FFCRA Update – One Federal Court Strikes Down Portions of the DOL's Final Rule Implementing The FFCRA

Description

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A federal court in New York ("Court") recently struck down a number of important provisions contained within the Final Rule issued by the Department of Labor ("DOL") interpreting the Families First Coronavirus Relief Act ("FFCRA"), sending employers scrambling to understand whether the ruling has national impact and how to adjust their company policies applying the FFCRA.

The FFCRA requires certain employers to provide up to 12 weeks of leave (with the first 2 weeks being unpaid and the remaining 10 weeks being partially paid) for employees who are unable to work due to their children's school or day care being closed due to COVID-19. The FFCRA also requires certain employers to provide up to 80 hours of fully or partially paid emergency paid sick leave for reasons associated with COVID-19. The FFCRA, in turn, calls upon the DOL (as the federal agency with the most expertise in employment issues) to administer the law and, in addition to other guidance, the DOL issued a 125 page "Final Rule" interpreting the FFCRA's various provisions. A Final Rule such as the FFCRA rule is generally the interpretation of the law that employers and courts will follow in implementing the law. For more detail on the FFCRA, view our previously published client alert here.

The State of New York sued the DOL, challenging certain of portions of the Final Rule. The Court made the following rulings:

1. The FFCRA provides leave for employees who are "unable to work because of" a COVID-19 related issue. The DOL's Final Rule states that leave and associated FFCRA pay is not available if the employer does not have work for the employee. This logically makes sense as the employee is not unable to work, for example, due to a school closing if the company has no work for the employee anyway. However, the Court struck down this provision, finding that it was not a reasonable interpretation of the FFCRA.2. The FFCRA allows employers to exclude certain "health care providers" from coverage. While the FFCRA contains a concise definition of health care provider, the Final Rule contains a far more expansive definition, which again the Court found unreasonable and invalid.

3. The FFCRA is silent as to the concept of intermittent leave (i.e. taking leaves in blocks of time as opposed to having to be used all at once). The Final Rule provides that leave may be taken intermittently in certain situations, but not in others, and then only if the employer agrees. New York challenged this provision, taking the position that intermittent leave was never permitted. The Court dismissed this interpretation. However, the Court did find that the Final Rule's requirement that intermittent leave is only permitted if the employer agreed to such leave to be unreasonable and invalid. The Court decided that while the DOL's prohibition on intermittent leave in situations that correspond with heightened risk of infection was appropriate, it found that when intermittent leave is available, it does not require the employer's discretionary consent.4. Finally, the Court found that while requiring certain documentation for leave was appropriate, the DOL's interpretation that such documentation was always required to be provided before the leave commenced was not.

So far, the decision does not have a direct effect outside of the state of New York. The Court could have issued an injunction which would have had a national effect, similar to the Texas federal court when considering the

2016 salary basis test, but it has not. Rather, it found that the work availability requirement, the definition of "health care provider", the requirement that an employee secure employer consent for intermittent leave, and the temporal aspect of the documentation requirement were all vacated, with the remainder of the Final Rule remaining intact. Thus, courts in other jurisdictions may very well rule in other ways on these issues or find other parts of the Final Rule to be unenforceable.

It remains to be seen how DOL may react to the decision. It could appeal to the 2nd Circuit, it could seek reconsideration or a stay of the decision, or it could even amend the Final Rule to address the issues raised by the Court. In the meantime, employers should understand that the Final Rule and related DOL guidance regarding the FFCRA may be vulnerable to challenges regardless of the state in which the employer is operating.

Partridge Snow & Hahn's Employment & Labor Group is ready to answer questions and advise on this topic.

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