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Electronic Alert

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FFCRA Leave Rules in Limbo After Federal Court Decision

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Under the Families First Coronavirus Relief Act (FFCRA), certain employers are required to provide employees with paid sick time to the extent that the employees are unable to work or telework due to a need for leave based on six qualifying reasons. Congress tasked the Department of Labor (DOL) with administering FFCRA, but on August 3, 2020 a federal judge in New York invalidated several of the DOL's rules that interpret that law.

Work Availability Requirement

A DOL rule precluded an employee from utilizing FFCRA leave for *any* of the six qualifying reasons if the employer otherwise did not have work for the employee. The court, considering the economic impact of the coronavirus, found that the DOL's rule would "greatly affect the breadth of the statutory leave entitlements." The court concluded that the DOL's work availability requirement was not based on reasoned decision making and it "considerably narrowed the [FFCRA's] scope." Under the court's ruling, employers do not need to have work available for employees to utilize FFCRA leave.

Intermittent Leave

The court invalidated the DOL's rule that required employer consent for the employee's use of intermittent FFCRA leave, but the court allowed the DOL to ban intermittent leave when it presents a public-health risk, such as when an employee has been advised by a healthcare provider to self-quarantine due to COVID-19 or when an employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis. Accordingly, an employer must allow intermittent leave when the reason the employee needs FFCRA leave does not present a public health risk, for example, when an employee is caring for a child whose school or place of care is closed.

Documentation

The court invalided the provision of the DOL's rule that required employees to provide documentation relating to their FFCRA leave *before* taking the leave. In other words, employers can no longer require employees provide documentation as a pre-condition to their FFCRA leave.

The Healthcare Provider Exemption

In an effort to put less strain on the healthcare system, Congress expressly exempted health care workers from FFCRA leave. However, the court found that the DOL's interpretation of "healthcare provider" was "vastly overbroad" and it included employees "who are not even arguably necessary or relevant to the healthcare system's vitality." For instance, the court noted that under the DOL's broad

definition of healthcare provider, a librarian or a cafeteria manager at a university with a medical school would be considered a healthcare provider.

The federal court's decision left a major question unanswered as to who does qualify as a "healthcare provider" (and thus is exempt from FFCRA leave). Employers in the healthcare setting thus face a difficult decision as to whether they can permissively deny FFCRA leave to their employees.

The court's decision leaves us with more questions than answers.

- Is the ruling effective nationwide or just in New York within the jurisdiction of the court?
- Do employers need to retroactively review previously denied leave requests and possibly pay leave dating back to April 1, or does the ruling only go into effect August 3 when the court issued its order?
- Will the DOL appeal the decision or promulgate new rules?

Given the uncertainty, employers in the healthcare setting should seek advice from counsel prior to denying FFCRA leave to any "healthcare provider." Meanwhile, employees in all settings should be careful not to deny an employee's FFCRA request because they did not provide documentation prior to beginning leave, and they should seek advice about denying leave based on lack of work availability or the employee's request to use intermittent leave.

For advice on FFCRA leave requests, please contact Heather Fossity at 503-276-2151 or hfossity@barran.com.

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