Coates' Canons Blog: Revised FFCRA Regulations Effective September 16, 2020

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On September 16, 2020, the United States Department of Labor (DOL) published revisions to its Families First Coronavirus Response Act (FFCRA) regulations in the Federal Register. The revisions were made in response to an August 3, 2020 ruling by a federal judge in New York holding that DOL had exceeded its statutory authority with respect to four features of the FFCRA regulations. The court found those four features to be invalid. In response, DOL has now revised certain of the FFCRA regulations to bring them in compliance with the judge's order. To learn what this means for North Carolina local government employers, read on.

Background

The Families First Coronavirus Response Act (FFCRA) became law on March 18, 2020. Included in the FFCRA are the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. The Emergency Paid Sick Leave Act requires employers to provide paid sick leave to employees who have been advised to self-isolate or self-quarantine, are seeking a diagnosis of COVID-19 symptoms, or are caring for an individual under isolation or quarantine or for children whose normal caregivers are unavailable due to the COVID-19 precautions. The Emergency Family and Medical Leave Expansion Act requires employers to provide up to twelve weeks of partially paid, job-protected leave for employees who are unable to work because their regular childcare providers are unavailable or their children's schools are closed because of COVID-19. For a detailed discussion of the FFCRA, see here.

On April 6, 2020, the U.S. Department of Labor (DOL) issued a comprehensive rule implementing the FFCRA's provisions. For a discussion of the FFCRA regulations, see here.

Soon after DOL issued its FFCRA rule, the State of New York brought suit under the federal Administrative Procedure Act. New York alleged that four aspects of DOL's FFCRA regulations exceeded the DOL's authority under the FFCRA. On August 3, 2020, Judge Oetken of the Southern District of New York issued his opinion and order in the case, *State of New York v. United States Department of Labor*. In it, he vacated the following provisions:

1. the so-called "work availability" requirement at 29 CFR 826.20; this provision excluded employees who were furloughed from taking emergency paid sick leave and emergency FMLA leave;
2. the requirement that an employer agree to an employee's use of intermittent leave at 29 CFR 826.50(a) – (c);
3. the definition of "health care provider" at 29 CFR 826.30(c)(1)(i); and
4. the requirement at 29 CFR 826.100that an employee provide documentation of their need for FFCRA leave before taking leave.

DOL issued no press releases in response to Judge Oetken's decision and made no public announcements about any intention to appeal the decision or to revise the rule – until it published its revised rule on September 16, 2020.

The Revised FFCRA Regulations: DOL's Response to the District Court's Order

DOL's response to the judge's order was to:

- reaffirm and further explain the provision that excludes furloughed employees from qualifying for emergency paid sick leave and emergency FMLA leave provides that an employee may only take leave if they have work from which to take leave (the "work availability requirement");
- reaffirm and further explain the provision requiring the employer's approval before an employee may take emergency paid sick leave or emergency FMLA leave on an intermittent basis;
- revise the definition of "health care provider" at 29 CFR § 826.30(c)(1)(i) so that it incorporates both the definition

of “health care provider” found in the original FMLA and other employees who provide diagnostic, preventive and treatment services to patients; and
- revise the FFCRA’s documentation requirement so that employees need only provide their employers with documentation supporting the need for leave as soon as practicable rather than before beginning the leave.

The following sections discuss each of these changes in turn.

The Work Availability Requirement

Last spring, while Governor Cooper’s Stay-at-Home Order was in effect, many local government employees furloughed those employees whose presence in the office or in the field was not essential and whose job duties could not be performed remotely. At 29 CFR § 826.20, the FFCRA regulations provide that emergency paid sick leave and emergency FMLA leave are available when an employee is “unable to work” because of one of the five qualifying reasons set out in the Emergency Paid Sick Leave Act or because their child’s school or place of care is closed due to COVID-19. As DOL advised in published guidance to the regulations, employees whose employers did not have work for them were not eligible for emergency paid sick leave or emergency FMLA leave since their reason for being “unable to work” was that there was no work, rather than for an FFCRA qualifying reason.

In the revised rule, DOL has made clear that regardless of the reason for which an employee has applied for FFCRA leave – emergency paid sick leave for reasons ## 1 ,2, 3, 4, 5, or 6 (reason # 6 is still not in use) or emergency FMLA leave – the employee is not eligible for leave where there is no work available for the employee.

Use of FFCRA Leave on an Intermittent Basis

Intermittent leave is leave taken in separate blocks of time for a single qualifying reason. It may be taken in periods from an hour or more to periods of several weeks. The text of the FFCRA does not mention intermittent leave. The FFCRA does, however, grant DOL broad authority to issue regulations to implement the purposes of the FFCRA and to make leave taken under the Emergency Paid Sick Leave Act and the Emergency FMLA Act consistent. In the explanatory comments to the revised FFCRA regulations, DOL notes that the statute’s failure to address intermittent leave is the sort of statutory gap that its regulations were supposed to fill. DOL therefore imported the concept of intermittent leave from the regular FMLA regulations at 29 CFR 825.205.

