BRANN & ISAACSON
ATTORNEYS AND COUNSELORS AT LAW

CLIENT ALERT: Key Provisions of FFCRA Struck Down in New York Case
August 14, 2020

On Monday, August 3, a federal judge in New York issued a ruling in *State of New York v. U.S. Dept. of Labor*. The New York Attorney General filed this lawsuit in April challenging several important portions of the Department of Labor's ("DOL") FFCRA final rule (remember the 124 pages of rules issued on the day the law came into effect). The DOL has yet to issue a statement on the ruling or provide any updated guidance, but in the meantime, Maine employers should reevaluate their FFCRA policies and procedures. These are tricky issues and we can provide guidance on any questions. For more information, contact Peter Lowe at plowe@brannlaw.com or 207-754-5672, Dan Stockford at dstockford@brannlaw.com or 207-607-3290, or Hannah Wurgaft at hwurgaft@brannlaw.com or 207-713-0118. Pay most attention to this Alert if you are a health care provider, if you have had employees seeking leave while on furlough, or you have denied consent for intermittent FFCRA leave.

Scope of decision

Although it appears as though this ruling only immediately impacts employers in New York, it will likely impact the DOL's policies and procedures moving forward and it will spur similar lawsuits against employers in other states. There are four significant regulations that have been called into doubt, primarily on the basis that the U.S. DOL issued regulations that are in conflict with the FFCRA legislation passed by Congress.

1. **Work-availability provision**

The FFCRA regulations provide that only those employees whose employers have work for them to complete are eligible for leave benefits. The Court struck down this requirement, stating the Dept. of Labor's final work-availability rule was "entirely unreasoned" and "patently deficient." The Court did not explicitly address whether its reasoning applies to those individuals on furlough, but it seems very likely that an employee is not disqualified from emergency sick leave or expanded FMLA just because they are furloughed.

Our recommendation: This is a particularly tricky provision to implement moving forward. Employers who receive a request from a furloughed employee for FFCRA leave should consult with counsel.

2. **Definition of "health care provider"**

Regarding who may be excluded from FFCRA leave benefits, the Court concluded that the definition of health care provider is overbroad. You may recall that anyone working in a provider's office could be considered a health care provider (including a person such as the receptionist). The court decision narrows the definition to those individuals who are capable of actually providing healthcare services, rather than all those employed by a provider.

Our recommendation: Until the DOL provides further guidance, we suggest using the FMLA definition of health care provider, which includes: 1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or 2) others capable of providing health care services, which includes *only* podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, and physician assistants who are authorized to practice under State law, as well as Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

3. **Employer consent for intermittent leave**

The judge rejected the FFCRA regulation that requires employer consent of an employee's intermittent leave. Intermittent leave is available, but the consent requirement is void.

Our recommendation: If an employee qualifies for FFCRA leave, we recommend allowing them to take intermittent leave without consent. As a reminder, under FFCRA, employees are eligible for intermittent leave when: 1) teleworking and unable to work their normal schedule of hours due to any one of the qualifying reasons for emergency paid sick leave, or 2) working at their usual worksite and needing leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19.

4. **Documentation requirement**

FFCRA regulations require employees to provide documentation substantiating their FFCRA leave prior to taking that leave. The Court's decision wipes out the temporal aspect of that rule, rejecting it as an "unyielding condition precedent to the receipt of leave." The documentation requirement stands, but employers must permit employees to submit documentation *after* their leave commences.

Our recommendation: Until we get updated guidance from the DOL, we suggest the following:

- For all FFCRA leaves: employers may request the employee's name, date(s) of leave, reason for leave, and a statement they are unable to work because of that reason. Employers may request documentation before the employee begins their leave, but must allow the employee to commence leave and submit the documentation afterwards. In other words, providing documentation cannot be an obstacle to starting the leave.
- If the employee is requesting leave because they are subject to a quarantine or isolation order, or to care for an individual subject to such an order: the employer may also request the name of the government entity that issued the order.
- If the employee is requesting leave based on their health care provider's advice that they self-quarantine, or if they are caring for an individual who received such advice: the employer may also request the name of the health care provider.

- If an employee is taking leave because they are experiencing symptoms of COVID-19 and are seeking a medical diagnosis: the employer may also ask the employee to identify their symptoms and the date of their test and/or doctor's appointment.
- If the employee is requesting leave to care for their child whose school or place of care is closed, or whose child care provider is unavailable: the employer may also request: 1) the name of the child, 2) name of the school, place of care, or child care provider that is closed or unavailable, and 3) a statement that no other suitable person is available to care for the child.

Retroactive Application

What should employers do if they followed the rules and, for example, denied a medical receptionist FFCRA leave when they might have been eligible but for the exception?

Looking back and addressing these types of issues needs to be considered on a case-by-case basis. We recommend consultation with legal counsel to chart the best course for managing the employee fairly and mitigating risk.