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Question of the Day: Health Care Provider Definition of the FFCRA

Legal Update
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By Kendra D. Simmons, Bridget R. Penick and Teresa M. Thompson

Question

I understand the health care provider definition of the FFCRA has been challenged. What do I need to know about this?

Answer

A recent Order by the U.S. District Court for the Southern District of New York (the "Order") has added to stress and uncertainty already facing employers who had been relying on the health care exemption to the Families First Coronavirus Response Act (FFCRA). The Order struck down parts of the Final Rule implementing the FFCRA, holding that the Department of Labor (DOL) exceeded its authority regarding certain parts of the Final Rule. What should be done in response depends on the applicability of the Order outside of the Southern District of New York and how broadly health care employers have interpreted and applied the health care exemption to date.

Does the Order have nationwide impact?

The Order does not have clear nationwide impact; however, it may indicate where the rules will go from here. In challenging the Final Rule, the state of New York did not pursue the option of a nationwide injunction available under the federal Administrative Procedure Act, and the Order does not clearly apply outside of New York or retroactively (i.e., to prior FFCRA leave requests that may have been denied based on a broad interpretation and application of the exemption).

This leaves employers to fly blind until the DOL takes action by potentially seeking an appeal and stay of the Order, issuing a new rule that narrows the definition of a health care provider that can be exempted from the FFCRA, accepting the Order and applying it more broadly, and/or announcing how it will view requests denied under the initial broader health care provider exemption.

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What was the Court's concern about the definition of health care provider?

The Final Rule's definition of health care providers that may be excluded from eligibility for FFCRA leave was admittedly broad and could be read to cover any employee of an entity providing health care services, though the DOL "encourage[d] employers to be judicious" in the evaluation and use of this exemption. The Order took issue with the fact that this broad definition of a "health care provider" focused on the nature of the employer rather than the employee and, carried to its extreme, could be used to exclude—as one example—an English professor at a university with a medical school, who is otherwise attenuated from the provision of health care services, from eligibility for FFCRA leave.

The Order, however, acknowledged the differences in purpose behind the FMLA's existing definition of "health care provider" and behind the FFCRA and its Final Rule, leaving open the possibility of a health care provider exemption that is broader than solely applying to doctors and others the DOL has found to be capable of providing health care services, but narrower than the current scope of the exemption the Order found to be overly broad.

What has the DOL done in response?

At the time of this article, the DOL has not yet made clear what action it will take; it has also not updated its FAQs regarding the FFCRA to either mention the Order or its effect on the health care provider exemption. The fact that the FFCRA only remains effective until the end of 2020 may affect the DOL's response, since some of its options could consume a significant portion of the approximately four-and-a-half months that the FFCRA remains effective, though this analysis could change if Congress either extends the FFCRA or passes a new relief package.

What should health care employers do?

Until the DOL acts, health care employers, outside of New York state, can consider whether to take different action regarding their treatment of FFCRA leave requests, or they can take no action and wait for the DOL to issue additional guidance.

If inclined to re-evaluate, health care employers may consider redefining which employees they treat as exempt under the FFCRA even though there is no authority, in the Order or otherwise, restricting the health care provider exemption retroactively. Employers in the health care field who have been judicious and evaluated FFCRA leave requests on a case-by-case basis should continue to do so; those who have applied the exemption more broadly to employees who do not directly provide health care services could consider assessing FFCRA leave requests on a more individual basis.

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When evaluating FFCRA leave requests, employers can consider the "skills, role, duties, or capabilities" of the individual employee, or class of employees, in light of the FFCRA's goal to sustain employers necessary to fight the COVID-19 pandemic. Many health care employees would still be exempted under this approach, but it may provide FFCRA benefits to those who are not directly involved in the provision of health care or necessary to sustain the health care services. And, of course, the health care employer would be entitled to seek the tax credit for providing the paid leave.

As with any guidance related to COVID-19, things may change on a dime. While there is no reason for health care employers to panic, they should check up on their use of the FFCRA's health care exemption going forward to be prepared for whatever action the DOL may take.

If you have questions regarding these obligations or others related to COVID-19, contact your Fredrikson & Byron Employment & Labor attorney.

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