LOOGOOTEE COMM. SCHOOL CORP.

Resolutions

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FAMILY FIRST CORONAVIRUS RESPONSE ACT

DATE: October 2020

TO: Neola Clients

SUBJECT: Family First Coronavirus Response Act - Regulations 2.0

FROM: Peters Kalail & Markakis Co., L.P.A.

In March, 2020, Congress passed the Family First Coronavirus Response Act ("FFCRA"). On April 1, 2020, as the law was going into effect, the Department of Labor ("DOL") issued an initial temporary rule ("4/1/2/2020 regulations") implementing provisions under the FFCRA.[1] On August 3, 2020, the U.S. District Court for the Southern District of New York issued a decision invalidating four sections of the 4/1/2020 regulations.[2] In light of the court's decision, on September 11, 2020, the DOL released revised regulations, which became effective on September 16, 2020. Simultaneously, the DOL updated its Frequently Asked Questions ("FAQs") concerning the FFCRA to conform to the revised regulations and to address a few situations presented by the significant number of schools that opened this fall either 100% remotely or in a hybrid learning format.

Work Availability Requirement

The first part of the 4/1/2020 regulations that the court struck down was the "work availability requirement" that states that leave under the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("Expanded FMLA") is only available if an employer has work available for the employee from which leave can be taken. In its revised regulations, the DOL reaffirmed this requirement and provided a more detailed explanation for why this precondition is critical.

In responding to the court's ruling, the DOL looked to its long-standing FMLA regulations that state that periods of time when an employee is not otherwise expected to work do not count against an employee's FMLA leave entitlement (think winter/spring/summer breaks for 9-10 month school employees and the inability of the district to count such breaks toward an employee's use of FMLA). The DOL applied this principle to its interpretation of the eligibility provisions of the FFCRA and reaffirmed its requirement that an employer must have work available for an employee in order for the employee to be eligible for Emergency Paid Sick Leave ("ESPL") or Expanded FMLA leave. In the revised regulations, the DOL stresses that "if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be the but-for cause of the employee's inability to work. Instead the individual would have no work from which to take leave." Consequently, the revised regulations continue to maintain that an employee may take EPSL or Expanded FMLA "only to the extent that any qualifying reason is a but-for cause of his or her inability to work."

Intermittent Leave Under the FFCRA Requires Employer Approval

The second section of the 4/1/2020 regulations that the court struck down was the requirement that an employee must have employer consent to take FFCRA leave intermittently. Again, the DOL reaffirmed its prior position and stated that intermittent leave under the FFCRA requires employer approval. To respond to the court's ruling, the revised regulations offer a much more extensive rationale for the requirement. Specifically, the DOL again looked to its existing FMLA regulations to find a basis for its interpretation of the FFCRA. In this case, the DOL cited to the FMLA regulations that provide for intermittent leave in two primary circumstances: (1) the intermittent leave is medically necessary, and (2) the employer and employee agree to the intermittent leave arrangement (e.g., to facilitate bonding following the birth or placement of a child). The DOL also referenced the FMLA regulations for the principle that an employee must schedule leave that is foreseeable in a way that is minimally disruptive to the employer's operations. Such a requirement the DOL found consistent with and a basis for its interpretation that an employee must have the consent (i.e., agreement) of his/her employer to take intermittent FFCRA leave.

Timeline for Employee Providing Notice of Need for Leave and Supporting Documentation

The third part of the 4/1/2020 regulations that the court struck down was a requirement that employees must provide their employers with certain notice and/or documentation before taking FFCRA leave (as opposed to after the leave begins). The new regulations clarify the timeline for when employees must provide notice to their employer concerning their need to take FFCRA leave and submit required supporting documentation.

Pursuant to the new regulations, any documentation that must be submitted to justify the use of FFCRA leave must be provided "as soon as practicable," but an employer may not require the documentation to be submitted before the leave begins. The DOL, however, added that "in most cases" that would be "when the employee provides notice" of his/her need for the leave. The revised regulations also provide that with respect to Expanded FMLA (and EPSL that is taken for the corresponding reason), if the leave is foreseeable, the DOL expects the employee will normally be able to provide notice before taking the leave (i.e., if the employee learns in advance that his/her child's school will be closed due to the pandemic, the employee is obligated to provide his/her employer with notice of leave as soon as practicable under the circumstances).

Additional Q&As Concerning Expanded FMLA

Besides issuing the revised FFCRA regulations, the DOL recently updated and added additional Q&As to its FAQ document concerning the FFCRA. In particular, the DOL added FAQs 98-100, which address district-mandated hybrid learning, parents' choices concerning their child's educational settings, and how to address situations when schools may open later to in-person schooling but is starting the year in remote learning.

FAQ 98 discusses situations where districts are providing hybrid learning this fall – i.e., the students are splitting their time between in-person learning and remote learning.

Under such circumstances, an eligible employee is entitled to take FFCRA leave on days/times when the employee's child is not permitted to attend school in person and instead receives his/her education/instruction remotely. This is true whether the hybrid schedule is on a daily basis (e.g., the child is remote on Mon-Wed-Fri and in-person on Tues-Thurs) or half-day basis (e.g., the child attends school in the morning and is remote in the afternoon). Interestingly, however, the DOL specified in its new regulations that employer consent is necessary if it is the employee's request to split his/her workday (i.e., the child is remote on Tues-Thurs but the employee wants to take-off half a day on Tues and half a day Thurs and have his/her spouse watch the child the other half of a day so the employee could work; such an arrangement would constitute intermittent use of FFCRA and therefore requires employer consent).

FAQ 99 addresses the situation when an employee's child's school is offering in-person instruction, but the employee has an option and, in fact, elects to have his/her child educated remotely. In this situation, since the school is available to the child, and the child is only participating in online/remote learning at the employee's choice, FFCRA leave is not available to that employee.

Finally, FAQ 100 confirms that if an employee's child's school starts the year in remote learning but later transitions to either hybrid or 100% in-person instruction, the employee is only able to take FFCRA leave when the school is closed to the employee's child. As such, when the school re-opens to in-person education the employee is no longer able to use EPSL and/or Expanded FMLA.

If you have any questions or concerns related to the revised FFCRA regulations or the DOL's recent additions to its FAQs concerning the FFCRA, please contact your local legal counsel.

This legal alert is intended as general information regarding the provisions of the FFCRA regulations and not legal advice. No attorney-client relationship exists through the issuance of this memorandum.

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[1]Recall, the FFCRA is applicable to leave taken between April 1, 2020, and December 31, 2020.

[2]While the court struck down four parts of the 4/1/2020 regulations, this Legal Alert only addresses the three topics that are of particular relevance to school districts. The fourth area, which is not discussed in this Legal Alert, pertains to the definition of "health care provider." Under the FFCRA, an employer may exclude health care providers from using FFCRA leave. The court determined that the definition used in the 4/1/2020 regulations was too broad; the revised regulations offer a more narrow definition that covers health care providers under the traditional FMLA definition along with other employees who are employed to provide diagnostic, preventive, or treatment services, or other services that are integrated with and necessary to the provision of patient care. If you believe your district may employ a "health care provider" and you wish to deny the individual EPSL or Expanded FMLA, you should discuss the matter with your local legal counsel.