Takeaways from the Labor Department's revised FFCRA regulations

COMPLIANCE CORNER

Heather Fossity

Since April, employers have been carefully tracking their obligations for providing emergency paid leave under the Families First Coronavirus Response Act (FFCRA), as well as the changing and expanding regulations and guidance from the U.S. Department of Labor (DOL). On Aug. 3, a federal court in New York invalidated four portions of the DOL's regulations, leaving employers nationwide with unanswered questions about how and whether to apply this ruling.

On Sept. 11, the DOL issued revised FFCRA regulations in response to the federal court's decision and to provide further clarification about FFCRA eligibility. While the DOL stood behind its original regulations regarding intermittent leave and the work availability requirement, it did narrow the health care provider exemption and modified the timing of when documentation could be required, so employers should be aware of these updates and may need to consider adjustments to policies and practices.

Employees may provide FFCRA documentation as soon as practicable

Employers should consider the timing of requiring FFCRA documentation from employees. The initial regulation required employees to provide documentation before taking FFCRA leave. However, the revised regulation states that an employee must provide the required information and documentation "as soon as practicable." Therefore, employers should modify their policies or practices if they previously required documentation as a condition of and prior to taking FFCRA leave.

The health care provider exemption now depends on the employee's duties

The DOL narrowed its definition of "health care provider," limiting the type of employees exempted from FFCRA leave. Previously, the definition of "health care provider" was so broad that the federal court noted that it included "an English professor, librarian, or cafeteria manager at a university with a medical school." In revising its definition of "health care provider," the DOL focused on the roles and duties of employees rather than the role of the employer. Accordingly, the revised definition of "health care provider" includes only those employees who directly "provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care." Employers that were previously relying on the broad definition of "health care provider" to exempt all of their employees from FFCRA leave may need to reconsider whether employees are actually eligible for emergency paid leave based on each employee's duties.

Other challenged provisions remain unchanged

Despite the challenge in federal court, the DOL reaffirmed its position with respect to the work unavailability requirement and the requirement for employer consent before taking intermittent leave. If employers relied on the federal court decision to make any changes to their policies and practices, this may require adjustment again.

Specifically, the DOL's revised regulations confirm that FFCRA leave is only available to employees who are unable to work or telework due to a qualifying event. Employees are precluded from FFCRA leave if the employer did not have work for the employee or the employee was otherwise unscheduled to work, regardless of whether the employee also happens to have a qualifying event.

In addition, employer consent is still required before employees are entitled to FFCRA intermittent leave. However, employers should keep in mind that intermittent leave is still only appropriate for qualifying events under FFCRA that do not present a public health risk, such as when an employee needs to care for a child whose school or place of care has been closed or is unavailable (or other qualifying reasons when the employee is working remotely and not reporting to the work site). In such an event, employers are entitled and obligated to give consent before providing FFCRA intermittent leave. Note, however, if schools are operating on alternate day schedules or other hybrid attendance, the DOL does not consider this to be intermittent leave and employer consent cannot be required as a condition of providing the leave to an eligible employee.

The revised regulations provide more guidance on FFCRA leave and apply nationwide, and this is another reminder of the constantly evolving landscape. Employers should seek advice from counsel to ensure compliance with all FFCRA regulations, as well as consider potential overlap with other state laws for sick or other protected leave.

Heather Fossity is an attorney with Barran Liebman LLP. She represents employers in a variety of employment matters. Contact her at 503-276-2151 or hfossity@barran.com.