Wait – Could You Go Over That Again?? Federal Court Sows Confusion by Invalidating Some FFCRA Regulations

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A federal judge in New York recently invalidated several parts of the U.S. Department of Labor's ("USDOL") regulations related to the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, which Congress passed earlier this year as part of the Families First Coronavirus Response Act ("FFCRA"). The Court struck down the provision that made paid leave available to employees only if their employers had work available for them to do; the expansive definition of an excludable "health care provider;" the ability of an employer to withhold consent for intermittent leave; and the requirement of advance documentation of the need for leave. Subject to the outcome of a possible appeal by the USDOL, the Court's invalidation of parts of the FFCRA regulations will require employers to carefully review and adjust their policies related to these two programs.

Background

The very first piece of legislation Congress passed in response to the COVID-19 pandemic was the FFCRA. Among other things, the FFCRA mandated Emergency Paid Sick Leave for certain COVID-19-related absences and expanded coverage (including by providing for partial pay) under the Family and Medical Leave Act (FMLA) for employees who could not work because school or child care had been disrupted. For an outline of those laws, see https://www.mccarter.com/insights/covid-19-legislation-assists-employers-and-employees-in-response-to-pandemic/. These two FFCRA programs require covered employers to pay eligible employees during certain COVID-19-related leaves of absence and then be reimbursed by the federal government through payroll tax credits or refunds. If an employer fails to provide the mandated paid leave, it can face legal action from the employee. On the other hand, if the employer provides payment when that payment is not required by the FFCRA, the federal government will not reimburse the employer.

Because the statute had been drafted and passed very quickly due to urgent needs created by the pandemic, it had some ambiguous provisions. In keeping with the urgency underlying the statute, the USDOL then quickly issued regulations interpreting the FFCRA (the "Regulations"), which we previously summarized. The New York Attorney General soon thereafter filed suit

challenging the validity of the Regulations under the Administrative Procedures Act.

On August 3, 2020, more than four months after the USDOL issued the Regulations, a federal district court in New York declared that several important provisions of the Regulations were invalid. As a result, employers covered by the FFCRA could face potential liability for past decisions made in reliance on the Regulations and some significant uncertainty over how to interpret the laws going forward.

The Work Availability Requirement

The Emergency Paid Sick Leave Act requires employers to provide paid leave to employees who are "unable to work (or telework) due to a need for leave because of" six specific COVID-19-related reasons. Similarly, the Emergency Family and Medical Leave Expansion Act provides partial pay for an employee who "is unable to work (or telework) due to a need for leave to care for" the employee's child whose school or day care is closed due to a public health emergency.

Under the Regulations, an employee who satisfied certain of the eligibility requirements of those programs was nonetheless NOT eligible for paid leave "where the Employer does not have work for the Employee." The Regulations provided that when an employee was unable to work because he or she was (a) subject to a quarantine or isolation order, (b) caring for a relative or household member, or (c) caring for a child whose school or day care is closed, the employer did not have to provide leave if the employer did not have work for the employee. However, the Regulations did not explicitly provide such a requirement where the employee was unable to work because he or she was (a) advised by a health care provider to self-quarantine or (b) seeking a medical diagnosis after experiencing COVID-19 symptoms. The Regulations also applied this work availability requirement to expanded FMLA leave.

Thus, in the circumstances to which the work availability requirement applied, an employer that did not have available work for an employee because of a slowdown or a shutdown was not required to provide paid sick leave or expanded FMLA leave to an otherwise eligible employee. If the employer chose to provide such paid leave despite not being required to by the Regulations, the federal government would not reimburse the cost of providing such paid leave.

Agreeing with New York's Attorney General, the district judge determined that the USDOL's application of the work availability requirement in the Regulations was invalid. In so holding, the Court first concluded that the terms of the statute were ambiguous. One reasonable reading was that in order for the employee to be eligible for the paid or partially paid leave, the qualifying reason must be the reason for the employee's inability to work – in other words, that where the employee would not be working anyway because work was unavailable, there was no occasion for leave. But equally reasonable, the Court believed, was the idea that if an employee were unable to work due to a qualifying reason, then the government, through the conduit of the employer, would pay the employee even if the employer did not have work for the employee.

Typically, where a provision of a statute is subject to two reasonable alternate meanings and Congress has authorized an agency like the USDOL to issue regulations interpreting the law, the agency can, through regulations, choose one of the competing reasonable interpretations. In such circumstances, when and if a court is ultimately forced to decide between reasonable interpretations, it will give significant deference to the interpretation of the agency Congress has charged with interpreting the statute.

In the case of the work availability requirement, however, the Court held that the USDOL did not act reasonably because it did not choose a single interpretation of the language but instead applied the work availability requirement to only three of the six qualifying reasons under the Emergency Paid Sick Leave Act. The Court held that the USDOL could not

interpret the same statutory language differently in the same act. Therefore, the Court struck down the work availability requirement as it applied to those specific instances.

