Rules on Eligibility for Federal Emergency Paid Leave Called Into Question

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Since April when Congress created nationwide emergency paid leave for employees, the rules for the program have been unclear and, in places, internally inconsistent. The temporary Family First Coronavirus Response Act ("FFCRA") leave provides up to 12 weeks of government-subsidized leave for employees through December 31, 2020. It was cobbled together quickly and the law tasked the United States Department of Labor ("DOL") with filling in the statutory gaps with regulations in a fraction of the time an agency normally would have had to create new federal rules. Additional regulations and guidance followed and employers found the requirements generally manageable in spite of ongoing confusion.

On August 3rd, a federal court in New York invalidated several of the DOL regulations that helped employers determine which employees qualify for leave. This decision potentially made FFCRA leave available to even more employees. It resulted from a lawsuit brought by the State of New York against the DOL, and argued successfully that several of the regulations' eligibility requirements contradicted the statute and exceeded the DOL's rule-making authority.

This New York case is the first court challenge to the FFCRA regulations and it could be reversed, narrowed or followed in other jurisdictions. Because the analysis applied by the New York court affects how employers make layoff and furlough decisions, Oregon employers may and perhaps should elect to be conservative and adjust their approach to determining eligibility of employees requesting FFCRA.

The New York court invalidated the following FFCRA eligibility rules:

Conditioning Leave on the Availability of Work

The early directives from the DOL told employers that employees who were already on furlough were not eligible for certain types of FFCRA leave. That meant that if the employer had shut down operations or reduced employee schedules for lack of business or to comply with shut-down orders, its employees could not use FFCRA leave to offset hours that they would have normally worked. The New York decision now prevents employees from being disqualified from FFCRA benefits simply because there is no work for them to perform. That would mean that employees are eligible for leave when they have a qualifying reason even though they would not have been working. That, in turn, will have an impact on employers making layoff decisions, and they will need to evaluate whether those employees will be entitled to FFCRA benefits even if they are temporarily laid off.

Requiring Supporting Documentation Before Leave

The DOL rules probably confused employers into believing that employees had to provide documentation of entitlement for FFCRA leave before the start of leave. Minimum documentation is still required, and is crucial to the tax credit that covers the cost of wages and health premiums during FFCRA leave. But as a result of the New York decision, employers cannot precondition approval of leave on when and whether documentation has been submitted. To be sure, there are still notice requirements, but notice can be given before supporting documents are available. Employers who introduced blanket rules requiring early documentation will want to re-evaluate their processes.

Exclusions for "Health Care Providers"

To support the health care system, FFCRA allowed employers to exclude "health care providers" from FFCRA leave. The DOL defined a "health care provider" broadly, but the New York court disagreed and noted that the "vastly overbroad" definition of the regulations included employees "who are not even arguably necessary or relevant to the healthcare system's vitality." Health care employers need to apply the definition judiciously and evaluate the employee's skills, role, duties and capabilities in the health care setting in making the decision whether a particular employee is eligible for FFCRA benefits.

Approving or Denying Intermittent Leave

Finally, the New York court rejected the DOL's rule that use of intermittent FFCRA leave required the employer's approval. The DOL intended its rule to achieve balance, so that an employee's request to stretch 12 weeks of leave over the rest of a year could be evaluated in light of the operational and staffing constraints of the business. The New York court found the DOL had no reasonable basis for imposing these requirements, and employers should be cautious when evaluating requests for a reduced workweek.

This decision is a reminder that employers have to do their best in a rapidly changing environment. The New York decision may be the first of many, or may lead the DOL to rewrite the challenged rules. Regardless, employers should review their decision-making for these issues and double-check the current state of the regulations as they make employee leave decisions, and as they use their best efforts to remain compliant with the law.

The decision is *New York v. United States DOL*, No. 20-CV-3020 (JPO) (S.D.N.Y. Aug. 3, 2020)

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