Significant Paid Sick Leave Law Changes

DOL Revises FFCRA Regulations Impacting Health Care Providers

On August 3, 2020 the U.S. District Court for the Southern District of New York struck down four provisions of the Department of Labor's ("DOL") regulations interpreting employee leave eligibility and entitlement under the Families First Coronavirus Response Act ("FFCRA") – the federal law that applies to employers with *fewer than 500 employees*. On September 11, 2020, the DOL issued new regulations (the "revised Final Rule") in hopes of clarifying employers' responsibilities under the FFCRA's paid leave provisions in light of the District Court's decision. The revised Final Rule does the following: (i) revises the definition of "healthcare provider"; (ii) reaffirms employer consent for taking FFCRA leave intermittently; (iii) clarifies that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable; (iv) reaffirms the "work-availability" requirement; (v) corrects an inconsistency regarding when employees may be required to provide notice of a need to take leave. Key provisions are summarized below.

1. The DOL Narrows the Definition of "Health Care Provider"

The FFCRA enables employers to exclude, *at their option*, "health care providers" from paid leave benefits. The District Court struck down the DOL Final Rule's broad definition of "health care providers." In the revised Final Rule, the DOL has narrowed the definition of "health care provider" to include:

- Employees who meet the definition of "health care provider" under 29 CFR 825.102 and 825.125 of FMLA, which generally includes nurse practitioners, nurse-midwives, clinical social workers, physician assistants, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and certain Christian Science Practitioners; and

- Employees 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 and that, if not provided, would adversely impact patient care.

Consistent with the District Court's opinion, the revised Final Rule's definition of a "health care provider" now focuses on the role and duties of the employee, as opposed to whether the employer identifies as a health care provider. The revised Final Rule sets forth a non-exhaustive list of the types of employees who may continue to be excluded from taking FFCRA leave, which includes: (1) nurses, nurse assistants, medical technicians and any other persons who directly provides diagnostic, preventive, treatment or other integrated services; (2) employees providing such services "under the supervision, order, or direction of, or providing direct assistance to" a health care provider; and (3) employees who are "otherwise integrated into and necessary to the provision of health care services," such as laboratory technicians who process test results necessary to diagnoses and treatment.

The revised Final Rule specifically *excludes* employees who do not actually provide health care services, "even if their services could affect the provision of health care services, such as IT

professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

The DOL reminds employers that the "health care provider" exemption is not work-place dependent. The revised Final Rule provides a non-exhaustive list of facilities where health care providers may work, including temporary heath care facilities that have been established in light of the COVID-19 pandemic. This list includes "a doctor's office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided." The DOL noted that a covered employee need not work at one of these enumerated facility to be considered a health care provider under the FFCRA, and working at one of these facilities does not automatically mean an employee is a health care provider. Rather, the analysis is fact-specific.

2. The DOL Reaffirms the Employer Consent Requirement for Intermittent Leave

The District Court invalidated the portion of the DOL regulations regarding the requirement that employees obtain employer consent before taking intermittent leave, reasoning that the DOL failed to explain why a "blanket requirement" of employer consent is needed. The revised Final Rule reaffirmed its initial interpretation, and provided further explanation for why employer approval is needed prior to taking intermittent leave in all situations in which FFCRA leave is permitted.

In its revised Final Rule, the DOL reasoned that its original interpretation is "consistent with longstanding FMLA principles governing intermittent leave." The DOL noted, "[d]epending on the reason for taking FMLA leave, the [FMLA] statute requires a medical need to take intermittent leave or an agreement between the employer and employee before an employee may take intermittent leave." The DOL explained that conditioning intermittent leave on employer-approval is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate risk of COVID-19 contagion. The DOL explained that it is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid "unduly disrupting the employer's operations."

Further, the revised Final Rule's employer-consent requirement for intermittent leave is akin to the FMLA's employer-consent requirement for caring for a newborn or adopted child, which, as the DOL observed, is similar to caring for a child whose school or place of care is closed because of COVID-19. Additionally, the revised Final Rule's employer-consent requirement for intermittent leave is consistent with its definition of "telework" as it also requires employer consent.

