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# CLIENT ALERT: DOL Revises Final Rule to Clarify Paid Leave Requirements Under the FFCRA in Light of Court's Decision Striking Portions of It

On August 3, 2020, the United States District Court for the Southern District of New York issued a decision holding that several provisions of the Department of Labor's ("DOL") Final Rule interpreting the Families First Coronavirus Response Act ("FFCRA") are invalid. *See N.Y. v. U.S. Dept. of Labor*, 2020 WL 4462260 (S.D.N.Y., 2020). As explained previously, the FFCRA provides eligible workers of covered employers with Emergency Paid Sick Leave ("EPSL") and Emergency Family and Medical Leave ("EFML") for various reasons related to the COVID-19 pandemic. Calling into question the DOL's interpretation of these laws, the Court found that the Final Rule's (1) "Work Availability" requirement, (2) definition of "Health Care Provider" for purposes of determining who may be excluded from eligibility, (3) employer consent for intermittent leave requirement, and (4) documentation requirements – to the extent that they were a pre-condition to leave entitlement – were invalid. On September 11, 2020 the DOL announced changes to its Final Rule in light of the decision, effective today, September 16, 2020. The following is an overview of the changes to the Final Rule.

***The "Work Availability" Requirement.*** Under both the EPSL and EFML provisions of the FFCRA, eligible employees of covered employers are entitled to paid leave if they are "unable to work (or telework) due to a need for leave" for various COVID-19 related reasons. In implementing these provisions, however, the DOL has generally excluded from eligibility those employees whose employers do not have work for them. *See* DOL's Q&A #26 (stating employees furloughed for insufficient work are not entitled to EPSL or EFML, but may eligible for unemployment benefits). While the S.D.N.Y. determined that the language of the FFCRA itself did not allow this, the DOL disagreed, and expanded and clarified its position in the revised Final Rule. Among its reasons for maintaining its position, the DOL explained that removing the work-availability requirement would not serve the FFCRA's purpose of discouraging employees who may be infected with COVID-19 from going to work (if there is no work to go to, an infected employee would not need leave), and would lead to perverse results in that furloughed employees with a qualifying reason (who were not working) could be paid FFCRA benefits while their colleagues without a qualifying reason (who also were not working) would not. The DOL noted that EPSL and EFML are forms of "leave" and that employees who had no work to perform, i.e., were on furlough, do not require "leave," as that word is commonly understood. Reminding of the FFCRA's anti-retaliation provisions, the DOL emphasized that employers may not make work unavailable in an effort to deny leave. The DOL also pointed out that other COVID-19 relief measures – including the Paycheck Protection Program and expanded unemployment provisions of the Coronavirus Relief, Aid, and Economic Security ("CARES") Act – more appropriately address the needs of employees for whom no work is available. To address specific failings noted by the Court, the DOL clarified that "work availability" is a requirement for all forms of leave under the FFCRA.

***The Definition of "Health Care Provider".*** Under the FFCRA, employers may exclude from EPSL and EFML eligibility "health care providers" and/or "emergency responders", the DOL definitions of

which were expansive. While the definition of "emergency responders" was not addressed in its decision, the Court held that the FFCRA's unambiguous terms did not allow for the broad definition of "health care provider." In light of the decision, the DOL has revised the definition of "health care provider" to match the definition in the FMLA, and include other employees who provide diagnostic services, treatment services, or other services that are integrated with and necessary to the provision of patient care. The DOL has updated its answer to Q&A #56, clarifying that "health care providers" who may be excluded by their employer from FFCRA eligibility include: (1) "anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA" and (2) "any other person who 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." This group includes "employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians." It also includes "employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services." Finally, employees who do not provide direct heath care services to a patient but "are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers." The Q&A further clarifies that a person is not a health care provider merely because their employer provides health care services, i.e., IT professionals, building maintenance staff, cooks, or food service workers. Notably, the revised "health care provider" definition no longer permits the highest official of a state (i.e., the governor) to expand the definition to include any individual they determine is a health care provider necessary for that state. The definition of "emergency responders" – including the highest official's ability to expand it – has *not* changed.

***Provisions relating to Intermittent Leave.*** The DOL's Final Rule allows employees to take EPSL and EFML intermittently "only if the Employer and Employee agree", and even then, only under certain circumstances, i.e., when the employee's use of intermittent leave will not risk the employee transmitting the virus to others. *See* DOL's Q&A #21 (explaining that employees who are working at their usual worksite may take intermittent leave with their employer's agreement only if the reason for the leave is that they are caring for their child whose school/daycare is closed or childcare provider is unavailable due to COVID-19). While the Court recognized that the Final Rule's restrictions on when an employee may use leave intermittently are consistent with Congress's public health objectives, it rejected the blanket requirement of employer consent. The DOL disagreed, however, and reaffirmed its position that employer approval is needed to take intermittent FFCRA leave. While the FFCRA did not expressly permit or prohibit intermittent leave (in contrast to the FMLA, which expressly authorizes employees to take leave intermittently, but only under certain circumstances), the DOL reasoned that the employer-approval condition is consistent with the longstanding FMLA principle that intermittent leave, where foreseeable, should avoid "unduly disrupting the employer's operations," particularly when it is not medically necessary (e.g., bonding leave). Notably, the DOL clarified that the employer-approval condition would *not* apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis, because such leave would not be intermittent. In an alternate day or hybrid-attendance schedule, the school is physically closed with respect to certain students on

particular days as determined by the school, not the employee. For the purposes of FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day, and thus intermittent leave is not needed because the school literally closes and opens repeatedly. This is distinguished from a scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule (in which case the use of leave would be intermittent and would require employer approval).

***The Documentation Requirements.*** The DOL's Final Rule required that employees submit documentation to their employer *prior to* taking leave. The text of the FFCRA, however, requires only that employees give notice "as is practicable" for foreseeable EFML, and that they follow reasonable notice procedures for EPSL after the first workday or portion thereof that they receive paid sick leave. *See* FFCRA §§ 3102(b), 5110(5)(E). Recognizing these inconsistencies, the Court held that the documentation requirements, to the extent they are a precondition to leave, are invalid. The DOL agreed with the Court, and has thus revised the Final Rule to clarify that the documentation need not be given "prior to" taking EPSL or EFML. Thus, employers may require an employee to furnish as soon as practicable the required information and/or documentation discussed here.

In light of the foregoing, employers of healthcare providers in particular should familiarize themselves with the revised definition in order to ensure accuracy in determining which of its employees may be excluded from eligibility for EPSL and EFML. Employers who have relied on the previous "health care provider" definition to exclude employees from eligibility may wish to contact their MBJ attorney with questions about the revised definition and/or its impact on excluding such employees from FFCRA entitlements going forward. Additionally, to the extent employers were requiring documentation to support a request for EPSL and EFML prior to the leave, such processes must be revised to allow employees to provide such documentation "as soon as practicable." Employers may continue to deny EPSL and EFML if there is no work available for the employee, and may continue requiring approval for use of EPSL and EFML on an intermittent basis, pursuant to the requirements of the revised Final Rule (and only if such intermittent use is for a permissible qualifying reason). Employers with questions about FFCRA or employee leave should consult with their MBJ attorney.

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This alert was prepared on September 16, 2020.