After Losing in the SDNY, the DOL Revises and Reaffirms the FFCRA Regulations

By Peabody & Arnold on October 8, 2020

After more than a month of debate, the U.S. Department of Labor ("DOL") has responded to the U.S. District Court for the Southern District of New York's ("S.D.N.Y.") decision striking down significant provisions of the DOL's regulations implementing the Families First Coronavirus Response Act ("FFCRA"). As we predicted in our previous post about the S.D.N.Y.'s decision, the DOL has issued revised temporary rules in response to the decision. The new rules, described in further detail below, are effective immediately but are set to expire on December 31, 2020.

The debate between the S.D.N.Y. and the DOL regarding the purpose and scope of the FFCRA highlights the importance of staying up to date on the latest regulations and court decisions in the jurisdictions where employers do business.

The DOL Reaffirms the Work-Availability Requirement as Applied to All Forms of FFCRA Leave

The DOL's regulations create a "work-availability requirement" that effectively conditions an employee's eligibility for FFCRA leave on whether there is work available for the employee to perform. The S.D.N.Y. decision was critical of the work-availability requirement because, in the court's view, the requirement appeared to apply only to some, but not all, types of FFCRA leave.

In its revised rules, the DOL reaffirmed its initial position and clarified that the work-availability requirement applies to *all* qualifying reasons for leave under the FFCRA. The DOL further explained it interprets the FFCRA to impose a "but-for causation standard" to all qualifying reasons for which an employee may take leave under the FFCRA. In other words, the DOL has clarified that the qualifying reason for leave must be the "actual reason" the employee is unable to work. Therefore, if an employer does not have any work for the employee to perform, the employee will not be entitled to take any type of leave under the FFCRA.

The DOL Reaffirms that Employer Consent Is Required for Intermittent Leave but Redefines What Constitutes "Intermittent" Leave Under the FFCRA

The DOL also reaffirmed its regulation requiring employer consent for an employee to use FFCRA leave on an intermittent basis. According to the DOL, such a requirement is consistent with traditional Family and Medical Leave Act ("FMLA") requirements and the need to schedule leaves so as to minimally disrupt employers' business operations. Leave for most of the qualifying reasons under the FFCRA is not available on an intermittent basis due to public health risks. Therefore, the only question for debate following the S.D.N.Y.'s decision was whether the DOL would continue to require employer consent for intermittent leave to care for a child whose school or place of care is closed.

The DOL answered this question in its regulatory preamble, which now specifically addresses leave to care for children whose schools are operating remotely full-time or through a hybrid model. In those

scenarios, the DOL considers each full day a separate, independent qualifying reason for FFCRA leave. In other words, each day of school closure "constitutes a separate reason for FFCRA leave that ends when the school opens the next day." The DOL reasons, therefore, that intermittent leave is not necessary in those scenarios. In the DOL's view, employer consent is required only when a school or place of care is closed for an extended period of time and the employee requests leave only for certain portions of that time. Given the prevalence of remote learning for students of all ages this fall, this interpretation will have significant impacts for employers big and small.

The DOL Revises the Documentation Requirement for Consistency Purposes

The DOL clarified the ambiguity in its regulations that appeared to require employees to provide supporting documentation before they can take leave. Specifically, the revised regulation now states that an employee does not need to provide documentation prior to taking leave, but rather the employee must provide documentation "as soon as practicable." The DOL notes that as a result, in most cases, the employee will need to produce documentation at the same time the employee gives notice of his or her need for leave. The timing of when the employee must notify the employer of his or her need for leave will, as always, depend on whether the need for leave is foreseeable or not.

The DOL Revises the Definition of "Health Care Provider"

The DOL likewise revised its regulatory definition of the term "health care provider," which it acknowledged needed clarification. Specifically, the DOL redefined the term to include all employees falling under the FMLA's existing regulatory definition, as well as other employees who provide diagnostic, preventative, treatment or other services that are integrated with and necessary to the provision of patient care. The DOL explained that its new regulatory definition includes employees who are considered health care providers based on the role and duties of those employees, rather than based on who their employer is.

Further Information

While it remains to be seen whether the DOL's revisions will be challenged again, there is some clarity for employers, at least for now. Employers are encouraged to contact a member of Peabody & Arnold's Employment Law and Litigation Practice Group for updated information and an analysis of their unique workplaces as they continue to sort through the issues surrounding COVID-19.