Of particular importance, as schools have started to reopen, the revised Final Rule stated that "[t]he employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid attendance)" because such leave would not be considered "intermittent leave." For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure

until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). This same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day. The DOL distinguished these examples from a scenario where a child's school is closed for some period and the employee wishes to take leave intermittently. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.

3. Employees Must Provide Documentation Supporting Leave and Notice of Leave "As Soon As Practicable"

The District Court struck down the provision of the DOL Final Rule that required employees to provide advance documentation *prior to* taking leave, reasoning that it was inconsistent with the FFCRA. In the revised Final Rule, the DOL eliminated the advance documentation mandate, and instead, requires employees to provide documentation "as soon as practicable."

The revised Final Rule also clarified when employees must provide notice before taking FFCRA-leave, which is different under the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"). Under the EPSLA, notice cannot be required in advance, it can only be required after the first workday (or portion thereof) for which an employee takes leave. After the first workday, it is reasonable to require the employee to provide notice as soon as practicable. On the other hand, under the EFMLA, notice is required as soon as practicable. Specifically, if the need for EFMLA leave is foreseeable, an employee should provide notice before taking leave. For example, if an employee learns on Monday morning before work that his or her child's school or day care will be closed on Tuesday due to COVID-19 related reasons, the employee must notify his or her employer as soon as practicable. If the need for EFMLA was not foreseeable—for instance, if that employee learns of the school's closure on Tuesday after reporting for work—the employee may begin to take leave without giving prior notice, but must still give notice as soon as practicable.

4. The DOL Reaffirmed the "Work-Availability" Requirement, Meaning Employees are Not Eligible for FFCRA Leave Unless the Employer Would Otherwise Have Work for the Employee to Perform

The District Court vacated the DOL's mandate that conditioned FFCRA leave eligibility (at least for three of the six qualifying reasons) on the employer having work available at the time the employee sought leave. The Court concluded that the work-availability requirement was invalid for two reasons: (1) the DOL's differential treatment of the six qualifying conditions was unreasoned; and (2) the DOL's "barebones explanation" for the work-availability requirement was "patently deficient" in that the agency failed to explain why an employee is only eligible for leave if there is work available for him or her to perform.

After considering the Court's rationale, the DOL's original position remains largely unchanged. The revised Final Rule reaffirmed that "paid sick leave and expanded family and medical leave may only be taken if the employee has work from which to take leave." In the revised Final Rule, the DOL clarified that the "work-availability" requirement applies to all qualifying reasons for

leave (not just some), and explicitly included the "work-availability" requirement in all qualifying reasons for leave under the FFCRA.

In response to the Court's critique of the DOL's "barebones explanation" for the work-availability requirement, the DOL provided a more detailed reasoning for its rationale. Specifically, the DOL explained that the language of the FFCRA provides for leave where the employee is unable to work (or telework) due to a need for leave "because" of or "due to" a qualifying reason for leave. The DOL found that the traditional meaning of "because" and "due to" establish a "but-for" standard – meaning that the qualifying reason must be the only reason that the employee was unable to work. In other words, an employee is entitled to FFCRA leave only if the qualifying reason is a "but-for" cause of the employee's inability to work. The DOL further explained:

> if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave—perhaps the employer closed the worksite (temporarily or permanently)—that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave.

Additionally, the revised Final Rule noted that the use of the term "leave" in the FFCRA-context is best understood to require that an employee is absent from work at a time when he or she would otherwise have been working. If an employee is not expected or required to work, he or she is not taking leave. The revised Final Rule cautioned that removing the work-availability requirement would lead to "perverse" results. For example, some furloughed employees (who do not have an FFCRA-qualifying reason) would not receive paid leave, while other furloughed employees (who also happen to have an FFCRA-qualifying reason) would receive paid leave. The DOL does not believe Congress intended such an illogical result.

