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We'll See How "Temporary": U.S. Department of Labor Issues New Temporary Rule Interpreting Families First Coronavirus Response Act of 2020

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"Nothing is so permanent as a temporary government program." - *Milton Friedman*

The federal "Families First Coronavirus Response Act of 2020" ("FFCRA" or the "Act") became law on March 18, 2020. It was enacted into law the way in which all federal statutes are: it was adopted by Congress and then approved and signed by the President.

Federal executive agencies, in the case of many such laws, are then charged with the obligation of issuing regulations designed and intended to inform those who must comply with the law what it means and what they are required to do. The federal agency commissioned to do so in the case of the FFCRA is the U.S. Department of Labor ("DOL").

The FFCRA imposed obligations on covered employers as of April 1, 2020, and is the first federal law that requires private U.S. employers to provide *paid leaves of absence* to their employees. Nothing about the Act, however, is simple or intuitively obvious. Two of its eight "divisions" provide for the paid leaves: the "Emergency Paid Sick Leave Act" ("EPSLA") and the "Emergency Family and Medical Leave Expansion Act" ("EFMLEA"), both of which are set to expire at midnight on December 31, 2020. The DOL, to be fair, has been faced with the arduous task of trying to fill in conceptual gaps in the Act and explain what much of the EPSLA and EFMLEA mean in practice. It tried to do so, but the FFCRA was enacted so quickly that it is hardly a model of legislative clarity. The Act left many questions unanswered. The DOL has published regulations to try to answer them.

Disputes sometimes arise as to whether an executive agency has provided those answers in a way permitted by law. When such disputes arise, the judicial branch – through the courts – is often then required to decide whether the executive agency has gotten it right. It's a marvelous system when it works, and it's been on full display in the context of the FFCRA.

On August 3, 2020, a federal district court in New York, in *State of New York v. U.S. Dep't of Labor*, decided that the DOL, *in its attempt to answer some of the many questions raised by the Act as to when paid leaves of absence must be provided*, has jumped "the guardrails of our government" and passed regulations that are inconsistent with the Act. The court, in effect, sent the DOL back to the drawing board and said "try again."

The DOL tried again. On September 11, 2020, the Wage and Hour Division of the DOL announced revisions to its regulations that implement the paid sick leave and expanded family and medical leave provisions of the Act. This article addresses the DOL's second attempt.

The Work-Availability Requirement

To begin with, the court took issue with a:

> fundamental feature of the [DOL's] regulatory scheme, the **work-availability requirement**. By way of reminder, the EPSLA grants paid leave to employees who are 'unable to work (or telework) due to a need for leave because' of any of six COVID-19-related criteria. ... The EFMLEA similarly applies to employees 'unable to work (or telework) due to a need for leave to care for ... [a child] due to a public health emergency.' ... **The Final Rule implementing each of these provisions, however, excludes from these benefits employees whose employers "do[ ] not have work" for them.** ... (emphasis added).

The court had to decide "whether the work-availability requirement is consistent with the FFCRA." The court ruled that it is not, and held that the DOL's "barebones explanation for the work-availability requirement is patently deficient" and that its rationale for it was "*ipse dixit*" – Latin for "a dogmatic and unproven statement" – which the court found unpersuasive. So you would think that the "work-availability requirement" in the regulations at 29 C.F.R. §826.20 – meaning the requirement that an employer must provide paid leave to an employee *only if the employer "has work for" the employee*– has bitten the dust.

But not so. The court concluded that the "work-availability requirement applies – and continues to apply –to three of the EPSLA's six qualifying conditions" and to "family leave under the EFMLEA." The **revised** regulation therefore, still provides in part that:

1. "An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer *does not have work for the Employee* as a result of the order or other circumstances";
2. "An Employee who is advised to self-quarantine by a health care provider may not take Paid Sick Leave where the Employer *does not have work for the Employee*";
3. "An Employee seeking medical diagnosis for COVID–19 may not take Paid Sick Leave *where the Employer does not have work for the Employee*"; and
4. "An Employee may not take Paid Sick Leave" when he or she is caring for someone who is subject to a federal, state or local "quarantine or isolation order" or has merely been "advised by a health care provider to self-quarantine due to concerns related to COVID–19", "unless, but for a need to care for the individual, the Employee would be able to perform work for his or her Employer" **and** the "Employee caring for an individual may not take Paid Sick Leave where the Employer *does not have work for the Employee*."

