Court Decision Expands Families First Coronavirus Response Act Coverage

By: Dawn M. Knepper, Tonie Bitseff, and Alexandra Shulman

A recent New York federal court decision has called into question whether businesses may safely rely on Department of Labor guidance regarding the recently passed Families First Coronavirus Response Act (FFCRA). The FFCRA provides employees of businesses with fewer than 500 employees with two temporary forms of paid leave—Emergency Paid Sick Leave and Emergency Family and Medical Leave. Emergency Paid Sick Leave provides up to two weeks of leave to employees experiencing specified COVID-19 related medical conditions or caring for someone experiencing such a condition and to employees entitled to Emergency Family Medical Leave. Emergency Family Medical Leave provides up to twelve weeks of leave to employees caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19. Buchalter's prior coverage regarding the FFCRA is available here.

In conjunction with the enactment of the FFCRA, the Department of Labor promulgated a final administrative rule implementing the statute's provisions (the Final Rule). The Final Rule included provisions that placed limits on which employees could use FFCRA leave. These provisions include a "work-availability" requirement under which employees are not entitled to take leave if their employers do not have work for them, an exemption for health care providers, restrictions on use of intermittent leave, and a requirement that employees provide certain documentation prior to taking leave. Buchalter's coverage regarding the Final Rule is available here.

The State of New York Challenges Certain Aspects of the Final Rule

On April 14, 2020, the State of New York filed a lawsuit against the Department of Labor in federal court alleging that the agency exceeded its rulemaking authority with respect to: (1) the "work-availability" requirement; (2) the Final Rule's definition of "health care provider"; (3) the prohibition on intermittent leave; and (4) the documentation requirements. In particular, the State of New York claimed that each of these four provisions either limited paid leave or burdened its exercise, forcing employees to choose between taking unpaid leave and going to work even when sick, therefore contravening the purpose of the FFCRA. *See New York v. U.S. Department of Labor*, No. 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020).

In its decision, the court substantially adopted the State of New York's position and vacated significant portions of the Final Rule. The court's decision notably expands the number of workers who are

eligible for FFCRA leave and may change several of the conditions surrounding such leave. Although the decision clearly applies to employers in the Southern District of New York, businesses nationwide should take note of the decision as the case has persuasive authority in other jurisdictions and could influence the Department of Labor's interpretation on a go forward basis.

Work Availability as a Requirement

The Final Rule included a provision that permitted employers to deny claims for FFCRA leave when they "do … not have work" for them. The court struck down the Final Rule's "work-availability" requirement, ruling that the Department of Labor did not provide sufficient justification for it. The court went on to hold that the "work-availability requirement" is contrary to the FFCRA's purpose because it "may considerably narrow the statute's potential scope" given the large number of businesses that have experienced temporary shutdowns and slowdowns of business nationwide. For example, if an hourly employee's hours were completely reduced because of a COVID-19-related business slowdown, the employee may be entitled to leave, even if the employee is not scheduled to work.

Unfortunately, a significant question for employers has been whether they have to provide FFCRA leave to employees who are furloughed. The ruling did not address this issue. This lack of clarity may create substantial challenges in determining whether employers are covered by the FFCRA and whether to undertake reductions-in-force in lieu of furloughs to avoid FFCRA's costs and administrative burdens.

Health Care Provider Exemption

The second provision that came under attack relates to the health care provider exemption. As described above, prior to this ruling, employers in the healthcare industry have been operating under the assumption that all of their employees, regardless of their position, are automatically exempted from Emergency Paid Sick Leave or Emergency Family Medical Leave under the FFCRA, based on the Department of Labor's Final Rule. The court's ruling vacates the existing definition of "health care provider" and leaves employers in the healthcare industry with little guidance on how to determine whether an employee can be excluded from these forms of paid leave or not.

Specifically, the court found that the Department of Labor exceeded its authority by defining "health care provider" in such an expansive manner. For example, under the Department of Labor's definition, an English professor, librarian, or cafeteria manager at a university with a medical school would all be considered "health care providers." While the court recognized the Department of Labor's intent to exempt employees who are essential to maintaining a functioning healthcare system during the

pandemic, it found that the definition was overbroad in that it includes employees whose roles bear no nexus whatsoever to the provision of healthcare services.

For the time being, the definition of "health care provider" for purposes of the exemption remains ambiguous. Employers in the healthcare industry should continue to monitor whether the Department of Labor redefines the term or appeals the decision. In the meantime, employers should consult with their legal counsel prior to utilizing the health care provider exemption for non-clinical employees.

Intermittent Leave

The third provision in the Final Rule that came under attack relates to a covered employer's obligation to provide intermittent leave under the FFCRA. Under the Final Rule, employees are only permitted to take intermittent FFCRA leave upon agreement between the employer and employee. While the court agreed with the Department of Labor that it is proper to constrain the exercise of intermittent leave to circumstances where there is minimal risk that the employee will spread COVID-19 to other employees, the court held that it is unreasonable to require an employer's consent for intermittent leave.

In practice, the court's holding as to intermittent leave means that an employer must allow intermittent leave unless the employee's specific circumstances appear to create a higher risk of viral infection. Employers trying to avoid any exposure related to intermittent leave should reasonably work with employees to agree to intermittent schedules. Generally, this will afford better business continuity, so most employers have a natural incentive to permit intermittent schedules.

Employee Notice of the Need for Leave

The final provision that came under attack relates to the requirement for an employee to provide notice to his or her employer regarding the need to take leave. The FFCRA clearly states that notice may not be required in advance and the Final Rule includes a notice rule consistent with that, but the Final Rule also requires the employee to provide documentation prior to taking leave, including the dates for which leave is requested and the reason for the leave. The court held that these two provisions are in unambiguous conflict and struck down the documentation requirements to the extent that they are a precondition to leave. Employers trying to avoid any exposure related to the documentation requirement will want to ensure that they do not require documentation before the first workday is missed.

Conclusion

It is likely that the Department of Labor will appeal this decision to the Second Circuit and seek an emergency stay pending review. While the ruling works its way through the appellate process,

businesses should reevaluate their policies pertaining to FFCRA leave and be on the lookout for more guidance from the Department of Labor and rulings in other jurisdictions.

The novel coronavirus presents novel challenges and as such, employers are well advised to engage experienced employment counsel to help navigate these complex and delicate considerations and the myriad laws implicated. Buchalter Attorneys have decades of experience providing counsel to employers on complex workplace issues and applicable laws and are uniquely equipped to help clients adapt and navigate these specific challenges. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

Dawn Knepper
Shareholder
(949) 224-6258
dknepper@buchalter.com

Tonie Bitseff
Special Counsel
(206) 319-7042
tbitseff@buchalter.com

Alexandra Shulman
Of Counsel
(503) 226-8625
ashulman@buchalter.com