This ruling creates a significant problem for employers trying to comply with the FFCRA. The Court did NOT say that the Emergency Paid Sick Leave Act definitely covered cases in which work was unavailable. Instead, it effectively erased the Regulation that said there was a work availability requirement for some, but not all, of the qualifying reasons for Emergency Paid Sick Leave. Thus, employers are left with statutory language that this Court at least says is ambiguous and no valid regulatory guidance to help resolve the ambiguity. Ultimately, either the USDOL will issue a new regulation that consistently takes a position, or perhaps the USDOL will appeal to the Second Circuit to seek to overturn the district judge and have its Regulation upheld as a reasonable interpretation of the statutory language.

In the meantime, employers face a quandary. If an employer does not have work available for an employee, and that employee nonetheless requests paid leave under the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act, what should the employer do? It can grant such leave, but the Treasury Department could take the position that it will not reimburse the employer because there was no work from which the employee could be taking leave. Alternatively, the employer could deny the requested leave, saying that it had no available work, but then the employee could bring a claim for violating the law based on the New York district court's invalidation of the USDOL's Regulation imposing a work availability requirement in certain settings.

At this point and subject to possible appellate proceedings in the New York litigation, the more cautious approach would be to provide the paid leave when requested even if the employer generally does not have work available for the employee. But there is risk in either approach, and because the law on this point is likely to evolve quickly through either a new statute, additional regulations, or an appeals court decision, employers should consult with counsel if and when this situation arises.

Definition of "Health Care Provider"

Under the FFCRA, an employer may, if it chooses, exclude a "health care provider" from both the Emergency Paid Sick Leave and the Expanded FMLA programs. For purposes of certifying health-related issues in the FFCRA, only an individual who is authorized to practice medicine by the state in which he or she practices or some other person specifically determined to be capable of providing health care services qualifies as a "health care provider." But for purposes of deciding whom an employer may exclude from eligibility for Emergency Paid Sick Leave or Expanded FMLA leave, the Regulations are far more expansive.

The Regulations provide that any person employed by any health care facility – such as a hospital, nursing home, or lab – and any person employed by any entity that contracts with a health care facility to provide services to maintain the operations of a health care facility is a "health care provider" subject to exclusion from the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act. To illustrate the breadth of the interpretation set forth in the Regulations, the district court noted that the USDOL agreed that "an English professor, librarian, or cafeteria manager at a university with a medical school would all be 'health care providers' under the Rule."

The Court had little difficulty concluding that the USDOL had overstepped its bounds with this broad definition. It held that the law required the USDOL to define "health care provider" only to include *individuals* capable of providing health care services, and invalidated the broad definition in the Regulations.

Unlike the work availability requirement, this conclusion creates less confusion for employers going forward. Only employees who are themselves traditional health care providers may be denied Emergency Paid Sick Leave and Expanded FMLA leave. Subject to the outcome of a

possible appeal by the USDOL, employers who have in the past four months applied the broader definition that had been set forth in the Regulations should consult with counsel to evaluate their risks and consider steps to address those risks.

Intermittent Leave

The FFCRA did not address intermittent leave in the statute. The Regulations provided that as a general matter leave could be taken intermittently if both the employer and the employee agreed. However, in those circumstances that, as the Court said, "logically correlate with a higher risk of viral infection," intermittent leave could not be agreed to if it required that the employee report to the employer's work site.

Finding no rationale for the Regulations to impose a blanket requirement of employer consent to intermittent leave, the Court invalidated part of this Regulation. Under the Court's ruling, employees are entitled under both the Emergency Paid Sick Leave Act and the FMLA Expansion Act to take leave intermittently whether or not the employer consents, unless working intermittently would require reporting to the employer's work site and the reason for leave is due to the employee:

- Being subject to a government quarantine or isolation order;
- Receiving a recommendation by a health care provider that the employee quarantine;
- Experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Taking care of another individual who is subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine.

Thus, subject to further rule-making by the USDOL or a reversal of the district court if an appeal to the Second Circuit is pursued, employer consent is no longer a requirement for intermittent leave. Importantly, unlike in the FMLA, there is no provision that allows an employer to transfer an employee to a different position that better accommodates an intermittent schedule.

Documentation Requirements

Finally, the Court struck down the requirement in the Regulations that employees provide advance documentation of the need for Emergency Paid Sick Leave or Expanded FMLA leave. The Court noted that the statute requires only "reasonable notice" and held that a blanket requirement of advance documentation would, in some circumstances, not be reasonable.

Employees must still provide employers with reasonable notice and sufficient documentation, but the failure to provide documentation in advance of the leave will neither prevent leave nor interfere with reimbursement through tax credits.

Conclusion

Employers who are subject to the FFCRA should review their policies and practices in light of these new developments. Employers should also pay attention to additional changes that may come through legislation, new regulations, or appellate court decisions. And of course, both the Emergency Paid Sick Leave Act and the FMLA Expansion Act expire at the end of 2020.