The "work-availability" condition may have been narrowed, but it is far from dead.

The Health Care Provider Definition

The court also tackled the provisions of both the EPSLA and EFMLEA that provide that an employer may **exclude** certain "health care providers" from the emergency paid sick leave and family leave requirements,

because the State of New York contended that the DOL's "definition of a 'health care provider' exceeds DOL's authority under the statute." The Act defines a health care provider as "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services."

But the DOL's initial regulation, at 29 C.F.R. §826.30 entitled "Employee eligibility for leave," defined "health care provider" far more broadly, saying essentially that the term applied to *all employees* at any doctor's office, hospital, health care center, or clinic.

The court rejected that definition and observed that the "DOL concedes that an English professor, librarian, or cafeteria manager at a university with a medical school would all be 'health care providers' under the Rule," and would be "surprised to find that[,] as far as DOL is concerned," they are "essential to the country's public health response." The court, therefore, vacated the DOL's sweeping definition. The term "Health care provider," "[f]or the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA," **now** means:

1. A "doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices"; "[a]ny other person determined by the Secretary [of Labor] to be capable of providing health care services"; and
2. Any other Employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care." Examples are "Nurses, nurse assistants, medical technicians, and any other persons who directly provide services" to patients. "Employees who do **not** provide health care services … are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers." 29 C.F.R. §826.30(c)(1).

Employee Notice of Need for Leave

The court held that the DOL's regulation regarding the form of notice of needed leave that an employee must provide an employer was more stringent than what the plain language of the FFCRA requires. Specifically, the EFMLEA provides that, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable," and the EPSLA provides that, "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." The court went on to hold that requiring that an employee provide documentation as a precondition to taking leave went too far.

The revised regulation (29 C.F.R. §826.90(b)) now provides that an employer may not require that an employee provide notice of needed leave in advance, and further provides that notice may be required only after the first workday (or portion thereof) on which an employee takes paid sick leave. After the first such workday, it will be reasonable for an employer to require notice as soon as practicable under the circumstances of the particular case.

Generally, it will be reasonable – and adequate – for notice to be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. Notice of the need to take leave under the EFMLEA is required as soon as practicable. If the reason for such leave is foreseeable, then it will generally be deemed practicable to provide notice to the employer before the leave is needed.

Furthermore, "it will be reasonable for an Employer to require oral notice and sufficient information for an Employer to determine whether the requested leave is covered by the EPSLA or the EFMLEA." 29 CFR 826.90(c). That does not mean that an employer cannot require documentation to substantiate the need for leave, but it cannot *condition* the determination of whether the requested leave is covered by either portion of the Act on the employee's having provided written notice. An employer may require that employee requesting provide the following documentation as soon as practicable:

1. Employee's name;
2. Date(s) for which leave is requested;
3. Qualifying reason for the leave; and
4. Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

If requesting leave pursuant to a quarantine or local government order, then the employee must also provide the employer with the name of the government entity that issued the quarantine or isolation order. If requesting leave to self-isolate on the recommendation of a healthcare provider, then the employee must provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to Covid–19. The regulation relating to EFMLEA documentation, which we previously wrote about here, remains unchanged.

Conclusion

The EPSLA and the EFMLEA of the Act, as noted, are supposed to die a natural death at the end of this year. That remains to be seen. President Reagan (perhaps paraphrasing Mr. Friedman) observed that “Nothing lasts longer than a temporary government program.” One suspects, given the persisting pandemic, which shows no signs of abating, and the federal government's anemic attempts to address it, that the FFCRA will prove the point.

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