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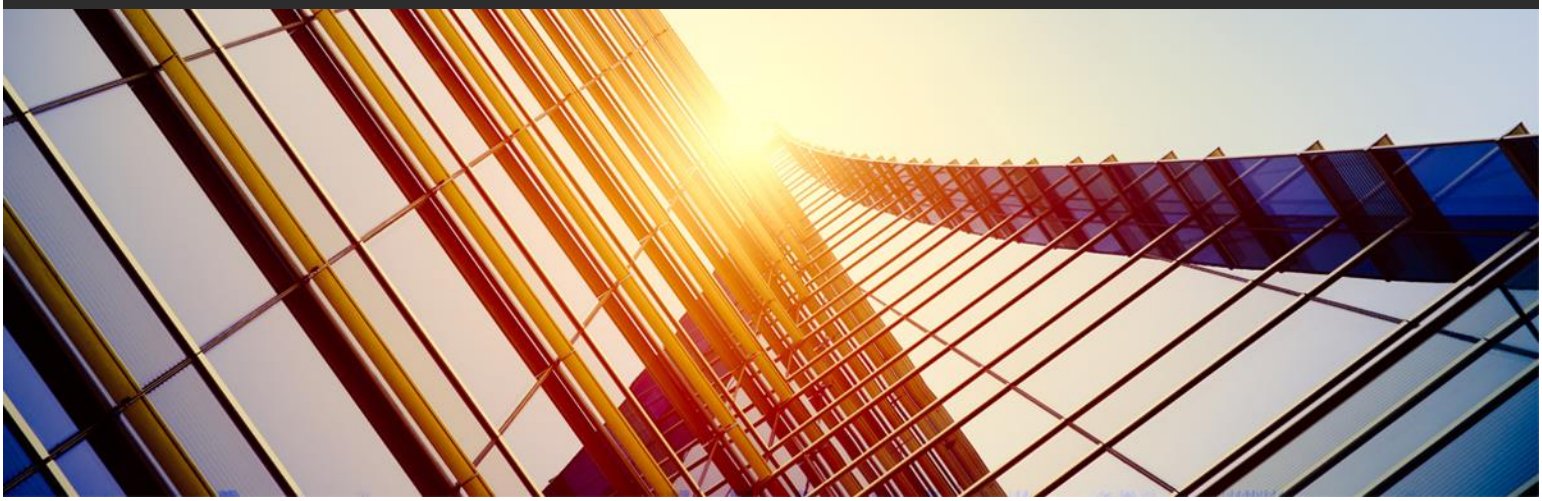
Alert | Health Emergency Preparedness Task Force: Business Continuity Amid COVID-19



September 2020

DOL Amends FFCRA Regulations to Address Concerns Raised by Judge's August 2020 Decision

Following our earlier Alert on this topic, the Department of Labor (DOL) issued a revised rule in response to U.S. District Judge Paul Oetken's August 2020 decision that nullified certain definitional aspects of the DOL's Families First Coronavirus Response Act (FFCRA) regulations. The DOL's revisions aim to clarify and address the Court's concerns. These changes become effective Sept. 16, 2020. The FFCRA is still set to expire Dec. 31, 2020.

Employer Must Have Work for Employee to Perform Regardless of Reason for Leave

The DOL made clear that regardless of an employee's need for paid leave under the Act, the employer must have available work for the employee to perform before an employee can take FFCRA leave. The DOL clarified that it does not matter whether the employee seeks leave because of an order to quarantine, to self-quarantine because of Coronavirus Disease 2019 (COVID-19) symptoms, to seek a medical diagnosis of COVID-19, to care for someone else who is ill because of COVID-19, or to care for children whose childcare or school is closed due to COVID 19 – leave will not be available if the employer does not require the employee's services in the first place. One of the qualifying grounds for leave must be the "but for" cause for the leave request, not because the employer does not have work for the employee. The employer cannot claim it does not have work to avoid FFCRA leave, but if it really does lack work for the employee, the employee is not entitled to FFCRA leave.

Employer Approval Required for Intermittent Leave That Does Not Risk Contagion

The DOL reaffirmed that employees requiring intermittent leave for qualifying reasons that do not exacerbate COVID-19 contagion risk must obtain employer approval. As the DOL noted, "[t]he District Court upheld the rule's prohibition on intermittent leave for employees who are reporting to the worksite when the reason for leave correlates to a higher risk of spreading the virus, i.e., all qualifying reasons except for caring for the employee's child due to school or childcare closure or unavailability." Because the FFCRA did not address intermittent leave, the DOL reasoned it can only apply when it does not increase the risk of spread. Accordingly, childcare is the only qualifying reason for intermittent leave. As the DOL regulations already provide that employees may telework only if the employer permits such an arrangement (see §826.10(a)), many will likely assume (though it is not clear) that the DOL also concluded it fair to require employer consent for intermittent leave necessitated by childcare concerns, which is typically accomplished through a teleworking arrangement.

Respecting the need for FFCRA leave at different points in time, the DOL clarified that using some FFCRA leave at a later date – not exhausting all of it at once – is not considered "intermittent leave" and remains permissible.

Finally, the DOL clarified that taking leave for days when schools are closed (i.e., school open on certain weekdays only) is not considered "intermittent leave" and therefore would not require employer consent. Leave is considered "intermittent" only when "the employee wishes to take leave only for certain portions of a period for reasons other than the school's in-person instruction schedule."

HCP Definition Narrowed to Exclude Those Not Engaged in Providing Health Care

The DOL narrowed its previous definition of health care provider (HCP) to include only doctors, nurses, nurse assistants, medical technicians and others who "*directly provide*" health care services. Under the revisions, employees who provide diagnostic, preventative or treatment services, or services integrated with and necessary to the provision of patient care, are included in this definition, but not IT professionals, business maintenance staff, food services personnel and others who support and provide services for HCPs but do not directly engage in patient care. This revision addresses the Court's concern about employees who are not really providing health care services but were excluded from the FFCRA leave requirements under the previous broad definition because of their affiliation with a health care institution.

Documentation of Need for Leave Required 'As Soon as Practicable'

The DOL clarified that documentation need not necessarily be provided in advance of the need for leave but may be provided "as soon as practicable."

The clarity from the DOL is welcome, as the FFCRA remains in place for eligible employees until the end of 2020.

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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