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Health Care Provider and Emergency Responder Exceptions to the Families First Coronavirus Response Act

On April 1, 2020, the United States Department of Labor ("DOL") issued regulations that allow many businesses whose work contributes to the battle of the COVID-19 pandemic, to preclude certain of their employees from taking leave under the recently enacted Families First Coronavirus Response Act ("FFCRA"). Because the regulations permit a wide swathe of employers to avoid disruptions to their operations due to FFCRA leaves, any employer whose products or services arguably fit within the infrastructure of the COVID-19 battle, should carefully review their provisions.

Overview of the FFCRA

As detailed in our earlier bulletins (that may be viewed here and here), on March 18, 2020, President Trump signed the FFCRA into law, mandating paid leave benefits to many employees affected by the pandemic. Specifically, most employers with fewer than 500 employees must provide their employees with: (1) up to 80 hours of emergency paid sick leave when they are unable to work due to certain COVID-19-related reasons; and (2) up to 12 weeks of leave (10 weeks of which is partially paid) under the federal Family and Medical Leave Act ("FMLA") when employees must stay home to care for children whose normal schooling or day care is closed because of the current public health emergency.

DOL Exemptions For Healthcare Providers and Emergency Responders

To minimize depleting the workforce of employees who are essential to the battle against COVID-19 – healthcare providers and emergency responders – Congress authorized the DOL to issue regulations that would allow employers to exempt those workers from taking FFCRA leave. On April 1, 2020, DOL issued such regulations. As detailed below, these regulations may help certain employers maintain their workforces by invoking the regulations' expansive definitions of "health care providers" and "emergency responders" to preclude such employees from taking FFCRA leave.[1]

The regulations define "health care provider" to include many categories of workers in addition to the medical professionals normally considered to fit within that term. The provision's accompanying commentary explains that the expanded definitions of "health care provider" are intended to include "any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency." Regulation Comments, § III.C. Altogether, there are four definitions of "health care provider":

> [A]nyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, 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 institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
>
> [A]ny individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility
>
> [A]nyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments
>
> [A]ny individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

29 C.F.R. § 826(c)(1)(i) and (c)(1)(ii).

Similarly, the regulations provide three, broad definitions of "emergency responder" with the prefatory explanation that such persons are deemed "necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19." 29 C.F.R. § 826(c)(2)(i). The three definitions are:

> [M]ilitary or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency,
>
> [I]ndividuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
>
> [A]ny individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19.

29 C.F.R. § 826(c)(2)(i).

Read together, it is clear that the intent of the regulations is to preserve the "front line" workforce that directly battles COVID-19, as well as the infrastructure that supports that workforce. Thus, employers may exclude any employee who fits within any of the above-quoted definitions from taking emergency or family leave provided in the FFCRA.

For example, contractors that provide cleaning services and linen to hospitals may arguably exclude those employees who provide such services from taking FFCRA leave. Those employees fit the "healthcare provider" definition of "individual[s] employed by an entity that contracts with any [health care treatment institution] to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility."

Similarly, an ambulance service may arguably exclude certain administrative staff, such as its payroll department employees, from taking FFCRA leave because they fit the "emergency responder" definition of "individuals who work for [a company employing emergency medical technicians] and whose work is necessary to maintain

the operation of the facility."

Limitations on "Healthcare Provider" and "Emergency Responder" Exemptions

Despite their breadth, the regulatory FFCRA exemptions for "healthcare providers" and "emergency responders" have several, significant limitations that employers who are contemplating their use, must consider.

First, the commentary to the regulations urges employers to be "judicious" when applying the exemptions so as to minimize the spread of COVID-19. Regulation Comments, § III.C. While the commentary is left vague, it appears that employers are supposed to balance how essential a given employee is to the COVID-19 battle against the employee's personal factors, such as his/her increased risk for virus exposure if he/she continues to work.

Second, and perhaps more significant, is that the regulations do not reduce or eliminate any other leave right an employee has under other laws or under a company's policies. 29 C.F.R. § 826.160(a). Thus, before exercising their right to exempt employees under the "healthcare provider" or "emergency responder" exemptions, employers must thoroughly examine whether other laws or policies may give the employees leave anyway.

For example, New Jersey recently expanded its Family Leave Act to provide up to 12 weeks of unpaid leave in a 24 month period to employees who are unable to work because they need to care for someone with a COVID-19-related condition, or to care for a child whose school or daycare is closed because of the current health emergency. Because this law, unlike the FFCRA, does not provide an exemption for healthcare providers or emergency responders, employers will have to provide such employees with family leave.

Third, employers must remember that the FFCRA exemptions apply only to those employees whose products and services are involved in battling COVID-19. They do not render employees who are not involved in COVID-19 efforts, or the employers themselves, exempt from the FFCRA's requirements.

Finally, employers should remember that they may not use the regulations' broad definitions of "healthcare provider" and "emergency responder" for any reason other than for applying the FFCRA exemptions. 29 C.F.R. § 826(c)(1)(iii) and (2)(i).

Conclusion

In sum, to help ensure adequate staffing levels, employers can possibly exclude employees who make products or provide services related to battling the COVID-19 pandemic, from taking FFCRA leave. Employers considering this option should carefully determine whether such employees fit within one of the definitions of "healthcare provider" or "emergency responder" provided in the FFCRA's regulations. Further, employers must take into account other leave laws and possibly also, employees' personal circumstances, before excluding any employee from taking FFCRA leave. If you need assistance navigating these various issues, please contact one of our Labor and Employment Law attorneys.

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[1] This memo is based on our interpretation of very recently enacted legislation (the FFCRA) and its implementing regulations. The opinions expressed here, therefore, do not have the benefit of supporting legal precedent, such as judicial or administrative agency adjudications of these laws to specific, factual circumstances.

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