Revised FFCRA Regulations May Prompt Policy Updates

By Allen Smith, J.D.
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Employers may need to change their documentation and intermittent leave policies following the U.S. Department of Labor's (DOL's) recent revisions (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-issues-revised-ffcra-leave-rules.aspx) to Families First Coronavirus Response Act (FFCRA) regulations.

Employers also must provide leave to some employees whom they previously exempted because the revised rule provides a narrower definition of "health care provider."

The revisions follow a ruling from the U.S. District Court for the Southern District of New York that invalidated portions of the DOL's April 1 temporary rule. Part of the rule that was overturned stated that employees had to get employer permission for intermittent leave under the FFCRA. Once again, according to the DOL, they do. The DOL has provided additional explanation for its underlying rationale for this rule—reasoning that the district court said the department originally failed to adequately give.

The department "believes the employer consent requirement is appropriate in order to avoid exacerbating the risk of COVID-19 contagion and to avoid unduly disrupting the employer's operations," said Adam Kemper, an attorney with Greenspoon Marder in Ft. Lauderdale, Fla. "Employers who created and implemented COVID-19 policies should revisit them and adjust them to conform with the new rule," said Benjamin Widener, an attorney with Stark & Stark in Lawrenceville, N.J.

In response to the issuance of the regulatory revisions in September, Emily M. Dickens, the Society for Human Resource Management's corporate secretary, chief of staff and head of government affairs, said, "Employers need clear, concise and consistent policies to manage the challenges presented by this public health crisis while supporting their employees. We appreciate the department's timely revisions as they provide much-needed clarity at a critical time."

[SHRM members-only Q&A: How does the Families First Coronavirus Response Act (H.R. 6201) impact employers? (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/how-does-the-families-first-coronavirus-response-act-hr-6201-impact-employers.aspx)]

Documentation

The documentation requirements for FFCRA leave haven't changed; only the timing of when the documentation must be provided has been revised, noted Jaclyn Kugell and Jaclyn McNeely, attorneys with Morgan, Brown & Joy in Boston.

Under the original final rule, the employee was required to submit the documentation prior to taking leave. Under the revised final rule, the employee must provide this documentation "as soon as practicable."

So, for example, if an employee learns before starting work on Monday that his or her child's school will be closed Tuesday because of reasons related to COVID-19, the employee must notify his or her employer as soon as practicable—in this case, on Monday, because the leave is foreseeable, said Ruth Zadikany, an attorney with Mayer Brown in Los Angeles.

But if the employee learns of the school closure after he or she already has reported to work on Monday, the leave may not be foreseeable. The revised regulation permits the employee to begin taking leave Tuesday, but only after giving notice that is as soon as practicable. "As a practical matter, there may be occasions where employers have to adjust more quickly and act nimbly regarding same-day staffing shortages because they receive less or no advance notice," she said.

Employers should revise leave-request forms and policies to state that a request for leave and required documentation should be provided to the employer as soon as practicable, not prior to leave, said Rachel Powitzky Steely, an attorney with Foley & Lardner in Houston.

Intermittent Leave

The DOL's revised regulations also provide reasoning for its requirement that employees have their employer's approval to take intermittent leave.

Employers that stopped requiring approval following the district court decision and now wish to implement the requirement again should communicate this to employees uniformly and prior to reimplementation, Kugell and McNeely said. "Employers may explain to their employees that the law has been clarified on this issue but should expect some dissatisfaction from affected employees," they stated. "Employers with greater flexibility that may be more agreeable to intermittent leave may choose to leave it at the employee's option."

Kugell and McNeely said an employer likely will want to assess each request for intermittent FFCRA leave on a case-by-case basis to determine the impact of such leave on its operations. For example, an employer may permit an employee to use intermittent leave when it can easily cover absences in one department but deny it in other departments when intermittent absences are more operationally disruptive.
Revise FFCRA consent forms to include separate approvals for permission for an employee to telework and for the use of intermittent leave, Steely recommended.

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Health-Care-Provider Exemption

Another notable change is that the DOL issued revised rules about who is a health care worker and therefore may be excluded by an employer from paid sick leave and expanded family and medical leave, said Andrew Rosenman, an attorney with Mayer Brown in Chicago.

Health care workers now include those classified as health care providers under the Family and Medical Leave Act and individuals employed to provide diagnostic services, preventive services, treatment services or other services integrated with and necessary to patient care, said Lindsay Ditlow, an attorney with McDermott Will & Emery in New York City.

Employees who would not fit under this new definition include HR professionals, IT professionals, building maintenance staff, cooks, food service workers, records managers, consultants and billers who are too far removed from the necessary components of care to support an FFCRA exclusion, she added.

Employers implementing the exemption should reevaluate whether individual groups of employees they previously believed fit within it still are exempted, Ditlow said.

Lilian Davis, an attorney with Polsinelli in St. Louis, said those covered by the exemption include individuals who bathe, dress, hand feed or take vital signs of patients; individuals who set up equipment for medical procedures; and individuals who transport patients.