August 11, 2020

COVID-19 Update: New York Federal Court Vacates Parts of Families First Coronavirus Response Act Regulation

The District Court for the Southern District of New York issued a decision (the "Decision") vacating parts of a temporary rule (the "Rule")[1] implementing the emergency family leave and paid sick leave requirements of the Families First Coronavirus Response Act (the "FFCRA").[2] The Decision struck down the following provisions of the Rule: (1) the "work-availability" requirement; (2) the definition of a "health care provider"; (3) the requirement that an employee secure employer consent for intermittent leave in certain circumstances; and (4) the requirement that employees provide documentation before taking leave. The Decision was in response to the State of New York's lawsuit[3] against the Department of Labor (the "DOL") challenging the Rule on the grounds that it unlawfully narrows workers' eligibility for family and sick leave guaranteed by the FFCRA and exceeds the DOL's statutory authority. While the court sided with the State of New York on a majority of issues raised in the suit, the remainder of the Rule, including the ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, still stands. The decision impacts New York employers covered by the FFCRA, and potentially, has broader, nationwide application.

I. Emergency Family and Sick Leave under the FFCRA

The FFCRA, which includes the Emergency Family and Medical Leave Expansion Act (the "EFMLEA") and the Emergency Paid Sick Leave Act (the "EPSLA"), entitles employees who are unable to work due to COVID-19 to paid leave.

The EFMLEA requires employers with fewer than 500 employees to provide up to 10 weeks of paid leave[4] to employees who are unable to work because they must care for a dependent child (1) whose school or place

1 85 Fed. Reg. 19,326 (Apr. 6, 2020).

2 Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020).

3 *State of New York* v. *U.S. Department of Labor, et al.*, No. 1:20-cv-03020 (S.D.N.Y.)

4 EFMLEA provides up to 12 weeks of leave to eligible employees. The first ten days of EFMLEA leave may be unpaid, but thereafter, paid leave must be available at two-thirds the employee's regular rates. *See* FFCRA § 3102(b).

of care has been closed or (2) whose care provider is unavailable due to COVID-19.[5] Employers must provide EFMLEA leave to any employee who has worked 30 days or more for the employer.[6]

The EPSLA requires employers with fewer than 500 employees to provide up to 80 hours of paid sick leave to employees who are unable to work due to the following circumstances:

(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 health care 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 subject to a federal, state, or local quarantine or isolation order or an individual advised by a health care provider to self-quarantine due to COVID-19-related concerns;

(5) The employee is caring for a child whose school or place of care has been closed, or whose childcare provider is unavailable due to COVID-19 precautions; or

(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 Treasury or Secretary of Labor.[7]

All employees are eligible for EPSLA leave, regardless of the duration of their employment.[8]

Both the EFMLEA and EPSLA remain in effect until December 31, 2020.[9]

II. The Decision

The State of New York challenged four provisions of the Rule on the grounds that they create unsupported exclusions for employee eligibility and impose new restrictions that are contrary to text of the FFCRA. We discuss each in turn.

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5 *Id.* § 3102(b).

6 *Id.*

7 *Id.* § 5102(a).

8 *Id.* § 5102(e)(1).

9 *Id.* §§ 3102, 3106, 5108, 5109.

Work Availability Requirement

The Rule provides that employees cannot take EFMLEA leave to care for their child "where the [e]mployer does not have work for the [e]ligible [e]mployee."[10] The Rule also provides that employees cannot take EPSLA leave for three out of six qualifying conditions—if they are (1) subject to a quarantine or isolation order; (2) caring for an individual subject to a quarantine or isolation order; or (3) caring for a child due to COVID-19-reasons—"where the [e]mployer does not have work for the [e]mployee."[11]

The Decision ruled that the FFCRA is ambiguous as to whether an employee's inability to work should be *solely* due to one of the specified reasons for FFCRA leave,[12] and concluded that the Rule's work availability requirement is not a permissible interpretation of the FFCRA. *First*, as to the EPSLA, the court found that the Rule's different treatment of the six qualifying conditions is "entirely unreasoned" and "manifestly contrary to the [FFCRA's] language," given that the six conditions share a single statutory umbrella provision.[13] *Second*, the Decision found that the DOL failed to offer a reasoned justification for imposing the work availability requirement other than its barebone explanation that "but-for" causation is required between the employee's inability to work and their qualifying condition.[14]

Thus, the Decision provides that eligible employees would be entitled to both EFMLEA and EPSLA leave even if their employer does not have work for them. Notably, the Decision can be interpreted as suggesting that FFCRA leave may be available to employees who remain employed but do not have work immediately available to them occasioned by a "temporary shutdown [or] slowdown"[15] of the employer's business.[16]

Definition of "Health Care Provider"

The Rule permits employers to exclude "health care providers or emergency responders" from taking paid leave benefits and defines "health care providers" as employees of a broadly defined group of employers, including, among others, "anyone employed at any doctor's office hospital, health care center, clinic, post-

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10 Rule at 19,350.

11 *Id.* at 19,349–50.

12 *Id.* at 15.

13 *Id.* at 17.

14 *See id.*

15 *Id.* at 11.

