COVID-19: REGULATORY RESPONSE: DEPARTMENT OF LABOR PUBLISHES REVISED FAMILIES FIRST CORONAVIRUS RESPONSE ACT REGULATIONS TO ADDRESS PROVISIONS INVALIDATED BY NEW YORK DISTRICT COURT

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By: April Boyer, David C. Lindsay, Erinn L. Rigney, Gulsah Senol

INTRODUCTION

On 11 September 2020, the Department of Labor (DOL) issued new regulations (Revised Regulations) for the Families First Coronavirus Response Act (FFCRA) in response to a New York federal court decision that invalidated certain provisions of the prior regulations published in April. As background, in April 2020, New York state filed a lawsuit against the DOL challenging several aspects of the DOL regulations issued on 1 April 2020 (April Regulations) under the FFCRA, including those which deny sick and family leave if the employer does not have work for the employee, the broad healthcare provider definition provided in the regulations, the rules on intermittent leave, and the requirements for documentation to receive the leave. Specifically, the lawsuit alleged that the DOL exceeded its authority in promulgating the April Regulations and that the April Regulations "conflict with the plain language and purpose of the statute Congress enacted by, among other things, (1) codifying broad, unauthorized exclusions from employee eligibility that risks swallowing Congress's intended protections and (2) creating from whole cloth new restrictions and burdens on employees that appear nowhere in the text Congress enacted." On 3 August 2020, a New York federal district court vacated four specific provisions of the April Regulations including the "work-availability" requirement, the expansive definition of "health care provider," the provisions relating to intermittent leave, and the documentation requirements.

As a response to the court decision, the DOL issued the Revised Regulations that aim to clarify certain provisions and provide a more limited definition for "health care provider" for purposes of excluding certain employees from FFCRA coverage. Employers, particularly those in the health care industry, should be aware that these updated regulations go into effect on 16 September 2020.

WORK AVAILABILITY AND ELIGIBILITY FOR FFCRA LEAVE

Under the Revised Regulations, the DOL reaffirmed that employees may only take FFCRA leave if their employers have work available for them. As set forth in the April Regulations, an employee was ineligible for FFCRA leave if the employer did not have any work for the employee. Based on the court's ruling, employees were to be deemed eligible for FFCRA leave for any of the qualifying reasons regardless of whether an employer

has work for them to perform. With the Revised Regulations, the DOL justified its interpretation of the FFCRA "to impose a but-for causation standard that in turn supports the work-availability requirement for all qualifying reasons for leave" and revised the provisions "to explicitly include the work-availability requirement in all qualifying reasons for leave." In clarifying its position, the DOL noted that if an employer does not have work for an employee to perform due to circumstances unrelated to a qualifying reason for FFCRA leave, such as a permanent or temporary worksite closure, then that qualifying reason could not form the basis for the employee's inability to work. Further, the DOL underscored that employers may not manipulate an employee's work schedule so that work is unavailable in an effort to deny an employee FFCRA leave, as that may be impermissible retaliation. Going forward, employees are only eligible for FFCRA leave if there is work available for them to perform.

THE DEFINITION OF "HEALTH CARE PROVIDER" FOR EXCLUSION FROM FFCRA ELIGIBILITY

In response to the court's ruling, the Revised Regulations now provide for a more limited definition of health care provider, which will require employers to provide FFCRA leave to employees that fall outside this new definition. Under the April Regulations, an employer of a "health care provider" may elect to exclude such employee from coverage under FFCRA. The April Regulations defined a health care provider as "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity." Further, the April Regulations provided that such a definition extends to "any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions" and would include "any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility." Finally, this definition also included "anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

In its ruling, the court vacated this expanded definition for purposes of excluding employees from coverage under FFCRA, citing the over-inclusiveness of employees who had no impact on patient care. Under the Revised Regulations, the definition of "health care provider" now includes "only employees who meet the definition of that term under the Family and Medical Leave Act (FMLA) regulations" or "who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care." This revision narrows the prior expansive definition while still providing for limitations so as to preserve the continuity of health care services during the ongoing pandemic.

Further, the Revised Regulations define the parameters of (1) diagnostic services, (2) preventative services, (3) treatment services, and (4) other services that are integrated with and necessary to the provision of patient care, which, if not provided, would adversely impact patient care as follows:

Diagnostic services include "taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results." For example, the DOL explained

that “a technician or nurse who physically performs an x-ray is providing a diagnostic service” and therefore is a health care provider under the revised definition.

Preventative services include “screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.” Here, the DOL notes that “a nurse providing counseling on diabetes prevention or on managing stress would be providing preventative services” and therefore would be a health care provider and able to be excluded from eligibility for FFCRA leave.

Treatment services include “performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments.”

Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care include “bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples”. To note, these tasks “must be integrated and necessary to the provision of patient care,” which will substantially limit the categories of employees that are covered by the new definition. For example, the DOL highlights that “bathing, dressing, or hand feeding a patient who cannot do that herself is integrated into to the patient's care.” Further, “an individual whose role is to transport tissue or blood samples from a patient to the laboratory for analysis for the purpose of facilitating a diagnosis would be providing health care services because timely and secure transportation of the samples is integrated with and necessary to provide care to that patient.”

The Revised Regulations also provide specific examples of employees who will be covered by the new definition (and will be able to be excluded from FFCRA leave) as well as those who will fall outside the definition (and will be eligible for FFCRA leave). Additionally, the Revised Regulations provided a nonexhaustive list of locations where employees may perform the services defined above including a “doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar permanent or temporary institution, facility, location, or site where medical services are provided.”

