JacksonLewis

What's New With The Families First Coronavirus Response Act (FFCRA)?

September 30, 2020

Craig S. Roberts
Jackson Lewis P.C. | Long Island
Craig.Roberts@jacksonlewis.com
631-247-4616

Henry S. Shapiro
Jackson Lewis P.C. | Long Island
Henry.Shapiro@jacksonlewis.com
631-247-4651

Introductory Statement

THE MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS P.C. FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY JACKSON LEWIS P.C. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.

An Overview – What Does the FFCRA Provide?

Emergency Paid Sick Leave Act

- Up to 80 hours of paid sick leave for select qualifying reasons relating to COVID-19;
- Employees eligible on first day of employment;
- Depending on qualifying reason, employee may receive full pay, up to a cap of $511/day, $5,110 total.

Emergency Family and Medical Leave Expansion Act

- Up to 12 weeks of expanded FMLA (first 2 weeks unpaid) for school or childcare provider closure or unavailability related to COVID-19;
- Eligible after 30 days of employment;
- 2/3 regular rate of pay, up to a cap of $200/day, $10,000 total.

Qualifying Reasons For Emergency Paid Sick Leave

(1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.

(5) The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Emergency Paid Sick Leave Act

- Only applies to employers with fewer than 500 employees.
- EPSL time is in addition to paid time off already provided by the employer.
- Part-time employees receive the equivalent of the average number of hours worked over two weeks.
- For qualifying reasons (1) – (3) – paid at the employee's regular rate but capped at $511 per day and $5,110 in the aggregate.
- For qualifying reasons (4) – (6) – paid at 2/3 the employee's regular rate but capped at $200 per day and $2,000 in the aggregate.

Emergency Family and Medical Leave Expansion Act

- Only applies to employers with fewer than 500 employees.
- Usual FMLA eligibility requirements do not apply (need 30 days of employment). Counts prior FMLA time used in lookback period.
- One qualifying reason – employee unable to work or telework because employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
- First 2 weeks are unpaid; remaining 10 weeks are paid at 2/3 the employee's regular rate but capped at $200 per day and $10,000 in the aggregate.
- Existing FMLA position restoration and group benefit continuation requirements remain.

But What About Health Care Providers?

- The EFMLEA and the EPSLA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements.
- In other words, if a health care provider fits the definition, it could avoid providing FFCRA benefits. See 29 CFR 826.30(c).

But What About Health Care Providers?

- The definition of health care provider for purposes of the exemption under FFCRA:
  - A health care provider is **anyone employed** at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
  - Includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

A Challenge Arises

- State of New York v. U.S. Department of Labor, et al., No. 1:20-cv-03020 (S.D. N.Y. Aug. 3, 2020). Following the U.S. Department of Labor's Temporary Rule on FFCRA that took effect April 1, 2020, the State of New York filed a complaint for declaratory and injunctive relief against the DOL and the Secretary of Labor in the U.S. District Court for the Southern District of New York ("SDNY") on April 14.

- The SDNY ruled on August 3, 2020. As a result, we saw changes to:
  - The definition of who qualifies for the healthcare provider exemption;
  - The exclusion from benefits of employees whose employers do not have work for them;
  - The requirement that employees secure consent for intermittent leave for certain qualifying reasons; and
  - The requirement that documentation be provided before taking leave.

Work Availability Requirement

- Original DOL Rule – Employees are not entitled to paid leave under the FFCRA if their employers "do not have work" for them to do. Significant because COVID-19 caused the temporary shutdown or slowdown of many businesses nationwide, resulting in a decrease in work available to employees.
- New York Complaint – Asserted that "[t]he Final Rule imposes a new 'work availability' requirement that permits employers to deny their workers emergency family leave or paid sick leave, with no statutory basis."
- DOL Argument – Employees are not "unable to work (or telework)" due to FFCRA qualifying reason if their employer has no work available for them to perform.
- SDNY – Work availability requirement exceeded the DOL's authority because it applied only to three of six qualifying reasons for EPSL leave, which the court found inconsistent with the language of the FFCRA.

Health Care Provider Exemption

- Original DOL Rule – Can exclude a "health care provider or emergency responder" from paid leave benefits.

- New York Complaint – Rule's definition of a "health care provider" exceeds the DOL's authority under the FFCRA. "Health care providers" applies too broadly to all employees at a group of employers (i.e., "anyone employed").

- SDNY – The FFCRA "unambiguously forecloses" the DOL's definition. The court found the definition to be "vastly overbroad" because it included employees whose roles bore "no nexus whatsoever" to the provision of healthcare services and "who were not even arguably necessary or relevant to the healthcare system's vitality."

