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Significant changes to FFCRA: DOL redefines "health care provider" exception & clarifies intermittent leave for childcare purposes

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On Friday, September 11, 2020, the Department of Labor (DOL) issued revisions and clarifications to its temporary rules implementing the Family First Coronavirus Response Act (FFCRA), largely in response to an August 3, 2020 ruling from the United States District Court for the Southern District of New York. The most significant revisions are (i) a significant change and narrowing to the definition of "health care providers" that can be excluded from the application of the FFCRA; and (ii) a clarification with respect to intermittent leave for childcare purposes. These changes are described in detail below, and result in employers who previously did not have to worry about FFCRA coverage suddenly having certain employees eligible for FFCRA leave, and all covered employers having to review and potentially revise their intermittent FFCRA policies and procedures. The revised rules are scheduled to take effect on September 16, 2020.

Revised definition of which employees are "health care providers" who can be excluded from the FFCRA

The FFCRA permits employers with less than 500 employees to exclude certain health care providers from taking FFCRA leave. Under the previous rules, the definition of health care provider was broad enough to include all employees of a health care employer's workforce (e.g., billers, IT technicians, human resource personnel, etc.). In essence, the definition was based on the employer. If the employer was a health care provider, all of its employees were "health care providers" under FFCRA and, thus, excluded from coverage. The revised rules change this and provides a narrower definition. Under the new rules, each employee's job duties must be examined on a case-by-case basis to determine if the employee is a "health care provider" and, thus, excluded from the FFCRA. As further detailed below, under the revised rules, employees of a health care employer who do not provide direct services to patients and are integrated into and necessary to the provision of health care services are not "health care providers" and, therefore, cannot be excluded from taking FFCRA leave.

Under this new, revised definition of health care provider, the following employees remain covered "health care providers" and thus excluded from the FFCRA:

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices;
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under state law;
- 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;
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable state or local law or collective bargaining agreement.
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.
- Any other person determined by the Secretary to be capable of providing health care services.
- Any other employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.
  - These employees include only: nurses, nurse assistants, medical technicians, and other persons who directly provides these services.
  - Diagnostic services include taking or processing samples, performing or assisting in performance of x-rays and other tests and procedures, and interpreting test and procedure results.
  - Preventative services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.
  - Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.
  - Services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.
- Employees providing services under the supervision, order, or direction of, or providing direct assistance to health care providers described above.

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

The DOL outlined the typical work locations of health care providers and specified that they include a: doctor's office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided.

Employees who are no longer "health care providers" and now have FFCRA rights

This revised definition of health care provider excludes those employees who do not provide health care services, 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, etc. This means that employers with fewer than 500 employees that provide health care services now must evaluate each employee, on a case-by-case basis, to determine if the employee falls under the definition of "health care provider." If the employee does not, the employee now has FFCRA leave rights.

Clarifying what is intermittent leave for childcare

Per prior and continued DOL rules, employees are entitled to use FFCRA leave on an *intermittent* basis for eligible childcare leave with employer approval. But, the DOL has now "clarified" that the 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 hybrid-attendance) basis. 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. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. 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). The DOL reasoned that "[u]nder the FFCRA, intermittent leave is not needed because the school literally closes and opens repeatedly."

The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person. Prior employer approval would not be needed in these circumstances either. Under the revised temporary rule, the employee is entitled to FFCRA (without needing the employer's permission) for the portion of the day in which the child is attending school remotely. This is distinguished from the scenario in which school is closed for an extended period of time and the employee wishes to take leave only for certain portions of that period for reasons other than the school's instruction schedule, at which point employer approval will be needed. Given this new guidance, employers

should work with employees to understand and document the employee's child's alternate or hybrid school model and work with the employee to schedule FFCRA leave if needed. In doing so, employers should be cognizant of the fact that the employee has rights to FFCRA in connection with the child's alternate/hybrid school model.

For our prior other articles explaining the FFCRA please see:

- "Families First Coronavirus Response Act: What employers need to know about the COVID-19 paid leave law."
- "Ten most pressing questions from employers about implementing FFCRA leave."

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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