New York | August 3, 2020

Court Decision May Impact FFCRA Rules

On August 3, 2020, a New York federal district court judge struck down portions of the DOL's final rule providing guidance regarding the Families First Coronavirus Response Act ("FFCRA"). Based on the order, it's unclear whether the decision will extend to impact employers and employees outside of the state of New York, or whether the decision will be limited to those employers within the state's boundaries. It is equally unclear whether the DOL will be appealing the federal judge's decision to the Second Circuit Court of Appeals, and whether other courts nationwide will adopt the same analysis and reasoning as the New York district court. An appeal to the Second Circuit is likely.

As of now, however, we know that the court struck down four provisions of the DOL's final rule regarding the FFCRA: (1) The rule's "work availability" requirement, (2) the rule's definition of a "health care provider", (3) the requirement (in part) for an employee to obtain an employer's permission prior to taking intermittent FFCRA leave; and (4) the requirement for an employee to provide an employer with documentation prior to taking FFCRA leave. These are potentially significant changes.

1. The rule's "work availability" requirement

First, the court struck down the DOL's requirement that an employee was entitled to leave under the FFCRA only where the employer had work for that employee to do. Until now, those employees subject to the FFCRA were not obligated to approve leave requests for employees who were furloughed or temporarily laid off where those employers were required to close operations due to the COVID pandemic. Likewise, employers were not required to approve FFCRA leave requests for part-time employees who were not scheduled to work. It appears—at least in New York and at least for now—that those employees would be entitled to leave despite an employer's lack of work. However, given the lack of clarity in the court's order, it is possible that other courts disagree, and find that—as an example—a furlough is still a safe harbor for covered employers to avoid financial liability.

2. The rule's definition of a "health care provider"

Second, the court rejected the FFCRA's definition of a "health care provider," finding the definition was too broad. The FFCRA permitted employers to exclude "health care providers" from paid leave benefits. "Health care provider" was defined broadly as a person employed at "any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, 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 institutions, employer, or entity." The court found this definition was too broad to meet the FFCRA's purpose, which was primarily to combat the spread of COVID. This potentially opens the door to a significant number of additional, valid FFCRA requests from employees whose prior requests were denied because an employer determined that they were "health care providers" and therefore excludable.

3. The requirement (in part) for an employee to obtain an employer's permission prior to taking intermittent FFCRA leave

Third, the court vacated portions of the FFCRA's intermittent leave provisions, which Congress had not included in the FFCRA, but which the DOL created through subsequent regulations. These regulations significantly curtailed an employee's ability to take FFCRA intermittently without obtaining their employer's permission in advance. Specifically, an employee could only take intermittent leave where either: (1) They had obtained advance permission from their employer; or (2) The employee's child's school or daycare was closed due to COVID (or where childcare was otherwise unavailable), to the extent that intermittent leave was necessary for the care of the child. While the court agreed that the second situation was practical and well-reasoned, the first situation was not.

4. The requirement for an employee to provide an employer with documentation prior to taking FFCRA leave

Fourth, the court invalidated the requirement that employees submit certain documentation to their employer prior to taking FFCRA leave which would indicate the basis for the leave (in other words, the authority or "quarantine or isolation order" that justified the leave). As with the last provision, the court found that having to obtain permission from an employer in advance did not serve the regulation's purpose of combatting the spread of COVID. It appears employers may still require documentation justifying the leave, just not as a precondition of granting an employee's request to take leave.

What does this decision mean for Hays Clients?

As of now, we do not know the precise scope of this decision. Until the decision is appealed or stayed pending appeal, however, the decision impacts employers based in New York. Whether the order extends beyond New York is unclear, as is whether the decision will be appealed to the federal circuit courts. That said, it is very likely that the DOL will appeal this decision, so the court's decision may not be final. Likewise, it's possible that the DOL and other federal regulatory agencies will issue updated guidance to the FFCRA given the district court's decision.

In the interim, employers should work with their employment/benefits counsel to determine:

+ Whether they remain a covered employer under the FFCRA after accounting for employees for whom the employer has no work. If a furloughed employee is now eligible for leave, it makes sense that the employee would also be counted for purposes of whether the employer is subject to the FFCRA at all (and falling within the FFCRA's 500-employee threshold). Certain employers who now count their furloughed employees may no longer be subject to the FFCRA if their employee count exceeds 500.

+ Whether they need to revisit prior leave denials based on lack of available work, "health care provider" status, lack of advance documentation, or intermittent need. Some employers may have denied leave requests under the FFCRA and, given this new guidance, the employers may be obligated to walk back those denials and permit certain leave requests.

+ Whether any policies/procedures the employer put into effect as a result of the initial FFCRA regulations and guidance promulgated by the DOL are still valid under this new decision.

THE HAYS DIFFERENCE

Hays Compliance will continue to monitor this situation as it develops and will keep everyone apprised as additional information becomes available.

Hays
PART OF THE BROWN & BROWN TEAM