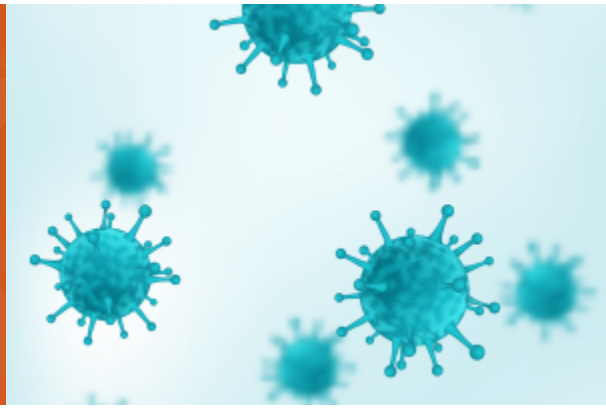
COVID-19 Alert: FFCRA Update

NY Federal Court Issues Opinion Invalidating Portions of the FFCRA

August 13, 2020



The Families First Coronavirus Response Act (FFCRA) was enacted as part of the CARES Act in March 2020, and Congress tasked the U.S. Department of Labor (DOL) in administering and enforcing it. The DOL issued final regulations interpreting the FFCRA on April 1, 2020 ("Final Rule"). Shortly after, the State of New York brought suit against the DOL claiming that several fundamental portions of the Final Rule exceeded the DOL's statutory authority and unduly restrict paid leave. The U.S. District Court of the Southern District of New York (the "Court") released its opinion on August 3, 2020 invalidating four key provisions of the DOL's final regulations.

Work-Availability Requirement

The Court reviewed the DOL's Final Rule that excludes paid leave benefits to employees whose employers do not have available work for them. In short, the Final Rule (and several of the DOL's FFCRA FAQs) require that an employer have work for the employee – or, in other words, the employee is *scheduled* to work for the employer. Without available work, there is no schedule from which to take leave.

In analyzing this portion of the Final Rule, the Court noted that the widespread shutdown and slowdown of businesses due to the pandemic would cause a significant number of employees to otherwise be excluded from paid leave due to this requirement. However, the Court's analysis ultimately turned on statutory interpretation. The Court reviewed the statutory text and determined that DOL did not exercise "reasoned decision-making" in the interpretation of the statutory text, invalidating the provision. This invalidation of the work-availability requirement now potentially opens the door for furloughed employees to claim FFCRA leave.

Healthcare Provider Exemption

The Court also invalidated the Final Rule's definition of "health care provider." The State of New York took issue with the definition, because under the FFCRA employers could elect to exclude health care workers. The State of New York contended that the Final Rule's *definition* of the term was overly broad. The State argued, and the DOL conceded, that based on the Final Rule's definition workers, workers such as an "English professor, librarian, or cafeteria manager at a university with a medical school" would all be considered "health care providers." Such an expansive definition gives employers too much discretion to exclude large swaths of workers likely intended to be *covered* by the FFCRA. The Court ultimately found that the DOL exceeded their authority in drafting this definition and struck it down.

Intermittent Leave

Next on the chopping block was the Final Rule's prohibition on intermittent leave under the FFCRA. The Final Rule permits intermittent leave "only if the Employer and Employee agree," and only under qualifying conditions. The Court noted that the FFCRA's statutory language was silent on this topic, allowing the DOL's "broad regulatory authority" to fill the gaps. The DOL's

Final Rule attempted to balance the risks between employees taking leave for COVID-19 symptoms or to care for an individual with COVID-19 symptoms, and those employees taking leave for childcare closings. It reasoned that the risk of allowing intermittent leave for those employees who are experiencing COVID-19 symptoms presents an "unacceptably high risk," given that the employee may spread the virus into the workplace upon their return after an intermittent leave. However, the Final Rule allows intermittent leave, *with employer consent*, to care for a child whose school or daycare is closed. The rationale by the DOL here is that this employee is not taking leave in response to direct or indirect COVID-19 symptoms/exposure, and therefore the risk of spread through intermittent leave is significantly reduced.

Based on this reasoned approach, the Court upheld the Final Rule's prohibition on intermittent leave based upon the risk of viral transmission to the workplace. However, it struck down the blanket requirement that all intermittent leave requires employer consent. While recognizing the DOL's broad authority, and recognizing its valid and careful risk balancing act, the Court found that the blanket consent requirement lacks the same reasoned rationale as the viral transmission rationale.

Timing of Documentation

The Final Rule also requires employees to provide documentation supporting the leave "prior to taking [FFCRA] leave." The Court, though, found that the statutory language of the FFCRA directly contradicts Final Rule's requirement. Instead, the FFCRA statutory language requires the "employee provide the employer with such notice of leave as is practicable" in the case of emergency paid family leave, and under "reasonable notice procedures" in the case of paid sick time. To the extent the Final Rule requires documentation *prior* to the leave, the Court found, it cannot stand.

What Now?

While it remains unclear whether this decision applies to New York employers only, employers nationwide are advised to exercise caution when making any FFCRA decisions that touch upon these four areas. The DOL has yet to appeal the decision or update its Final Rule in response to the Court's decision – but either route remains possible and employers should continue to watch for any updates closely.

The Morse Employment Law Group is following this issue closely. Please feel free to contact them should you have any questions.

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