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August 10, 2020

Labor & Employment Alert

FFCRA – Court Strikes Key Regulations on Federal Paid Leave

A federal district court in New York last week struck down key provisions of the United States Department of Labor regulations implementing the **Families First Coronavirus Response Act** (FFCRA) and its two key federal paid leave laws, the **Emergency Family and Medical Leave Expansion Act** (EFMLEA) and the **Emergency Paid Sick Leave Act** (EPSLA). Our **April 3 Client Alert** on the regulations anticipated some of the issues decided by this Court, but the outcome still is startling in its scope and potential impact on covered employers.

The DOL has not commented publicly on the Court's decision or whether the agency will appeal, and there has been surprisingly little commentary from the legal news media and from law firms. In the two most likely responses, the DOL could forego an appeal and issue amended rules or guidance, or it could send the case to the federal appeals court for the Second Circuit, which covers New York, and perhaps the Supreme Court. In either event, while there is considerable confusion and consternation about the potential impact, employers likely will have some time gather their wits to decide what to do, while we await a decision from the DOL or the appellate courts on whether there will be anything to do.

The case is formally known as ***State of New York v. United States Department of Labor***, and below is a synopsis of the decision and its potential impact.

BACKGROUND OF THE CASE

The DOL issued the FFCRA regulations on April 1 to provide guidance for employers covered by the EFMLEA and the EPSLA. Our previous **Client Alert** provided an analysis of the regulations and what was needed for compliance. Within two weeks, the Attorney General for the State of New York had filed a lawsuit in federal court challenging the regulations on several grounds. New York also immediately filed a motion for summary judgment and sought expedited review and decision. The DOL shortly thereafter filed its own dispositive motions, seeking both dismissal and its own summary judgment, which framed the matter for a decision that was issued last week.

POSITIONS OF THE PARTIES

New York focused its challenge on four provisions of the regulations, arguing that the first two were contrary to the language of the FFCRA and the second two exceeded the DOL's authority under the Administrative Procedure Act (APA), which governs the promulgation of regulations by federal agencies. The DOL countered that New York did not even have standing to bring the lawsuit against the federal government, to begin with, and that in any event the challenged regulations faithfully implemented the letter and spirit of the FFCRA and did not contravene the APA.

The parties differed somewhat over the schedule for the court proceedings, but by and large got down to brass tacks rather quickly to set up a prompt decision. No discovery was taken, and both parties acknowledged that the initial issues could be decided on the papers submitted. All told, the parties filed more than 700 pages of arguments and evidence within a matter of weeks to support their respective positions, which, following oral argument on May 12, yielded a twenty-six-page decision by the Court three months later.

THE DISTRICT COURT AND ITS DECISION

The lawsuit was immediately assigned to Judge J. Paul Oetken of the United States District Court for the Southern District of New York, which sits in New York City. Judge Oetken is a fifty-four-year-old native of Kentucky who was educated in Iowa and Connecticut, and thereafter clerked for federal judges in Chicago and Washington DC and for Justice Harry Blackmun at the United States Supreme Court. Prior to becoming a judge he worked in the Clinton White House, for the Department of Justice, in a private law firm, and as in-house counsel for a large company. President Obama appointed him to the federal bench in 2011.

When the lawsuit was filed, Judge Oetken lost no time in establishing a sense of even-handedness among the parties and the disputes that immediately arose. He granted some demands and denied others for both sides, as the parties jostled over the proceedings that would decide this potentially momentous case. It could be said that Judge Oetken did much the same in his ultimate ruling last week, granting some (albeit most) of what the New York Attorney General sought, but denying some of it and agreeing with DOL on those portions. He also gave a parting nod to both sides with a bit of wit and wisdom at the close of his opinion, but again, siding mostly with New York:

> The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail.

