

Federal Court Invalidates Portions of the DOL's FFCRA Rule

by Aaron Goldstein

I. Issues

On August 3, 2020, the Federal District Court for the Southern District of New York issued a decision in *State of New York v. United States Department of Labor, et al.*¹ In this case, the State of New York claimed that the Department of Labor (DOL) exceeded its statutory authority when it promulgated its Final Rule implementing the Families First Coronavirus Response Act (FFCRA), and in the corresponding FAQ posted to the DOL website. For months, employers have relied on the Final Rule and FAQ to help implement the paid leave provisions of the FFCRA. The lawsuit sought to invalidate portions of the Final Rule, including portions related to the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA).

This decision invalidates or modifies four portions of the Final Rule:

- The work availability requirement as a prerequisite to taking paid leave;
- The definition of “health care provider” as it relates to employees who are excluded from the paid leave benefits of the FFCRA;
- Employer consent before an employee can take intermittent leave; and
- The documentation requirements to support an employee’s request for leave.

II. FFCRA Provisions Affected

A. The Work Availability Requirement

Under the FFCRA, employees are eligible for paid leave who are either

(1) “[U]nable to work (or telework) due to a need for leave because” of any of the enumerated COVID-19-related reasons (under the EPSLA); or

(2) “[U]nable to work (or telework) due to a need for leave to care for . . . [a child] due to

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a public health emergency” (under the EFMLEA).

The Final Rule excluded from eligibility employees whose employers “do not have work” for them.

The court held that paid leave benefits under the FFCRA are available to employees, regardless of the availability of work. This is significant because it may extend paid leave benefits to employees on furlough or who are temporarily unable to work due to a site closure in response to a COVID-19 outbreak in the workplace. The court reasoned that the 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 would otherwise remain formally employed.”

B. Definition of “Health Care Provider”

Health care providers are excluded from the paid leave provisions of the FFCRA. The FFCRA defines “health care provider” as “(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services.” The Final Rule defines the term as:

[A]nyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as

[A]ny individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The court held that the DOL’s definition of “health care provider” is overly broad and exceeds the authority granted by the FFCRA. The court criticized 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.” Because employers may exclude health care providers from leave benefits, the definition materially affects employee’s rights under the FFCRA.

C. Intermittent Leave

The FFCRA does not address whether employees are eligible for intermittent paid leave. However, the Final Rule permitted “employees to take [EPSL] or [EFML] intermittently (i.e., in separate periods of time, rather than one continuous period) only if the Employer and Employee agree” and subject to certain conditions “where there is a minimal risk that the employee will spread COVID-19 to other employees.”

The court explained that the Final Rule fills “the sort of statutory gap . . . that DOL’s broad regulatory authority empowers it to fill.” It reasoned that the Final Rule largely aligned with the statutory language that prohibits intermittent leave when there is a higher risk of transmission. However, the court held that the employer consent provision of the Final Rule “utterly fail[ed] to explain why employer *consent* is required for the remaining qualifying conditions, which concededly do not implicate the same public-health considerations.” The court went on to explain:

[I]f an employee requires paid leave “solely to care for the employee’s son or daughter whose school or place of care is closed,” the “absence of confirmed or suspected COVID-19 in the employee’s household reduces the risk that the employee will spread COVID-19 by reporting to the employer’s worksite while taking intermittent paid leave.” [. . .] The Final Rule therefore 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.

Under the court’s ruling, employees have the right to take intermittent leave where the risk of viral transmission is low, regardless of their employer’s consent.

D. Documentation Requirements

The Final Rule provides that employees submit the following documentation “prior to taking [FFCRA] leave”:

- (1) the reason for leave;
- (2) the duration of the requested leave; and
- (3) the authority for the quarantine or isolation order (where relevant).

However, as the court noted, the FFCRA includes specific provisions regarding prior notice of the need for leave. With regard to emergency paid family leave, the EFMLEA provides that “[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.” With regard to paid sick leave, the EPSLA provides that “[a]fter 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 held that to the extent that the Final Rule requirement differs from the language of the FFCRA, it is invalid. Because the statute does not require prior notice before taking paid leave under the FFCRA, the advance notice provision of the Final Rule is void. However, the court left the remainder of the documentation requirement intact.

III. Applicability of Decision

The Southern District of New York did not specify the scope of its decision, leaving many attorneys questioning whether it applies outside of New York. The complaint did not request, and the court did not issue, an injunction, which would have barred the DOL from enforcing the invalidated provisions of the Final Rule. The DOL has not appealed the court's decision to date, which means that the Second Circuit has not issued any order staying the decision. Ultimately, the effect of the court's ruling is uncertain, but employers should be aware that it could be determined to have nationwide applicability. It also is unclear whether the court's decision would apply retroactively. However, under established principles of administrative law, it is distinctly possible that the decision will have retroactive effect, creating liability for employers who have relied on the Final Rule as promulgated by the DOL.

IV. Takeaways

This decision may be a significant problem for employers who have relied on the Final Rule as promulgated by the DOL. Almost certainly, these issues will be appealed and subject to ongoing litigation. Employers may see similar litigation in other jurisdictions, and courts could reach similar conclusions regarding the validity of the Final Rule in those cases. It is also possible that the DOL will amend the Final Rule to comply with the decision to avoid the burden of continued litigation on multiple fronts.

With schools starting, employees will be eligible for paid leave under the FFCRA if their children's school uses remote learning in the fall. For purposes of the FFCRA, remote education constitutes a school closure. Employers may face significant labor shortages as well as labor insecurity if employees are permitted to take leave on a day to day basis.

Pending further developments, because the risks associated with failure to provide adequate leave benefits under the FFCRA are high, employers nationwide are encouraged to consider policies and practices consistent with the Final Rule.

¹ Case 1:20-cv-03020-JPO (S.D.N.Y)