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LAW ALERT
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DOL Responds to Decision of Southern District of New York Invalidating Four Provisions of the Family First Coronairus Response Act

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On August 3, 2020, the District Court for the Southern District of New York ruled that four parts of the temporary rules adopted by the DOL to implement the Emergency Paid Sick Leave Act (EPSLA) and the Emergency and Family Medical Leave Expansion ACT (EFMLEA) provisions of the FFCRA were invalid: i) the requirement that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave; (ii) the requirement that an employee may take FFCRA leave intermittently only with employer approval; (iii) the definition of an employee who is a health care provider whom an employer may exclude from eligibility for FFCRA Leave ; and (iv) the statement that employees who take FFCRA leave must provide the employer with certain documentation before taking leave (more information on the court's decision). On September 11, in response to the District Court decision, the DOL reaffirmed its regulations in part, revised the regulations in part, and provided a more detailed explanation with respect to certain of the positions taken by the District Court.

First, the DOL reaffirms its position that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave and explains further why this requirement is appropriate. In the original text of the regulation, this work-related availability requirement only applied to three of the six qualifying reasons for leave. The revised text extends the but-for causation requirement to all six qualifying events, and also specifies that the work-availability requirement will apply if an employee requests leave for a substantially similar condition as specified by the Secretary of Health and Human Services. In reaching this conclusion, the DOL relied upon rules of statutory interpretation, the meaning of the word "leave" in other contexts, and various policy arguments. The DOL clarified, however, that employers may not make work unavailable in an effort to deny FFCRA leave to an employee, since altering an employee's schedule in an adverse manner because the employee requests or takes FFCRA leave may be impermissible retaliation.

Second, the DOL reaffirms its position that, where intermittent FFCRA leave is permitted by the DOL regulations, an employee must obtain his or her employer's approval to take paid sick leave and expanded family and medical leave intermittently, and explains further the basis for this regulatory requirement.

The third issue, the definition of health care provider, which appeared to be the issue on which the DOL was most vulnerable, was also the area in which it made the most substantive revision. The definition of health care provider now provides different definitions for different purposes under the FFCRA. For purposes of the exclusion from leave, in addition to physicians and others who make medical diagnoses, the term includes (i) nurses, nurses' assistants, medical technicians, and any other persons who directly provide diagnostic, preventive or treatment services, or other services that are integrated with and necessary to the provision of patient care. Included within that definition are employees providing diagnostic, preventive or treatment services, or other services that are integrated with and necessary to the provision of patient care, under the supervision, direction or order of, or providing direct assistance to either physicians or other persons providing medical diagnoses, or nurses, nurses'

assistants and medical technicians. Additionally, health care providers include employees who may not directly interact with patients and/or might not report to another health care provider or directly assist another health care provider, but nonetheless provide services that are integrated with and necessary components of the provision of patient care. As an illustration, the DOL indicated that a lab technician who processes test results would be providing diagnostic health care services, because, although the technician does not work directly with the patient, his or her services are nonetheless an integrated and necessary part of diagnosing the patient and thereby determining the proper course of treatment. The regulations also provide an illustrative list of employees who are not health care providers because their services are too attenuated to be part of the integrated and necessary components of patient care. This list, which is not exhaustive, includes: information technology professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billing staff. This portion of the revised regulations also provides illustrations of diagnostic, preventive, treatment, and other services that are integrated with and necessary to the provision of patient care.

Finally, the DOL agreed with the District Court that requiring an employee to provide documentation prior to taking paid sick leave or expanded family and medical leave was inconsistent with the statute. Under the revised regulation, an employee must provide notice of expanded family and medical leave as soon as practicable; if the need for leave is foreseeable, that will generally mean providing notice before taking leave. With respect to paid sick leave, advance notice will not be necessary.

The DOL, with these revised regulations, provides some much needed clarification for employers trying to administer paid sick leave or expanded family leave for their employees. Employers need to make sure they are providing leave only to employees with work available and excluding from leave only those health care providers who meet the definition of health care provider in the revised regulations. Note, however, that there may be further litigation regarding the revised regulations, since the DOL has reaffirmed many of its positions that the court found objectionable, albeit with further explanation of its reasoning.

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