The short version of the substance of the Court's decision is that it struck down four provisions of the regulations: **(1)** the work-availability requirement for taking certain forms of paid leave; **(2)** the definition of "health care provider," which is extraordinarily broad; **(3)** the requirement of employer consent for intermittent leave; and **(4)** the requirement that documentation must be provided before leave. The Court salvaged the rest of the regulations, holding:

> The remainder of the Final Rule, including the outright ban on intermittent leave for certain qualifying reasons and the substance of the documentation requirement, as distinguished from its temporal aspect, stand.

POTENTIAL IMPACT ON COVERED EMPLOYERS

The demise of the "work-availability" provision likely will have the most impact on covered employers. "Work-availability" is the Court's own phrase and refers to the provision of the regulations that disallows paid leave under Category 1 of the six available paid-leave categories if work is NOT available from the individual's employer. This is explained more fully in our previous **Client Alert**, but in short, if the employer's business is shut down due to a governor's COVID-19 order, or the employee is laid off for lack of work due to COVID-19, the regulation said the individual is NOT entitled to paid leave—even if he or she meets the other criteria for paid leave.

We referred to this issue in our previous **Client Alert**, noting that some experts were surprised when DOL included this interpretation in the regulations. However, the DOL rule also was consistent with how other experts had interpreted the law initially. Suffice it to say, the statute is not clear on this, and the DOL's interpretation—which effectively shut out many otherwise qualifying workers—was ripe for controversy. By the same token, that same ambiguity and ripeness, and the impact on employers of trying to undo much of what has been done in the last four months in accordance with the DOL regulation, also makes it something of a toss-up as to how the appellate courts would rule.

The next most significant of the four provisions was Item 3 above, the requirement of employer consent for intermittent leave. The potential impact, however, is expected to be less than the "work-availability" ruling, if for no other reason, because it would be practically impossible to unravel the history of three months of compliance with the DOL rule on this, to figure out how to fix it for employees who "would have taken" intermittent leave if it was available. Nonetheless, going

forward, this could significantly affect employers simply because of the complexity of administering intermittent leave in many workplaces and in the confusing context of COVID-19. This part of the DOL regulation, however, may have a stronger likelihood of being upheld on appeal (that is, of having the district court's decision reversed) simply because, as the district court acknowledged in striking it down, the DOL was using its institutional expertise to regulate in a "gap" that must have been deliberately left open by Congress to be filled by administrative regulation.

Item four above, relating to the timing of the documentation requirement for paid leave, does not carry the impact or potential controversy on appeal as the items discussed above. It is hard to imagine how it could have retroactive impact, even if it is given retroactive effect. Moreover, while it will affect the administrative burden or complexity of paid leave, it most likely will not affect the amount of leave taken.

Probably the most predictable part of the decision was Item two, relating to the definition of "health care provider." Judge Oetken pointed out that the regulatory definition given to this phrase is "needless to say, expansive." We suggested in our previous **Client Alert** that it could include an employee of a lawn care service used by a university with a nursing school. Judge Oetken opined that it could include an "English professor, librarian, or cafeteria manager" at a university with a medical school. However, it appears employers have not made widespread use of the "health care provider" exemption outside of traditional notions of that phrase, so this decision likely will not have significant impact on employers generally. It would also appear to be the portion of Judge Oetken's decision that is most likely to be upheld on appeal.

Finally, the Court said nothing about the retroactive effect or the geographic reach of the decision. At present it is difficult to assess what the retroactive effect might be, simply because of the almost impossible scenarios it conjures of employers trying to unravel leave that was NOT allowed but MIGHT have been taken, and the cascade of consequences for mutually exclusive benefits and expenditures that WERE received and made, and the prospect of having to unwind all of that, provide different levels of benefits now that should have been provided then, and recoup alternate benefits that WERE provided but now will be rendered duplicative. As to geographic effect, New York did not explicitly seek a nationwide remedy and the Court did not specify the geographic effect it intended for its decision, so that is likely something to be clarified on appeal.

What is clear, going forward and if the decision stands, is that many more employees will be entitled to FFCRA paid leave benefits than were allowed under the initial DOL regulations.

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