

September 24, 2020

Labor and Employment Update

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

As we informed back in April 2020, the federal **Families First Coronavirus Response Act** enacted in March 2020 creates two kinds of paid leave that apply to employers with 500 employees or less, granting employers refundable tax credits against their portion of Social Security taxes for 100% of the qualified sick leave and family leave wages paid in accordance with its provisions. The law became effective on April 2 and expires on December 31, 2020.

On April 14, 2020, however, the State of New York filed suit challenging certain parts of the temporary rule under the Administrative Procedure Act. On August 3, 2020, the United States District Court for the Southern District of New York ("District Court") ruled that four parts of the temporary rule are invalid: (1) The requirement that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave; (2) the requirement that an employee may take FFCRA leave intermittently only with employer approval; (3) the definition of an employee who is a "health care provider" whom an employer may exclude from being eligible for FFCRA leave; and (4) the statement that employees who take FFCRA leave must provide their employers with certain documentation before taking leave.

In response to this ruling, the Department of Labor examined the District Court's opinion and reevaluated the portions of the temporary rule that the Court held were invalid. Because of this, the Department issued a new temporary rule, effective immediately, to reaffirm its regulations in part, revise its regulations in part, and further explain its positions. The revisions do the following:

1. **Reaffirm that**, paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave. This requirement applies to all qualifying reasons to take paid sick leave and expanded family and medical leave.
2. **Reaffirm that, where** intermittent FFCRA leave is permitted by the Department's regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently to avoid unduly disrupting the employer's operations.
3. Revise the definition of "health care provider" to mean employees who are health care providers under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care. The definition excludes information technology professionals, maintenance staff, human resources personnel, cooks and food service workers, records managers, consultants, and billers.



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4. Clarify that the information the employee must give the employer to support the need for his or her leave should be provided to the employer as soon as practicable.
5. Correct an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to his or her employer. That is, if the need for leave is foreseeable, it will typically be practical for employees to provide notice before taking leave, and, in most cases, required documentation will be submitted when notice is provided.
These revisions became effective on September 16, 2020.

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