The DOL warned employers that they cannot "avoid granting FFCRA leave by purporting to lack work for an employee." The DOL emphasized that the availability or unavailability of work must based on legitimate, non-discriminatory and non-retaliatory business reasons.

Updated FAQs

In addition to issuing the revised Final Rule, the DOL has also updated and added to its FAQs to reflect its new guidance concerning the application of the FFCRA.

Implications and Employer Takeaways

While guidance and revisions to the DOL's Final Rule were highly anticipated in light of the New York District Court's decision, many questions still remain unclear. For example, it remains to be seen whether the revised Final Rule applies retroactively, which would mean that employers would have to grant FFCRA leave to employees who were not eligible under the DOL's original regulations, but are now eligible under the revised Final Rule. Additionally, it is unclear whether the DOL will face additional challenges by the State of New York or possibly other jurisdictions.

While neither the District Court's order nor the revised Final Rule explicitly addressed whether the Court's decision applied nationwide, the DOL clarified that it viewed the decision as applying on a nationwide basis. Specifically, in FAQ#102, the DOL stated that they "consider[] the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case."

In light of the nationwide applicability, employers in all states, including California, should make adjustments to their FFCRA procedures in accordance with the revised Final Rule. Employers should be cognizant of state and/or local laws that have been enacted in light of the COVID-19 pandemic, specifically those that have interpreted or adopted portions of the DOL's Final Rule. Importantly, the revised Final Rule has immediate impact on health care employers, particularly those that have exempted all or some of their employees from FFCRA leave as a result of the DOL's initial broad definition concerning health care providers. As explained above, it is unclear whether employers must retroactively grant paid leave benefits to employees who have now qualified under the revised Final Rule. Good faith reliance on the former DOL Final Rule may provide a defense to any claim for retroactive benefits. Employers should continue to monitor DOL announcements regarding further updates to the revised Final Rule and the FAQs on the FFCRA. Employers with questions about the impact of these revised regulations should consult with experienced employment counsel.

California Expands COVID-19 Supplemental Paid Leave Requirements Impacting Employers With 500 Or More Employees Nationwide and Other Employers of Certain Health Care Employees Who Opted Not to Provide Leave Under the FFCRA

On September 9, 2020, Governor Newsom signed AB 1867 into law, creating two new Labor Code sections: 248 (food service workers) and 248.1(covered workers), and also amending Labor Code § 248.5 (enforcement procedures). Governor Newsom's office touted this bill as "eliminat[ing] coverage gaps to ensure every employee has access to paid sick days if they are exposed or test positive to COVID-19 for 2020" and delivering on his "commitment to work with the Legislature to expand paid sick days." The bill was intended to close the gaps between federally mandated paid COVID-19 related sick days under the FFCRA and the Governor's previous Executive Order (EO N-51-20) that only provided paid sick leave for food sector workers. As a budget trailer bill, the provisions are effective immediately, and require (1) private businesses with 500 or more employees nationwide, and (2) employers of certain health care providers and emergency responses who opted not to provide leave under the FFCRA – to provide COVID-19 supplemental paid sick leave (CSPSL) no later than September 19, 2020.

Supplemental Paid Sick Leave - Covered Employers & Employees

Labor Code § 248.1 applies to private "hiring entities" with 500 or more employees in the United States, Washington, D.C., or any U.S. territory, but only covers individuals who leave their home or place of residence to perform work for a hiring entity. Moreover, under Labor Code § 248.1, all covered workers are considered employees, and any hiring entity is considered an employer. Labor Code § 248.1 excludes 248 employees, i.e., food sector workers, ensuring that food sector workers

do not receive double coverage under these new laws. Notably, unlike a number of other paid sick leave laws, Labor Code § 248.1 does not contain an exception for unionized workforces.

