Here We Go Again: FFCRA Rules Change Again…Maybe

By: Gus Lazares on August 5, 2020 on graydon.law

Just when employers thought they understood the FFCRA, a New York federal judge has thrown a curveball by **striking down** certain Department of Labor (DOL) regulations interpreting the Families First Coronavirus Response Act (FFCRA). If the decision stands, it will have wide-ranging effects for employers and employees nationwide. Let's go through the regulations that have been affected:

The "work availability" requirement: Under the FFCRA, covered employees are entitled to paid leave if they are unable to work for a variety of COVID-related reasons. The DOL interpreted the FFCRA to say that an employee was not entitled to paid leave if the employee's employer did not have work available for the employee. The DOL argued that if an employer did not have work available, then an employee's lack of work was not due to COVID-19. The court found this argument "patently deficient" and struck down the "work availability" requirement. This will be important for companies with furloughed workers.

The definition of "health care provider": The FFCRA has exceptions for "health care providers" such that "health care providers" are not entitled to the same paid-leave benefits—the rationale being that we need these individuals at work during the pandemic. The court, however, found that the DOL's definition of "health care provider" was "vastly overbroad," such that "an English professor, librarian, or cafeteria manager at a university with a medical school" could be included. The court therefore struck down the DOL's definition of "health care provider." If you have relied upon the "health care provider" exemption, please reach out to your employment attorney to discuss whether the exemption still applies (it still applies in many cases).

The employer-consent requirement for intermittent leave: The FFCRA allows employees to take paid leave intermittently, but only with employer consent. The court found that the DOL's added requirement of employer consent was not in the text of the FFCRA and was "entirely unreasoned." Thus, the court struck down that provision. This is a big blow to employers. If you have denied intermittent leave to employees, please reach out to your employment attorney.

The prior notice requirement: The text of the FFCRA includes notice requirements for

paid leave that depend on whether the leave was foreseeable and reasonable. The DOL seemingly supplanted that language with a blanket regulation requiring prior notice and documentation before an employee takes leave under the FFCRA. The court struck down this regulation to the extent that it "impose[d] a different and more stringent precondition to leave" than the text of the FFCRA. Of all of the changes, this is likely the least impactful.

These changes are significant. At this point the status of the regulations is unclear … which is not helpful to employers! For now it may be best to take a conservative approach. Likely, the decision will be appealed, which will put things back to "normal" (whatever that is) pending the appeal. This means that the rules may change again once an appellate court reviews the ruling. Stay tuned to the **Graydon COVID-19 Task Force** for updates on this ruling and on all things COVID-19.