Department of Labor Revises Families First Coronavirus Response Act Temporary Rule

Labor and Employment Alert | **September 18, 2020**

By: Tanya A. Salgado

The United States Department of Labor (DOL) has issued revisions and clarifications to the Families First Coronavirus Response Act (FFCRA) temporary rule, in response to a ruling by a federal district court that had found certain provisions of the rule invalid. The DOL's revisions and clarifications were announced on September 11, 2020 and became effective September 16, 2020.

The revisions address each of the four parts of the temporary rule that the United States District Court for the Southern District of New York ruled invalid, in an opinion dated August 3, 2020. The new temporary rule reaffirms its regulations in part, revises its regulations in part and provides further explanation of the DOL's positions.

- **Work-Availability Requirement.** The DOL reaffirmed that paid sick leave and expanded FMLA leave may be taken "only if the employee has work from which to take leave." This means that where, for example, the employer has temporarily or permanently ceased operations, or where a business downturn results in furloughs, FFCRA leave is not available. The DOL explained its rationale, noting that "the use of the term 'leave' in the FFCRA is best understood to require that an employee is absent from work at a time when he or she would otherwise have been working."
- **Employer Approval of Intermittent Leave.** The DOL reaffirmed that where intermittent FFCRA leave is permitted (such as school closings due to COVID-19), an employee must obtain his or her employer's approval to take paid sick leave or expanded FMLA on an intermittent basis. Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason. The DOL explained that the "employer-approval condition for intermittent leave … is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate risk of COVID-19 contagion," since FMLA leave should avoid "unduly disrupting the employer's operations." Intermittent leave is not available for reasons that correlate to a higher risk of spreading the virus; for example, paid sick leave due to a COVID-19 isolation order.
- **Narrowed Definition of "Health Care Provider" Exception.** The FFCRA allows employers to exclude employees who are "health care providers" or who are "emergency responders" from eligibility for expanded FMLA and paid sick leave. This exception is intended to prevent disruptions to the healthcare system's capacity to respond to the COVID-19 public health emergency. As originally drafted, the DOL had defined the term "health care provider" broadly to include anyone employed at any doctor's office, hospital, healthcare center or similar entities, regardless of whether the employee actually provided healthcare. In the revised temporary rule, the DOL narrowed the definition of "health care provider" under § 825.30(c)(1) to mean "employees who are health care providers under 29 CFR 825.102 and 825.125," as well as "other employees who are employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care." Under the revised regulation, "it is not enough that an employee works for an entity that provides health care services" to be

subject to the leave exclusion. Instead, employees must themselves be "capable of providing and employed to provide" healthcare services as defined in the regulation. This includes "nurses, nurse assistants, medical technicians, and any other persons who directly provide services" as described in the regulation. The regulation specifically excludes IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants and billers.

- **Required Information to Support Leave.** The DOL revised the regulations to clarify that the employee must supply the employer with information to support the need for leave "as soon as practicable." Under the old version of the rule, employees were required to supply certain documentation *before* taking leave. Employees are required to provide documentation including the employee's name; date(s) for which leave is requested; the qualifying reason for the leave; and an "oral or written statement that the employee is unable to work because of the qualified reason for leave."

Employers covered by the FFCRA should take note of these revisions, particularly those employers that rely upon the healthcare provider exception. For additional information, please contact Tanya A. Salgado (salgadot@whiteandwilliams.com; 215.864.6368) or any other member of the Labor and Employment Practice Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.