Advance Notice Not Practicable

The DOL Final Rule requires employees seeking paid sick leave for any reason under the EPSLA or paid leave under the EFMLEA to provide, ***before taking leave***, documentation containing: (i) the employee's name; (ii) date(s) of requested leave; (iii) reason for leave; and (iv) a statement that the employee is unable to work because of a qualified reason for leave.

Additional documentation requirements depend upon the reason for leave. If, for example, an employee seeks leave due to a quarantine order (reason (1)), the employee must provide documentation that includes either the name of the government entity that issued the order, or the name of the health care provider who advised the employee to self-quarantine. If an employee requests leave because her child's school is closed (reason (5)), or leave under the EFMLEA, the documentation must include the name of the child, the name of the school, and a representation that no other suitable person will be caring for the child during the period of leave. Employers may also require additional documentation if needed to support a request for tax credits.

The state argued the Final Rule's documentation requirements were inconsistent with and more stringent than the FFCRA in that they required employees to provide documentation before taking leave. The court determined that such a requirement was more onerous than the "unambiguous statutory scheme Congress enacted" and thus could not stand as a matter of law.

Conclusion

It remains to be seen whether the DOL will appeal the District Court's Order.

For more information and updates on the developing situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019 and Business Continuity Amid COVID-19 page.

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