Under the new definition, those employees included under the new health care provider definition (and still permitted to be excluded from FFCRA leave) include:

- Nurses, nurse assistants, medical technicians, and any other persons who directly provide diagnostic, preventive, treatment, or other services that are integrated with and necessary to the provision of patient care;
- Employees providing diagnostic, preventive, treatment, or other services that are integrated with and necessary to the provision of patient care under the supervision, order, or direction of, or providing direct assistance to, persons who are health care providers under the usual FMLA definition or nurses or nurse assistants and other persons who directly provide diagnostic, preventive, treatment, or other services that are integrated with and necessary to the provision of patient care; and
- Employees who may not directly interact with patients and/or who might not report to another health care provider or directly assist another health care provider but nonetheless provide services that are integrated with and are necessary components to the provision of patient care. The Revised Regulations use as an example a laboratory technician who processes test results and note that he or she “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."

To further clarify the types of employees who will now be eligible for FFCRA leave under the Revised Regulations, the DOL identified the following types of employees who will be excluded from the health provider definition, including information technology (IT) professionals; building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers. While the services provided by these employees may be related to patient care, the DOL identifies these individuals as "too attenuated to be integrated and necessary components of patient care." Therefore, health care employers who are not exempt as large, private employers will be required to provide the emergency sick leave and extended FMLA leave benefits to all employees other than those who are defined as health care providers under the Revised Regulations or who qualify as emergency responders under the April Regulations.[1]

INTERMITTENT LEAVE AND EMPLOYER CONSENT

Pursuant to the April Regulations, eligible employees who were teleworking were permitted to take intermittent leave for any qualifying reason subject to agreement from the employer. Additionally, employees who were reporting to a worksite were permitted to take intermittent FFCRA leave for childcare reasons only, again, with employer consent. Based on the court's ruling, the foregoing categories of employees were permitted to take FFCRA leave intermittently without securing employer consent. With the Revised Regulations, the DOL reaffirms its position that employer consent is required for intermittent leave for applicable qualifying reasons based on longstanding FMLA principles. As the FMLA regulations provide that intermittent leave "should, where foreseeable, avoid 'unduly disrupting the employer's operations,'" the DOL highlighted that such principle should also apply to leave taken under the FFCRA.[2] In advancing this interpretation, the DOL notes that it promotes flexibility, which may lessen an employee's need for FFCRA leave through accommodation of scheduling needs. Notably, under both the April Regulations and the Revised Regulations, employees reporting to a worksite still may not take intermittent leave for purposes of care for oneself or another due to COVID-19 symptoms, diagnosis, or isolation/quarantine order.

Further, the DOL did clarify that when employees take FFCRA leave for purposes of childcare related to an alternate day or other hybrid-attendance schedule implemented due to COVID-19, such leave is not taken intermittently. Under the FFCRA, each day a school or place of care is closed "constitutes a separate reason for FFCRA leave that ends when the school opens the next day" and this same reasoning applies to longer and shorter alternating schedules, such as half-day in-person school attendance. In these situations, an employee is not taking FFCRA leave intermittently and therefore does not need employer consent for such leave. However, in the event a school is closed for a period of time and an employee takes FFCRA leave for certain segments of time for reasons other than the school's in-person class schedule, such leave would be intermittent and would require the employer's consent.

TIMING FOR SUBMISSION OF REQUIRED DOCUMENTATION

Under the April Regulations, an employee was required to provide the employer with documentation addressing the need for leave prior to taking FFCRA leave. Pursuant to the court's ruling, employers were prohibited from conditioning the taking of leave on submission of the required documentation. However, under the Revised Regulations, the DOL clarified that the required documentation "need not be given 'prior to' taking paid sick leave

or expanded family and medical leave, but rather may be given as soon as practicable" after the need for leave arises. The DOL did note that this typically will occur at or around the same time as when an employee provides an employer with notice of the need for FFCRA leave.

PRACTICAL GUIDANCE FOR EMPLOYERS

With the Revised Regulations, the DOL returned to the status quo for purposes of intermittent leave and the work availability requirement. Regarding the documentation requirement, an employer may still require submission of documentation; however, it cannot require documentation to be provided prior to the leave being taken, only as soon as practicable after the need for FFCRA leave arises. As for the revised definition of a health care provider, employers in the health care industry should promptly evaluate the impact to their workforce. Despite the more limited health care provider definition, health care entities may still be able to take advantage of certain exemptions. First, large, private employers (over 500 employees) are not required to provide FFCRA leave to employees. This large employer exception does not apply to public agencies. Additionally, employers may exclude employees who are emergency responders from the FFCRA leave provisions. Finally, smaller entities may be exempt from providing employees with childcare leave if they satisfy certain requirements. Going forward, health care employers who are not exempt as large, private employers will be required to provide the emergency sick leave and extended FMLA leave benefits to all employees other than those who are defined as health care providers under the Revised Regulations or who qualify as emergency responders under the April Regulations. As this will be a highly fact-intensive analysis, employers should consult counsel in making these determinations.

FOOTNOTES

[1] Neither the lawsuit nor the Revised Regulations addressed the definition of "emergency responder" and therefore, that exclusion remains in effect. For reference, emergency responders include, but are not limited to, "military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility." Further, the April Regulations note that the emergency responder definition extends to "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19."

[2] 29 C.F.R. § 825.302(f).

KEY CONTACTS

APRIL BOYER
PARTNER

MIAMI
+1.305.539.3380
APRIL.BOYER@KLGATES.COM

ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

DAVID C. LINDSAY
PARTNER

RALEIGH, CHARLOTTE
+1.919.743.7304
DAVID.LINDSAY@KLGATES.COM

