Department of Labor Narrows Health Care Provider Exemption to FFCRA Paid Leave Entitlement

Late yesterday, the Department of Labor (DOL) published regulatory guidance relating to employee paid leave entitlements under the Families First Coronavirus Response Act (FFCRA). The guidance predominantly further responds to a legal challenge to the regulations by providing greater explanations for certain regulatory provisions, while leaving the underlying requirements unchanged. But the new regulations are significant insofar as they significantly narrow the definition of who is a "health care provider" that may be excluded from the FFCRA's paid leave entitlement.

We previously discussed that very expansive definition of "health care providers" who could be excluded from the paid leave entitlements, which could be read essentially to include anyone employed by a health care practice. That definition was challenged by the State of New York, and a federal court eventually concluded that it was overbroad.

In response to the court's order, the DOL has now significantly narrowed the definition to only include individuals "capable of providing health care services." The DOL explained that, in addition to physicians and others who make medical diagnoses (as set forth in existing FMLA regulations), this new definition includes only those employees "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, if not provided, would adversely impact patient care."

Fortunately for health care employers, the DOL provided examples of individuals who would fit this definition (and who therefore may be excluded from taking paid leave):

- Nurses, nurse assistants, medical technicians, and any other persons who directly provide diagnostic, preventive, treatment, or other integrated services
- Employees providing diagnostic, preventive, treatment, or other integrated services under the supervision of a physician or other individual who legally may render medical diagnoses
- Employees who are "integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment"

According to the DOL, the typical work location of these types of employees could include 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. But the DOL was quick to caution that an employee doesn't need to be employed at one of these facilities to be considered a "health care provider."

The DOL also provided clarifications as to the types of services that would meet the definition:

- **Diagnostic services**: taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results
- **Preventive services**: screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems

- **Treatment services**: performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments
- **Integrated and necessary services**: bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples

In light of the earlier expansive definition, the DOL provided an instructive, non-exhaustive list of employees whose services affect the provision of health care services, but who are not "health care providers" under the revised definition:

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

Although not specifically delineated in the revised regulations, these exclusions strongly suggest that other support or clerical staff likewise would not meet the revised definition, and thus must be provided paid leave (if requested, and subject to other eligibility requirements).

This new regulatory definition becomes effective on September 16, 2020, and will apply from that date forward. Health care employers therefore should reevaluate any paid leave exclusions to determine whether the new definition would compel a different conclusion on a going-forward basis. In addition, since DOL responded to the court's ruling by reaffirming the other regulatory provisions that had been challenged (including conditioning leave on work being available, permitting intermittent leave if approved by the employer, and requiring notice of leave as soon as practicable), there may be additional challenges to these regulations—either by New York or elsewhere. But, for now, these regulations remain in effect and applicable to employers subject to the FFCRA.

Our Chambliss team continues to monitor legal developments in connection with the COVID-19 pandemic. Please contact Jim Catanzaro, Justin Furrow, or your relationship attorney if you have questions or need additional information.

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