THE BEACON
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COURT RULING CHANGES COVID-19 PAID LEAVE RULES

A new Federal Court ruling from the Southern District of New York struck down four parts of the Families First Coronavirus Response Act's (FFCRA) interim final rules on paid leave. Noting that the federal Department of Labor (DOL) went beyond the law's bounds in these sections of the regulation, the court made these changes to the rule:

1. The Paid Sick Leave Work Availability Standard—The law creates six different ways an eligible employee can qualify for COVID-19 related paid leave. The FFCRA itself does not specify if qualifying for the paid leave requires that the employee would otherwise be able to go to work. However, the FFCRA regulations stated that the paid leave rules only applied if the employee in question would otherwise be able to work "but for" their qualifying event (e.g., being quarantined or home caring for a child whose school was closed). The court ruled that employees are eligible for FFCRA employer-paid sick leave and FMLA leave, whether their work was otherwise available or not. The result is that employees on "furlough" may be eligible to take paid FFCRA leave during their furloughed period.

2. The Definition of Healthcare Provider—When the DOL wrote the FFCRA rules, they included an expansive definition of "healthcare provider." Since employers may exclude healthcare providers from FFCRA leave benefits, the comprehensive description had far-reaching implications. The court struck down the existing definition, and essentially told the DOL to try again. Until the DOL redefines the term, an employer who wants to exclude a healthcare professional from the leave provisions is still limited to the definition of a healthcare provider in the FFCRA statute. That definition is "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery" or "any other person determined by the Secretary to be capable of providing health care services."

3. Intermittent Leave—Right now, the FFCRA and related rules allow employees to take paid leave intermittently, as long as the employer agrees, and doing so doesn't pose a public health risk. In other words, you may make arrangements with your employer to take paid leave intermittently to care for a child whose school is closed. You may not take paid leave to take a COVID test, go back to work while you await your results, and then take leave again if you later get a call that you are positive. The court ruling keeps the intermittent leave rules in place with one key exception. It strikes down the permission requirement, so now employers have to allow otherwise qualifying intermittent leave requests.

4. Documentation Requirements—The original rules included employee documentation requirements to substantiate the need for either type of FFCRA leave. The court keeps the substance of the documentation requirements in place. However, it clarifies that employers cannot make an employee provide their documentation before they start their leave. Instead, employees have to provide documentation as soon as practical.

What Does This Mean for Employers?

This ruling affects any business with fewer than 500 employees that is otherwise subject to the FFCRA. These companies should review their existing FFCRA paid leave policies to see if they need to change any standard operating procedures.

Two things make this particular court decision a bit tricky compliance-wise. One is that there was some confusion about the applicability of the ruling. Initially, some court-watchers thought it might only apply to employers in the Southern District of New York. However, most agree that in the absence of language to the contrary, the ruling applies to the whole country. The second is that, so far, the DOL has not issued an official response. We remain on the look-out for new FAQs that might help employers determine how best to respond. Another possibility is that the DOL will release new supplemental rules. They could also appeal the ruling and possibly ask for the District Court's decision not to be implemented during the appeals process. Until then, businesses will need to rely on the court's ruling in adjusting compliance practices.

MZQ Consulting will continue to monitor potential DOL action and update you as appropriate.