Labor and Employment Alert: Significant Change to Employee Leave Regulation for Healthcare Providers

September 14, 2020

Healthcare employers with fewer than 500 employees may need to change their COVID paid leave policies as of September 16, 2020 because the U.S. Department of Labor (USDOL) will be significantly narrowing a critical Families First Coronavirus Response Act (FFCRA) regulation on that date. Previously, USDOL regulations had permitted healthcare employers to exclude their entire staff from FFCRA paid leave; however, going forward, that exclusion will be greatly diminished, which will expand the leave rights of the employees.

The Legal Backdrop

Initially, the FFCRA, which provides for different forms of COVID-related paid leave through December 31, 2020, allowed employers of "healthcare providers" to exclude such employees from this new temporary federal paid leave program. The law as drafted had a narrow definition of who could be excluded from the law's coverage as a "healthcare provider," similar to the narrow definition in the long-existing Family Medical Leave Act (FMLA). The USDOL, however, expanded the definition last April by broadly defining a healthcare provider as pretty much anyone who worked for the healthcare provider. This included the receptionist, bookkeeper, and all staff. Many healthcare employers understandably relied on this regulation and elected not to provide any staff member with any COVID-related paid leave under the FFCRA because of the needs of the practice. But all that will now change on September 16, 2020 because of a recent federal court decision in New York, which ruled that the USDOL had overstepped its authority in expanding the definition of healthcare provider.

The New Regulations

After only a few days' notice, effective September 16, 2020, the USDOL will apply a narrower definition of a healthcare provider who may be exempted from the FFCRA paid leave rights:

- Licensed and practicing doctors of medicine and osteopathy;
- Licensed and practicing podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist);
- Licensed and practicing nurse practitioners, nurse-midwives, clinical social workers, and physician assistants; and
- Persons "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care" (referred to as "Health Care Services").

The new USDOL regulation elaborates on this last, catchall category, stating it only includes:

- Nurses, nurse assistants, medical technicians, and any other persons who directly provide Health Care Services;
- Other employees providing Health Care Services "under the supervision, order, or direction of, or providing direct assistance to" any of the persons defined as health care providers; and
- "Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary for diagnoses and treatment."

The regulation provides additional guidance about what types of services are integrated with and necessary to diagnostic,

preventive, or treatment services, and explains that employees whose work could affect the provision of healthcare services, but who do not directly participate in providing such services, may not be excluded from the FFCRA. Such employees include "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

Next Steps

Healthcare employers with fewer than 500 employees must reassess their COVID leave policies if they have previously excluded their staff from FFCRA paid leave. Options include expanding FFCRA paid leave to all staff (in light of the past almost six months of experience) or identifying the specific staff members who may be excluded under the new regulation and including all other staff members. Employers should keep in mind that the costs of FFCRA paid leave may be offset against FICA taxes. Employers should also consult counsel to determine whether they may have legal exposure for having excluded all staff since April 2, 2020.

As always, we are here for you. If you have any questions about this alert or if we can assist in any other way, please reach out.

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