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To: FCA International Members
From: FCA International Legal Counsel
Subject: **New York Federal Court Ruling Impacts FFCRA Regulations**
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New York Federal Court Invalidates Key Elements of FFCRA Regulations

Yesterday, a federal district court in New York issued a critical ruling on Aug. 6 invalidating four important provisions of the Department of Labor's (DOL) regulations implementing the Families First Coronavirus Response Act ("FFCRA"). The Court found these provisions to be unduly restrictive and inconsistent with what Congress is believed to have intended.

The State of New York brought the lawsuit, to which the Trump administration objected on the grounds that the State was not actually impacted by the regulations governing private employers. However, Federal District Court Judge J. Paul Oetken ruled that New York was directly impacted because the regulations affected whether employees might or might not go to work during the pandemic.

Those that did not report for work paid less taxes, thereby affecting the State's revenues, while those reporting for work were more likely to become ill, thereby increasing the use of State health care resources. As such, the court concluded that the state of New York had a stake in the interpretation of the DOL's regulations and had standing to pursue the litigation.

"Work Availability" Requirement

The Emergency Paid Sick Leave Act ("E-PSLA") and the Emergency Family Medical Leave Act ("E-FMLA") – which together comprise the FFCRA – both require covered employers to grant paid leave to employees who are unable to work due to various specific COVID-related reasons. However, the DOL's final rule states that employees are not eligible for such leave if their employers "do not have work" for them. *The Court found that the DOL had no legitimate explanation for this work-availability requirement.*

The Court's reasoning basically came down to the judge's view that an employee may need to be off work "due to" more than one reason. Thus, an employee who is absent "due to" a qualifying condition (e.g. their child's school has closed) remains off work for that reason even though they may also be off work "due to" a second reason as well. The judge likened this to a teacher on paid parental leave who will still be considered on such leave even though the school is closed due to a snow day.

As a result, **employers may now have to provide FFCRA leave to qualifying employees even if they do not have work available for those employees.**

Definition of "Health Care Provider"

The Court also invalidated the regulation's interpretation of the definition of (and thus exemption for) "health care providers." The DOL argued that the broad exemption of health care providers from leave eligibility was necessary due to the need for such workers during a pandemic. The State countered, however, that the rule, which essentially applies to "anyone employed by any entity that provides medical services," focuses too much on the "identity of the employer" and not enough on the "skills, role, duties, or capabilities of a class of employees."

The judge agreed, noting the possible odd result that under the DOL's rule, an English professor working for a university that has a medical school could be considered a health care provider. Thus, the DOL's regulation in this regard was invalidated, which presumably now allows the definition of "health care provider" to be interpreted in a more customary manner.

As a result, a much larger number of health care employees will now be able to seek leave for qualifying reasons under the FFCRA.

Intermittent Leave

The DOL final rule did not guarantee intermittent leave. Instead, the rule bans intermittent leave for employees who need to be absent due to reasons where returning to work risks further infection spread (e.g. those employees who (1) are subject to quarantine or isolation orders; (2) have been advised to self-quarantine, (3) are obtaining a medical diagnosis due to COVID-19 symptoms; or (4) are taking care of an individual under these same circumstances).

The rule permits intermittent leave for other qualifying circumstances (e.g. school closures), but only with the employer's permission.

The judge observed that while it made sense to ban intermittent leaves for those who might re-infect the workplace, it made no sense to bar employees seeking time off for the other FFCRA reasons from taking leave on intermittently. Therefore, requiring employer permission for these leaves that ought to be provided as a matter of course seemed inconsistent with the intent of the law and the judge invalidated this requirement.

Now, employees may be entitled to intermittent leave, without the need for employer consent, for those FFCRA-related leaves that do not implicate reinfection of the workplace.

Documentation Requirements

Finally, the state also challenged the FFCRA documentation requirements, which require employees to submit documentation indicating their reason for leave, the duration of the requested leave, and the authority related to isolation or quarantine order, if applicable, prior to taking FFCRA leave. The state argued that the final rule impermissibly conflates the FFCRA's requirement of prior notice of a **need** for leave with a requirement of prior **proof** that the leave is needed. The Court agreed, finding the "documentation requirements, to the extent they are a precondition to leave, cannot stand."

This means that employers will not be able to condition the grant of FFCRA leave based on whether or not the employee has submitted the required documentation. Instead, these leaves will proceed along the lines of ordinary FMLA leave where the employee often is granted the leave on a provisional basis as the employer awaits receipt of the medical certification.

Other Portions of the DOL's Rule Remain Intact

Even though portions of the DOL's FFCRA Rule were invalidated, the Court found that the rest of the DOL's FFCRA Final Rule could stand. Thus, only the following portions of the rule were invalidated: (1) the work availability requirement, (2) the definition of the "health care provider," (3) the provision requiring employer consent for intermittent leave, and (4) the provision requiring an employee to provide documentation before taking leave.

Bottom Line

Unfortunately, at a time when employers are already struggling to deal with a constantly changing legal landscape, the fallout from the invalidation of these four provisions of the FFCRA regulations could be huge.

This decision is likely to be appealed but until then (or until new regulations are implemented), employers will need to reassess the following: (1) the granting of E-PSL or E-FMLA to eligible employees even if no work is available; (2) the scope of the "health care provider" exemption, if applicable; (3) the handling intermittent leave requests; and (4) the timing for requiring employees to submit documentation.

Finally, it is unclear whether this decision can be applied retroactively such that employees previously denied leave can now claim that such denial was unlawful – we really hope that is not the case as this could generate significant liability for a great many employers.

Naturally, we will watch for further developments in this critical area, including any appeal or announcements or new guidance from the DOL and advise accordingly.