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HR Heads-up

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The Latest Regulatory Changes to FFCRA Leave

The Department of Labor (DOL) has issued revisions to the regulations governing leave under the Families First Coronavirus Response Act (FFCRA). Boardman Clark's Labor & Employment team continues to monitor developments related to this law. Our most recent prior article on the FFCRA is available here.

The latest DOL regulatory revisions are in response to a ruling by a federal district court in New York that struck down portions of the DOL's prior regulations. The consequences of that court decision on employers outside of the state of New York were initially unclear. However, these new regulations clarify the DOL's interpretation of several key aspects of FFCRA leave at issue in that case. The DOL's revisions to the regulations governing FFCRA leave are binding on all Wisconsin employers covered by the law (which generally include all public employers regardless of size and all private employers with fewer than 500 employees).

The revisions cover four major issues:

- Leave for employees who are not currently scheduled for work
- Leave for employees who are healthcare providers
- Intermittent leave
- Documentation and notice requirements for leave

Leave for employees who are not currently scheduled for work

Due to the pandemic, many employers had to either furlough or lay off employees. However, these employees are not eligible for FFCRA leave because they are not currently scheduled for work by their employers. The DOL reiterated this position in its revisions to the regulations. Only an employee who has work available from which to take leave is eligible to take FFCRA leave. A furloughed or laid off employee does not have any work available from which to take leave and is therefore ineligible for all forms of FFCRA leave.

Leave for employees who are health care providers

The DOL narrowed its definition of "health care providers" under the FFCRA for purposes of excluding these individuals from being eligible for leave under the law. Now, the definition of "health care providers" includes physicians and others who make medical diagnoses, as well as those employees who are capable of providing health care services, meaning the employees 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 and, if not provided, would adversely impact patient care. This definition includes specified positions, such as nurses, nurse assistants, and medical technicians. The definition also includes positions

that provide services to the above positions such as laboratory technicians. Finally, the definition was narrowed so that certain positions are not considered health care providers even if their services could affect the provision of health care services, including IT professionals, maintenance, human resources personnel, cooks, consultants, and billers. The emphasis of the analysis is on the duties the employees perform and the potential impact on patient care if those duties are not performed. Employers that have denied employees leave in the past under the health care provider exclusion should consult with legal counsel as to whether these employees still fall under the revised definition.

Intermittent leave

The DOL reiterated in its revisions that intermittent leave is only permissible if approved by the employer. If the employee is teleworking (and not reporting to the worksite), intermittent leave can be permitted by the employer for any qualifying FFCRA reasons. If the employee is working on-site, intermittent leave is only available if an employee needs the leave to care for a son or daughter because of childcare unavailability or school closure due to COVID-19.

However, the new regulations clarify how employers must administer FFCRA leave for employees who need to care for children due to school closures when schools are utilizing a hybrid school schedule due to COVID-19. A hybrid school schedule is when students attend school in-person on some days and attend school virtually on other days. The DOL does not consider a request from an employee to take leave for part of a workweek due to their child's hybrid school schedule to be a request for intermittent leave. Instead, the DOL considers each day the school is closed to the employee's child for in-person instruction to be a separate event that qualifies for leave. Therefore, *employers must permit an employee to take partial weeks of leave when the employee needs leave due to school closures arising from a hybrid school schedule*. An employer cannot require an employee to take the entire week off if the school where the employee's child attends is open for in-person instruction for that child for part of the employee's workweek.

Documentation and notice requirements for leave

The DOL slightly loosened the requirements for when employees must provide employees with notice and supporting documentation for a request for FFCRA leave. Notice and supporting documentation are not required in advance of the leave. Instead, notice and documentation are required as soon as practicable under the facts and circumstances of the particular situation. For example, it is generally reasonable for notice of the leave to be given by a family member or friend of the employee. Additionally, if the need for the leave is foreseeable, it will generally be practicable for the employee to provide notice prior to the leave. In practice, this revision means that, in certain situations, an employer might have to conditionally approve an employee's FFCRA leave request, subject to receiving appropriate documentation from the employee as soon as is practicable under the circumstances.

Conclusion

The DOL continues to revise its regulations and guidance regarding the FFCRA. We will continue to monitor these developments and provide updates as appropriate. If you have any questions about FFCRA leave, please contact a member of the Boardman Clark Labor & Employment team.

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