Additionally, the law applies to *any entity* – including a public entity – *that is subject to the FFCRA and that elected to exclude health care provider or emergency responder employees from the FFCRA's emergency paid sick leave requirements*, and thereby extending Labor Code § 248.1 to such excluded employees. Given this extension, these employers may wish to revisit the decision to exclude their health care provider and emergency responder employees from FFCRA coverage. In particular, the FFCRA provides an employment tax credit for the pay provided as Emergency Paid Sick Leave while Labor Code § 248.1 does not offer such tax relief. As such, these employers might prefer to change their prior FFCRA exclusion election to allow those previously excluded employees to use the paid time off benefit provided under FFCRA and to exempt themselves of compliance obligations under Labor Code § 248.1.

Amount of Supplemental Paid Sick Leave:

Under Labor Code § 248.1, full-time employees may receive 80 hours of CSPSL if considered "full time" or the employee worked/was scheduled to work, on average, at least 40 hours/week in the 2 weeks preceding the leave. Part-time employees with a normal weekly schedule receive CSPSL equal to the total number of hours they are normally scheduled to work over 2 weeks. However, if their hours vary, they receive 14 times the average number of hours they worked each day in the 6 months preceding the leave. Employees are paid at the regular rate of pay for their last pay period, or the state or local minimum wage, whichever rate is highest.

Offsetting CSPSL with LSPSL

The CSPSL only covers employees who are:

(1) subject to a federal, state, or local quarantine or isolation order related to COVID-19;
(2) advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; and/or
(3) prohibited from working by the Company due to health concerns related to the potential transmission of COVID-19.

In other words, the CSPSL only covers COVID-19 related concerns about the employee's health and does not cover an employee who must care for another for COVID-19 related reasons. This limitation is significant because the local supplemental paid sick leave ("LSPSL") ordinances enacted throughout California also cover employees who must care for a child whose school or childcare provider is closed. There are a number of other key differences between the CSPSL and LSPSL ordinances.

The differences above between the CSPSL and LSPSL coverage are problematic because AB 1867 specifically states an employer may only offset LSPSL paid to an employee as CSPSL if the LSPSL covers the three reasons identified above, which only apply to the employee's health. As such, an employee who already received LSPSL for caring for a family member could conceivably receive CSPSL as well.

Offsetting is also difficult because the amount of LSPSL paid must be equal to or greater the amount of leave paid through CSPSL. Thus, an employee who already received LSPSL may recoup the difference between the amount paid for CSPSL and LSPSL if the LSPSL amount was less. For employers with employees located throughout California, the offset process is made even more difficult due to variations in how different LSPSL is calculated.

In light of the above, employers should consult the requirements for any LSPSL available to their employees for any employee who has used LSPSL previously or wishes to use LSPSL for caring for a family member. Doing so will allow the employer to ensure the proper amount of CSPSL and corresponding payment provided to employees are correct.

Posting Requirement

AB 1867 states that "[b]y seven days after the law's effective date, the California Labor Commissioner must make available a model notice to provide to workers. If workers do not frequent a workplace, a business can disseminate notice electronically, e.g., by email." The model notice is not available yet. However, once it is available, employers should post it in the workplace and circulate it to employees by email.

Wage Statement Requirement

Like California's paid sick leave, employers must also provide employees with written notice concerning the amount of CSPSL available on either an itemized wage statement or in a separate writing provided on designated pay dates. Additionally, like the recordkeeping requirement for paid sick leave, employers must also retain records documenting hours worked, CSPSL provided, and CSPSL used by an employee.

Practical Considerations

AB 1867 serves as a reminder to revisit your policies and practices to ensure they still comply with the law. Additionally, for businesses that previously questioned whether there was an applicable exception concerning coverage, consult counsel about whether one might in fact exist. For other companies that will be newly subject to these requirements, there is little time to get policies, practices, payroll programs, and paystubs into compliance. Entities that were not covered previously, but were contending with one or more of the 10 similar local ordinances in California, will want to determine whether and how their pre-AB 1867 policies and practices hold up, and whether they might need to provide supplemental paid sick leave to workers under the new state law.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation,

potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.