In response to the New York judge’s ruling, DOL has reaffirmed its original regulation on the use of intermittent leave, which is found at 29 CFR § 826.50. It has now provided a more detailed explanation for that regulation in the explanatory comments in the preamble. Employees make take FFCRA leave on an intermittent basis only if the following requirements are met:

- the leave is emergency FMLA leave or emergency paid sick leave for the care of a child whose school or place of care is closed due to CVOID-19, **or**
- the leave is emergency paid sicl leave for reasons #1 – 4 where the employee is teleworking;

and

- the employer agrees to intermittent leave and to the particular schedule the employee proposes.

Intermittent leave is not available for any of emergency paid sick leave reasons #1 – 4 where the employee is working at the employer’s workplace because reasons #1-4 involve situations where an employee has a higher risk of being infected with COVID-19 or may be caring for someone with a high risk of being infected with COVID-19. DOL explains, “[p]ermitting such an employee to work intermittently when he or she is at an elevated risk of transmitting the virus would be incompatible with Congress’ goal to slow the spread of COVID-19.”

The Definition of Health Care Provider

Sections 3105 and 5102(a) of the FFCRA allow employers to exclude “health care providers” and “emergency responders” from eligibility for emergency FMLA leave and emergency paid sick leave respectively. These provisions did not define those terms, however. In the original FFCRA regulations, DOL defined “health care provider” broadly for the purposes of

exclusion from FFCRA leave as including *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 entity. That esd a very broad exclusion and one which the Judge Oetken in the New York case found overly broad.

In response, DOL has amended the definition of health care provider found in the FFCRA regulations at 29 CFR § 826.30(c)(1). The definition now includes anyone defined as a health care provider under the "regular" FMLA regulations at 29 CFR §§ 825.102 and 825.125, as well as any other person 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," including but not limited to nurses, nurse assistants, medical technicians, laboratory technicians and those who take or process samples, take or assistant in the taking or x-rays or other diagnostics tests. The new definition expressly excludes IT personnel, building maintenance staff, human resources personnel, records managers, and those involved in billing for health care providers and entities.

For most local government employers, this change in definition will not affect who they may exclude from FFCRA leave since most local government health care employees already qualify as emergency responders (see my blog posts here and here).

Note that the definition of health care provider for the purposes of advising an employee to self-isolate due to COVID-19 concerns is different. This definition may be found at 29 CFR § 826.20(a)(3). Here, the definition of health care provider is the same as that found in the "regular" FMLA regulations at 29 CFR § 825.102. In other words, the definition of health care provider is the same for the purposes of a medical certification under "regular" FMLA and for advising an employee to self-isolate due to COVID-19 infection, exposure or risk of complications.

Notice and Documentation Requirements for FFCRA Leave

The FFCRA regulations require employees to provide employers with the following information to substantiate the need for leave: the employee's name, the dates 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 qualifying reason. Additional information is required depending on whether the request is to take emergency paid sick leave for reasons #1-4, on one hand, or for emergency FMLA leave or emergency paid sick leave fore reasons #5 (child care), on the other. Further details may be found here.

The original regulation required employees to provide employers with such documentation *before* taking leave. The judge in the New York case held that the requirement that employees provide notice prior to leave was inconsistent with the statutory text of the FFCRA, which requires that documentation be provided after the first day of emergency paid sick leave and "as soon as practicable" for emergency FMLA leave. DOL has therefore revised 29 CFR § 826.100 to require that documentation be provide for both emergency paid sick leave and emergency FMLA leave as soon as practicable.

DOL has also tweaked 29 CFR § 826.90 to make clear than employer may require notice of the need for emergency FMLA leave as soon as practicable where the need for leave is foreseeable.

Conclusion

The changes that DOL has made to the FFCRA regulations are relatively minor ones that should not dramatically change the way North Carolina public employers have been administering emergency paid sick leave and emergency FMLA leave. All previous Coates' Canons blog posts on the FFCRA's substantive provision (see here and here) have been updated to reflect these changes.

Links

- www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act

- www.nysd.uscourts.gov/sites/default/files/2020-08/State%20of%20New%20York%20v.%20United%20States%20Department%20of%20Labor%20et%20al%2C%2020-cv-3020%20%28JPO%29.pdf
- www.law.cornell.edu/cfr/text/29/826.20
- www.govregs.com/regulations/expand/title29_chapterV_part825_subpartB_section825.205#title29_chapterV_part825_subpartB_section825.205
- ecfr.io/Title-29/Section-826.50
- www.ecfr.gov/cgi-bin/text-idx?node=pt29.3.826&rgn=div5#se29.3.826_130
- www.law.cornell.edu/cfr/text/29/825.102
- www.law.cornell.edu/cfr/text/29/825.125
- ecfr.io/Title-29/Section-826.100
- ecfr.io/Title-29/Section-826.90