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EMPLOYMENT LAWSCENE ALERT: DOL UPDATES FFCRA LEAVE REGULATIONS

On September 11, 2020, the Department of Labor issued updated regulations regarding the Families First Coronavirus Response Act and leave available under that law. These updates were issued in response to a recent federal district court ruling out of the Southern District of New York that invalidated portions of DOL's original rules under the FFCRA because the agency exceeded its authority in issuing certain portions of its rules. These updated regulations are effective on September 16, 2020.

Most notably, the new DOL regulations update the definition of "health care providers" that are excluded from the FFCRA. The original definition included anyone employed at a hospital, medical school, and a variety of other places where medical services are provided, as well as individuals employed by a business that produced medical equipment. This definition was criticized as being overbroad and including many more workers than the traditional FMLA definition of health care provider. DOL has revised the definition to include both those who meet the traditional FMLA definition of health care provider who can issue an FMLA certification, as well as individuals capable of providing health care services such as diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. Non-medical personnel such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants, and billers are no longer considered health care providers, even if they work at a hospital or other medical service provider.

Employers should take notice that the DOL clarified its stance on intermittent leave under the FFCRA. While intermittent leave is still available only with the agreement of the employer, the DOL clarified that if a child is going to school under a school-mandated hybrid model (e.g., in person two days per week and remote learning three days per week), an employee's need for leave only on those days that their child is home engaged in remote learning would not be considered intermittent leave, and, therefore, the employer's agreement for such a leave schedule would not be necessary. On the other hand, the DOL explained that if it is the parent's choice to have the child attend remote learning instead of in person classes, rather than the change being imposed by the school, then the parent would not be eligible for any FFCRA leave because the school is not "closed" due to a COVID-19 related reason. Under those circumstances, the employer could lawfully deny the employee's request for FFCRA leave.

O’Neil, Cannon, Hollman, DeJong and Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.