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# Department Of Labor Amends The FFCRA's Paid Leave Regulations to Clarify Workers' Rights and Employers' Responsibilities

September 14, 2020

On Friday, September 11, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) announced revisions to regulations regarding the paid sick leave and expanded family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA). These revisions were made in response to an August 3, 2020, U.S. District Court for the Southern District of New York ruling (*State of New York v. U.S. Department of Labor, et al.*) which vacated several portions of the FFCRA regulations which were issued on April 1, 2020. Specifically, the Court found that the following provisions were invalid: (1) the requirement that there must be work available for an employee to take leave; (2) the definition of a "health care provider" that could be excluded from paid leave; (3) that an employer must consent to intermittent leave; and (4) the rule that certain documentation be provided before taking leave.

In response to this ruling, the WHD's revisions:

- Reaffirm that leave under the FFCRA may be taken only if the employee has work available from which to take leave. The revisions also clarify that the work-availability requirement applies to all qualifying reasons to take said leave.
- Reaffirm and explain that, where intermittent FFCRA leave is permitted by the Department's regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently.
- Modify the definition of "health care provider" to include only employees who meet the definition of that term under the FMLA regulations (29 CFR 825.102 and 825.125) or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. Those who do not provide such health care services may not be excluded from paid leave requirements, even if these employees' services could affect the provision of health care services, such as: IT professionals, building maintenance staff, HR personnel, cooks, food services workers, records managers, consultants, and billers.
- Clarify that employees are required to provide documentation "as soon as practicable" to support their need for FFCRA leave to their employers.
- Correct an inconsistency between the FFCRA and the FMLA regarding the timing of notice for employees who take expanded family and medical leave. The updated regulation provides that advanced notice of expanded family and medical leave is required "as soon as practicable." If the need for leave is foreseeable, the employee must generally provide notice before taking leave. However, if the need for expanded family and medical leave is not foreseeable, an employee may begin to take leave without giving prior notice but must still give notice "as soon as practicable."

## Continued

The revised regulations are expected to take effect on September 16, 2020.

If you have any questions about the revised regulations, please contact your Miller Canfield attorney or any of the authors of this alert.

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*