FFCRA Documentation Requirement Rule Struck Down

Court also invalidates need to secure employer consent for intermittent leave, exclusion of some employees from benefits, 'health care provider' definition

By Allen Smith, J.D.
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A Department of Labor (DOL) rule that required employees to provide documentation before taking Families First Coronavirus Response Act (FFCRA) leave was struck down by a federal district court Aug. 3. The U.S. District Court for the Southern District of New York also decided against other aspects of the final rule, including the requirement that an employee secure employer consent for intermittent leave, the exclusion of employees from FFCRA benefits if their employers do not have work available for them, and the broad definition of "health care provider."

EPSLA and EFMLEA Requirements

The court noted that the FFCRA has two major provisions: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).

Under the EPSLA, employers with fewer than 500 employees and certain public employers must pay sick leave of up to 80 hours, or roughly 10 days, to full-time employees who are:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19.
- Advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Caring for an individual subject to a quarantine or isolation order by the government or a health care provider.
- Caring for a child whose school or place of care is closed or whose child care provider is unavailable because of COVID-19. This may not sound like sick leave, but it's one of the EPSLA's six grounds for such leave.
- Experiencing any other substantially similar condition specified by the secretary of health and human services in consultation with the secretary of the treasury and the secretary of labor.

For employers of fewer than 500 employees, an additional 10 weeks of family leave at two-thirds of regular wages is available under the EFMLEA to care for a child whose school or place of care is closed or whose child care provider is unavailable because of COVID-19. The FFCRA does not have requirements for private-sector employers with 500 or more employees (https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool/employee).

Documentation Challenge

The state of New York, which brought the lawsuit challenging the regulations, argued that the final rule's documentation requirements (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-releases-ffcra-regulations-coronavirus.aspx) are inconsistent with the FFCRA.

The final rule requires that employees submit documentation to their employer prior to taking FFCRA leave. The documentation must indicate the following:

- The reason for leave.
- The duration of the requested leave.
- When relevant, the authority for the isolation or quarantine order qualifying them for leave.

But the FFCRA already has a scheme to govern prior notice that does not require the worker to tell the employer why or how long he or she will need leave.

Under the EFMLEA emergency paid-family-leave provisions, "in any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable."

Regarding paid sick leave, the EPSLA states, "After the first workday (or portion thereof) an employee receives paid sick time under this act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time."

The court stated, "To the extent that the final rule's documentation requirement imposes a different and more stringent condition to leave, it is inconsistent with the statute's unambiguous notice provisions."

Nonetheless, the court left the substance of the final rule's documentation requirement, as distinguished from its stricken precondition to leave, intact.

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Intermittent Leave

New York argued that the FFCRA rule's prohibition on intermittent leave exceeded the DOL's authority under the statute.

The parties disagreed on the meaning of the regulations. New York said they require employees to take any qualifying leave in a single block, and therefore intermittent leave is not available as it is under the FMLA. The DOL responded that the regulations forbid intermittent leave only for any single qualifying reason.

The court agreed with the DOL's view and said the DOL's stance largely aligned with the statutory language. The conditions for which intermittent leave is barred are those that correlate with a higher risk of viral infection, according to the DOL.

These include leave because employees are:

- Subject to a government quarantine or isolation order related to COVID-19.
- Advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Experiencing symptoms of COVID-19 and taking leave to obtain a medical diagnosis.
- Taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Experiencing any other substantially similar condition specified by the secretary of health and human services.

But the court said the employer-permission requirement for those conditions for which intermittent leave is allowed was "unreasoned." The court stated, "The final rule ... acknowledges that the justification for the bar on intermittent leave for certain qualifying conditions is inapplicable to other qualifying conditions but provides no other rationale for the blanket requirement of employer consent."

The decision "will have a significant impact on the use of intermittent leave," said Jeff Nowak, an attorney with Littler in Chicago. "Under the ruling, employees will have the right to take intermittent leave in situations where health and safety is not at risk—namely, those situations where a child's school is closed or child care unavailable because of the pandemic."

Work-Availability Requirement

The court said that FFCRA benefits are available even when work isn't, contrary to the final rule's work-availability requirement, which requires that work be available with the employer in order for benefits to also be available. The court's ruling is significant because it means FFCRA benefits may be available during furloughs. Under the final rule, FFCRA benefits weren't available then.

The final rule's work-availability requirement "is hugely consequential for the employees and employers covered by the FFCRA, because the COVID-19 crisis has occasioned the temporary shutdown and slowdown of countless businesses nationwide, causing, in turn, a decrease in work immediately available for employees who otherwise remain formally employed," the court stated.

The DOL provided an inadequate explanation for this requirement, the court concluded.

The revision to the work-availability requirement will likely cause much consternation for employers, according to Lori Armstrong Halber, an attorney with Reed Smith in Philadelphia. "In theory, under this decision, an employee who was furloughed would now potentially be eligible for FFCRA leave," she said. "I think the court has this wrong. The statute says that an employee is entitled to leave 'because of' six qualifying needs. ... If an employee is not working because there is no work available [i.e., the employee has been furloughed], the employee is not absent from work 'because of' one of those needs; rather, the employee is absent from work because there is no work for the employee to perform."

Health Care Provider

Certain health care providers are exempt from the FFCRA's coverage.

The court struck down the DOL's definition of "health care provider (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-ffcra-small-business-exemption.aspx)" as too broad.

"The definition, needless to say, is expansive," the court stated. "[The] DOL concedes that an English professor, librarian or cafeteria manager at a university with a medical school would all be 'health care providers' under the rule."

The court criticized the DOL's definition for relying "entirely on the identity of the employer, in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties or capabilities of a class of employees."

The regulations, except the four areas discussed above—the timing of documentation, consent for intermittent leave, work-availability requirement and definition of health care provider—remain in place, said Joseph Cartafalsa, an attorney with Ogletree Deakins in New York City. "Pending an appeal or additional rulemaking, employers are advised to follow the regulations in a manner consistent with the court decision."

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