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Question of the Day: Health Care Providers Exempted from FFCRA Leave

Legal Update
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Question

What do health care employers need to know about the revised definition of health care providers who can be exempted from FFCRA leave?

Answer

After more than a month of uncertainty following an August 3 Order by the U.S. District Court for the Southern District of New York (the "Order") striking down parts of the Final Rule implementing the Families First Coronavirus Response Act (FFCRA), the U.S. Department of Labor (DOL) has responded. (We had attempted to predict which route the DOL may take in our August 14 Question of the Day.) Rather than appealing the Order, in light of the current December 31 expiration of the FFCRA, the DOL issued a new temporary rule (New Rule), which takes effect on September 16, upon publication in the Federal Register.

The DOL held firm on certain parts of the Final Rule that the Order had struck down, providing additional explanation to support those positions, while revising other parts. One of those revisions addresses the definition of health care providers who can be exempted from FFCRA leave. As a reminder, the FFCRA requires employers with fewer than 500 employees to provide paid leave for employees who need time off for certain COVID-19 reasons. However, covered employers may exempt from FFCRA leave employees who qualify as a "health care provider."

How did we get here? In the initial Final Rule, the DOL defined – with surprising breadth – health care providers who could be exempted by their employers from FFCRA leave. This broad exemption was challenged by the state of New York and ultimately struck down by the court's Order. The Order left room, however, for the DOL to redefine "health care providers" who may be exempted more broadly than the existing FMLA definition but more narrowly than the original Final Rule. Employers outside of New York were left in limbo as they awaited the DOL's response to the Order, wondering whether the scope of health care providers potentially exempt from the FFCRA would change nationwide.

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How does the New Rule change the definition of a "health care provider" whom an employer may exempt from eligibility for FFCRA leave? The New Rule acknowledges the difference in definition and purpose of a health care provider who can certify a qualifying need for FFCRA paid sick leave and health care providers who may be excluded by employers from taking FFCRA leave themselves due to their crucial role in fighting the COVID-19 pandemic. The DOL starts by confirming that the first group of health care providers who may be excluded are those who qualify under the traditional FMLA definition of health care provider — a doctor, nurse practitioner or other provider qualified to issue an FMLA certification.

It then expands the list of health care providers who may be precluded from taking leave to include providers of diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. The DOL also further defines each of these types of services and provides examples of such health care providers (including nurses, nurse assistants and medical technicians), as well as non-examples (including IT, maintenance workers, HR personnel, food service staff and billers) while making clear that neither set was exclusive. In expanding this definition of potentially exempt health care providers, the DOL seems to acknowledge the Order's emphasis on the nature of the employee, instead of the employer, for purposes of this exemption.

In essence, the DOL revised the definition of "health care provider" to reflect the judicious approach it has been encouraging employers to take all along. This philosophy is reflected in the DOL's updated FAQ 56. So, employers who have taken a case-by-case approach in exempting health care provider employees should continue to do so. Employers who have taken a broader approach, while potentially having the defense of good-faith reliance on the original definition, should re-evaluate their approach going forward.

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

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