16 The Decision acknowledged that limiting the availability of FFCRA leave to exclude workers whose employers do not have work for them would be "hugely consequential" because COVID-19 has caused the shutdown and slowdown of countless businesses nationwide, "causing in turn a decrease in work immediately available for employees who otherwise remain formally employed." *Id.* at 11.

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 institutions, Employer, or entity."[17]

The Decision rejected the Rule's definition as "vastly overbroad,"[18] and noted that the Rule's focus on the identity of the *employer* was contrary to the statutory mandate that the *employees* who are designated as "health care providers" be capable of providing healthcare services.[19] Although the Decision would not go as far as to requiring a designation on an individual-by-individual basis, it stated that the statute's text "requires at least a minimally role-specific determination."[20]

The Decision did not determine what the proper definition of "health care provider" would be for purposes of FFCRA, but makes clear that an acceptable definition would have to bear at least some nexus to the employee's actual role in providing healthcare services. For example, the Decision would not permit employers to exclude "an English professor . . . at a university with a medical school," who otherwise would have qualified as a "health care provider" under the Rule, from taking FFCRA leave under the "health care provider" exemption.[21]

Use of Intermittent Leave and Employer Consent

The Rule limits employees' eligibility to take FFCRA leave intermittently (*i.e.*, in separate periods of time, rather than one continuous period) to the following circumstances:

- The employee obtains employer consent for intermittent leave; and
- If the employee physically commutes to the worksite, their reason for leave is to take care for a dependent child whose school or place of care has been closed or whose care provider is unavailable due to COVID-19.

In other words, an employee who does not telework cannot take intermittent leave if they (1) are subject to a government quarantine or isolation order related to COVID-19; (2) have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, (3) are experiencing symptoms of COVID-19 and are taking leave to obtain a medical diagnosis, (4) are taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or (5) are experiencing any other

17 Rule at 19,351.

18 Decision at 19.

19 *Id.* at 18–19.

20 *Id.* at 18

21 *See id.* at 18.

substantially similar condition specified by the Secretary of Health and Human Services. The Rule explains that this restriction advances public health interests by preventing employees who may be infected or contagious from returning intermittently to a worksite where they could transmit COVID-19.[22] The Rule permits employees who telework to take leave intermittently as long as their employer consents.

The Decision upheld the Rule's ban on intermittent leave for situations involving "a higher risk of viral infection."[23] But, the Decision invalidated the employer consent requirement on the grounds that DOL "utterly fails to explain why employer *consent* is required for the remaining qualifying conditions, which . . . do not implicate the same public-health considerations."[24]

Documentation Requirement

The Rule requires that employees submit to their employer, "prior to taking [FFCRA] leave,"[25] documentation indicating, among other things, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave."[26]

Notably, the text of neither the EFMLEA nor EPSLA requires prior notice or includes details regarding what the notice should entail. The EFMLEA allows employees to provide the employer with notice of leave "as is practicable."[27] The EPSLA provides that "*[a]fter* the first workday (or portion thereof) an employee receives paid sick time," an employee may require the employee to "follow reasonable notice procedures" to continue receiving paid sick time (emphasis added).[28]

The Decision concluded that the Rule may not require employees to secure employer consent *before* taking FFCRA leave because doing so would be inconsistent with the statute's unambiguous language.[29] In particular, the Court stated that the Rule's blanket requirement that an employee furnish documentation before taking leave renders the notice exception for unforeseeable leave under EFMLEA and the one-day delay for notice under the EPSLA completely nugatory.[30]

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22 *See id*. at 19,337.

23 *Id*. at 22.

24 *Id*. (emphasis in original).

25 Final Rule at 19,355; *See* Decision at 23.

26 Decision at 23.

27 FFCRA § 3102(b).

28 Decision at 23.

29 *Id*. at 24.

30 *Id*.

However, the Decision left intact the substance of the remaining documentation requirement under the Rule.

III. Implications for Employers

- FFCRA-covered employers in New York should review their policies and practices to ensure that they are in compliance with the Decision regarding (1) how they determine when employees qualify for paid leave; (2) the scope of the "health care provider" exemption, to the extent it applies; (3) their requirements for intermittent leave; and (4) the timing of requiring documentation for taking leave under the FFCRA.

- The Decision leaves open what the appropriate definition of a "healthcare provider" is under the FFCRA, and suggests that FFCRA leave is available to employees who remain employed but do not have work immediately available to them because of a temporary shutdown or slowdown of the employers' business.

- The Decision does not expressly opine on whether its ruling applies nationwide, beyond the state of New York. Other states may bring similar challenges, and the DOL may seek an appeal of the Decision.

- Given the uncertainty surrounding the meaning of the Decision and its geographic scope, employers should closely monitor any updates and seek legal counsel, if necessary, to remain in compliance with their obligations under the FFCRA.

Please refer to our March Memorandum on the FFCRA for a more detailed discussion of emergency family and sick leave requirements under the FFCRA.

The Rule can be found here.

The Decision can be found here.

The complaint filed by the State of New York can be found here.

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's Coronavirus (COVID-19) Resource Center.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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