Intermittent Leave

- Original DOL Rule – Permits employees to take leave intermittently (i) upon agreement between the employer and employee and (ii) only for a subset of qualifying conditions.

- New York Complaint – No statutory basis exists for conditioning intermittent leave on employer approval.

- SDNY – Upheld the DOL's limitation of leave to qualifying reasons that are not logically correlated with a higher risk of viral infection. However, the court determined that the DOL "utterly fails to explain why employer consent is required for the remaining qualifying conditions." Intermittent leave may only be taken if an employee's qualifying need is to care for a child whose school or place of care is closed or unavailable, and employees do not need employer consent to take such intermittent leave.

Documentation Requirements

- Original DOL Rule – Requirement that employees submit to their employer, prior to taking FFCRA leave, documentation explaining their reason for leave, the duration of leave, and, to the extent relevant, the authority for the isolation or quarantine order qualifying them for leave.

- New York Complaint – Requirements more onerous than those provided by the statute.

- SDNY – The FFCRA contains notice requirements but not documentation requirements. Requirement that employees provide documentation in advance of leave is higher standard than the FFCRA's unambiguous notice provisions. "The documentation requirements, to the extent they are a precondition to leave, cannot stand." Substance of documentation remains the same.

What Can I Ask For?

- Per the IRS:
  1. The employee's name;
  2. The date or dates for which leave is requested;
  3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason;
  4. A statement that the employee is unable to work, including by means of telework, for such reason; and
  5. In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The DOL Addresses the SDNY Decision

- Following the SDNY ruling calling several provisions of the DOL's FFCRA temporary rule into question and outright striking portions down, the DOL issued a new temporary rule with updated FAQs.

- Now, as of September 16, 2020, the DOL:
  - Reaffirmed that employees may take FFCRA leave only when work is actually available to them (good for employers that furloughed employees).
  - Reaffirmed that employees must have their employer's approval to take intermittent FFCRA leave.
  - Revised the definition of "health care provider" regarding those who can qualify for the health care provider exemption.
  - Clarified that employees must provide employers with documentation as soon as possible supporting their need for FFCRA leave (including EFMLEA leave).

New FAQs

- **When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated?**
  - August 3, 2020. The Department first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit New York v. Scalia, Civ. No. 20-3020-JPO (S.D.N.Y.). The challenged provisions were vacated when the District Court issued its opinion and order on August 3, 2020. As of August 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.
- **Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?**
  - Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.
- **When do the revisions to the Department's FFCRA paid leave regulations become effective?**
  - September 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on September 16, 2020. This means they are effective from September 16, 2020 through the expiration of the FFCRA's paid leave provisions on December 31, 2020.

Work Availability

- Leave is only available if a qualifying reason was the but for cause of the employee's inability to work.

- An employee may take paid sick leave or expanded family and medical leave only to the extent that a qualifying reason for such leave is a **but-for cause** of his or her inability to work.

- "[I]f there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be a but-for cause of the employee's inability to work."

Intermittent Leave

- Intermittent leave may only be taken with the approval of the employer, but there is a difference between intermittent leave and consecutive requests for leave.

- "[T]he employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent. In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee."

- Each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens again for the particular student. "The employee may take leave due to a school closure until that qualifying reason ends (*i.e.,* the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.,* school closes again the day after that)."

- However, if the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule, this would constitute a request for intermittent leave that would require his or her employer's agreement.

Health Care Provider Exemption (1 of 2)

- Health care providers that an employer can elect **not** to cover under the FFCRA include:
  1) Doctors of medicine or osteopathy who are authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
  2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors authorized to practice in the State and performing within the scope of their practice as defined under State law;
  3) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

Health Care Provider Exemption (2 of 2)

- Health care providers that an employer can elect **not** to cover under the FFCRA include:

4) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
5) Any other employee who is capable of providing health care services, meaning he or she is employed to provide:
   a) diagnostic services (taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results);
   b) preventive services (screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems);
   c) treatment services (performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments);
   d) or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care (bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples).

Health Care Provider Exemption

Types of employees falling under this last category include only:

i. Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in 5 above;

ii. Employees providing services described in 5 above, under the supervision, order, or direction of, or providing direct assistance to, a person described in numbers 1-4 above or (i) above; and

iii. Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

- The DOL further clarified that **employees who do not provide health care services as described above are not health care providers** even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.

JacksonLewis

Thank you.