As of September 16, 2020

FFCRA Litigation Update

The DOL released updated rules for the Families First Coronavirus Response Act ("FFCRA") in response to the August 3rd, New York federal district court decision striking down four provisions of the DOL's first set of final rules for the FFCRA. According to the DOL, the updated rules take effect September 16, 2020, and apply nationwide, providing clarity to the scope of the NY district court's ruling.

The four provisions of the DOL's final rule regarding the FFCRA previously struck down were: (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. A more comprehensive review of the litigation can be found here.

The DOL's responsive update to the rules is as follows:

1. Reaffirmed its initial approach to the **"work availability"** requirement by providing greater detail on why it adopted the requirement. In a sense, the DOL doubled down on its initial position by providing greater support for its position instead of changing the rule to comply with the district court's decision. Further litigation is possible concerning this issue if the State of New York, or another entity, still disagrees with the DOL's position.

2. Altered its definition of a **"health care provider"** to more closely align with the district court's ruling that the definition needed to be narrowed and more closely tailored to the nature of the worker's position and not the industry of the employer. Going forward, generally, a health care worker that can be exempt from the leave requirement under the FFCRA is an employee who has the authority to sign FMLA certifications and employees that are either necessary or closely integrated in the diagnosis, treatment, prevention, and care of those that have, or may have, Covid-19.

3 Reaffirmed its initial approach to **intermittent leave**, allowing employers to require prior approval for employees to take intermittent leave. The DOL noted that there are different needs between teleworkers and employees that cannot telework and that because the intent of the FFCRA is, in part, to slow the spread of Covid-19, that teleworkers may not have the same needs for intermittent leave. The DOL also noted that the period requested for intermittent leave to care for a child when their school or care provider is closed will also dictate whether the employee needs prior authorization for intermittent leave.

4 Altered its **documentation requirement** for those taking leave under the FFCRA to provide the documentation "as soon as practicable." This change aligns with the district court's ruling that prior authorization for leave under the FFCRA did not fit within the intent of the FFCRA as it could require an employee to report to work sick before having the ability to avail themselves of the necessary leave.

The DOL has also updated their FFCRA Q&A to reflect the Department's revised regulations.

There are still a number of moving parts surrounding this litigation. As a result, employers should discuss these developments with their employment and labor law counsel to ascertain whether it is necessary to look at past actions and determinations in order to come into compliance with the new rules.

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
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