MODIFICATIONS TO FFCRA REGULATIONS:

PAID SICK LEAVE

As a result of the recent New York federal court ruling, which rejected portions of the Families First Coronavirus Response Act (FFCRA) regulations, the Department of Labor (DOL) issued revised rules that went into effect on September 16, 2020, and will continue to be enforceable through the end of 2020.

Which rules did the New York federal court strike down?

- A rule allowing for intermittent FFCRA leaves only if the employer consents to the use of such leave time
- A rule denying FFCRA benefits to employees unless employers have work available for them to perform (for example, this would exclude an employee on furlough status due to a COVID-related reduction in force)
- A rule allowing employers of health care providers to exclude a broad range of employees from the FFCRA's benefits
- A rule allowing employers to require documentation of the need for FFCRA leave time prior to taking such leave

What changes did the DOL make in response?

- **Intermittent leave still requires employer consent, but "intermittent" leave exists only when an employee is taking partial day increments of FFCRA leave**. An employee who is taking FFCRA leave in full day increments to care for a child whose school is operating on alternate day bases, for example, would not be considered to be taking intermittent leave. In that scenario, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.

- The DOL held firm that **an employer must have work available for an employee in order for the employee to be eligible for FFCRA leave**. In other words, the employee's FFCRA reason for leave must be the sole reason they are not working. However, employers may not arbitrarily withhold work in order to thwart an employee's ability to take leave; the unavailability of work must be due to legitimate, nondiscriminatory, non-retaliatory business reasons.

- **The DOL provided a narrower definition of "health care provider" than its original regulations to cover employees who are health care providers** under the classic Family and Medical Leave Act (FMLA) definition (i.e., a doctor of medicine or osteopathy or others who are determined by the Secretary of Labor as being capable of providing health care

services), as well as other employees who are employed to provide diagnostic, preventive, or treatment services, or other services that are integrated with and necessary to the provision of patient care (i.e. nurses, nurse assistants and medical technicians). **However, if a person provides services that merely affect, but are not integrated into, the provision of patient care (i.e., IT professionals, HR personnel, cooks, food service workers, and billers), they are not covered by the "health care provider" definition** and are eligible for FFCRA leave if they are otherwise qualified, even if they work for a hospital, doctor's office, or long term care facility.

- Employees may provide the documentation required under 29 CFR § 826.100(d) "**as soon as practicable" rather than prior to the commencement of the leave**. The DOL noted that in most cases this will likely be when the employee provides notice of the need for FFCRA leave.

Moving Forward

Employers can certainly breathe a sigh of relief on many of these issues. The goal is to balance an employer's operational needs with their employees' health and family responsibilities. Now that the DOL has provided better justification for a few of these regulations, they have a stronger chance of surviving legal challenge in the future. Check out the DOL's extensive FFCRA FAQ page for other related questions.

For More Information

We will continue to monitor this situation and release updates. For more information or assistance, please contact our Human Resources team at **210–775–6082**, toll-free at **1–888–757–2104**, or **HRManagement@BFGonline.com**.

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