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Federal Court Strikes Down DOL's FFCRA Regulations

By Barry Y. Freeman

Last week, a New York federal court struck down a number of Department of Labor (DOL) regulations applying the new Families First Coronavirus Response Act (FFCRA) as invalid. The Court determined the regulations exceeded the DOL's regulatory authority. It remains to be seen whether the Court's decision will apply outside New York and if other courts will follow suit. Employers should be aware of the Court's decision and stay updated on decisions from other courts.

As a refresher, the reasons for COVID-related paid leave under the FFCRA are: (1) The employee is subject to government quarantine or isolation order (full pay for up to 2 weeks); (2) the employee is self-quarantined under health care provider orders (full pay for up to 2 weeks); (3) the employee is experiencing COVID symptoms and seeking a diagnosis (full pay for up to 2 weeks); (4) the employee is caring for an individual described in 1-3 (2/3 pay for up to 2 weeks); (5) is caring for a child whose school or childcare is closed due to COVID (2/3 pay for up to 12 weeks); and (6) the employee is experiencing symptoms similar to COVID (2/3 pay for up to 2 weeks.)

In a long, thorough decision, the U.S. District Court for the Southern District of New York invalidated the following DOL regulations because they exceeded the DOL's regulatory authority:

1. The Court invalidated 29 CFR §826.20(a)(2), (a)(6), (a)(9) and (b)(1). Those regulations limited recent federal paid leave and paid FMLA benefits to those whose employers had work available for them but, nevertheless, were unable to work for COVID-related reasons. The Court held the regulations were impermissible because (a) the DOL only applied the "had work available" requirement to half the reasons for COVID-related leave and (b) the DOL offered no explanation for the distinction. As a result, otherwise qualifying employees can collect COVID-related paid sick leave and paid FMLA regardless of whether their employers had work available.

2. The Court invalidated 29 CFR §826.25. That regulation exempted all health care employees from FFCRA benefits. The Court held the regulation conflicted with the FMLA, which limits health care providers to those "capable of providing health care services." As written, the DOL regulation would exempt not just those who provide health care, but those who do not -- for example, a librarian at a medical school or a cafeteria worker at a medical school. Because the regulation conflicts with the statute, it cannot stand. Only employees who might actually perform health care services will be exempted from the FFCRA.

3. The Court partially invalidated 29 CFR §826.50(a)-(c). The Court upheld portions of the regulation which limit intermittent, paid COVID leave to situations where there is minimal risk the employee will spread COVID. But the Court invalidated the regulation portion which required employer consent before allowing intermittent leave. The Court did not find any conflict between the regulation and any statute. However, the Court found it was unreasonable to require employer consent: Either there is a risk of spreading disease and intermittent leave should be barred, or there is not a risk

and intermittent leave should be permitted. Allowing employer vetoes in non-health related cases is unreasonable.

4. Finally, the Court invalidated 29 CFR §826.100, which required employees submit documentation of the reason for leave, the duration and (if relevant) the authority for the government quarantine/isolation order before taking leave. The Court invalidated that regulation as contrary to the plain statute, which only requires advance notice when (and to the extent) reasonable.

The case is State of New York v. United States Department of Labor, Southern District of New York Case No. 1:20-cv-03020. It can be found here.

We recommend that employers take notice of these invalidated regulations and modify their practices accordingly. Please feel free to reach out to your Roetzel attorney for assistance.

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