

## **GAFP - Urgent - FFCRA - New DOL Definition of Health Care Provider**

On behalf of Rich Sanders, Esq., please see the below update to GAFP members concerning revised regulations issued by the U.S. Department of Labor (**DOL**) under the Families First Coronavirus Response Act (**FFCRA**) following a federal court's decision that invalidated a handful of regulatory provisions interpreting the FFCRA. The revised regulations become effective on **Wednesday, September 16, 2020**.

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GAFP Members,

On Friday, September 11, 2020, the DOL issued revised regulations on who qualifies for emergency paid sick leave and expanded family and medical leave under the FFCRA. The revised regulations were issued in response to a August 3, 2020 federal court decision from New York that struck down several parts of the FFCRA's final rule, including the definition of an employee who is a "health care provider," who an employer may exclude from use of FFCRA leave.

The federal court decision did not explicitly address whether it applied nationwide. However, the DOL acknowledged that it viewed the decision as applying nationwide in its new [FAO #102](#) (Question: "Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?" Answer: "Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.").

### **Definition of Health Care Provider**

The FFCRA permits employers to exempt "health care providers" from emergency paid sick leave and expanded family and medical leave. In its original regulations, the DOL broadly defined a "health care provider" for purposes of the emergency FMLA and paid sick leave exemptions under the FFCRA to include "anyone employed at any doctor's office, hospital, health care center, clinic...."

The revised regulations provide an amended, narrower definition of "health care provider" that focuses on employees whose duties or capabilities are directly related to the provision of health care services or are so integrated to provision of such services so as to adversely impact patient care if not provided. Specifically, for purposes of exemption from emergency paid sick leave and expanded family and medical leave, the DOL revised definition of "health care provider" includes only employees who:

- (1) Meet the definition of that term under the existing FMLA regulations; or
- (2) Are "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."

### **Existing FMLA Regulations**

Existing FMLA regulations define "health care provider" to include Doctor of Medicine and osteopathy and "others capable of providing health care services." Also included in this definition are podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse

practitioners, nurse midwives, clinical social workers, and physician assistants.

### **Newly Revised FFCRA Regulations**

The new DOL regulations provides that the definition of "health care provider" includes any employee who is capable of providing health care services, meaning he or she is employed to provide:

- Diagnostic services (taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results);
- Preventive services (screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems);
- Treatment services (performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments); or
- Other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care (bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples).

The revised DOL regulations identify the following types of employees who may continue to be excluded from taking FFCRA emergency paid sick leave and expanded family and medical leave:

- (1) Nurses, nurse assistants, medical technicians and others directly providing diagnostic, preventive, treatment, or other integrated services,
- (2) Employees providing diagnostic, preventive, treatment, and other services "under the supervision, order, or direction of, or providing direct assistance to" a health care provider; and
- (3) 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 diagnostic purposes and treatment.

The DOL further clarified that employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services (e.g., IT professionals, building maintenance staff, human resources personnel, records managers, consultants, and billers).

### **Are the Revised Regulations Retroactive?**

A common question resulting from the DOL's revised regulations is whether health care employers have to retroactively grant/cover FFCRA emergency paid sick leave and expanded family and medical leave to now-eligible employees that may have requested or used such leave since April 1, 2020.

Violations of the paid leave provisions of the FFCRA are subject to the Fair Labor Standards Act remedies, which provides as follows:

No employer shall be subject to any liability or punishment ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States ... such a defense, if established, shall be a bar to the action or proceeding.

The above-identified language provides a defense as to an employer's actions that precede the effective date of the DOL's revised regulations.

**Applicability to GAFP Members**

The DOL's regulatory revisions have immediate impact on all GAFP Members with 50 or more employees. GAFP Members with fewer than fifty employees will continue to qualify as a whole organization under the small business exemption to the FFCRA. For those GAFP Members with more than 50 employees, some employees may no longer be exempt from FFCRA leave and will be entitled to such leave. GAFP Members should provide emergency paid sick leave or expanded family and medical leave to non-exempt employees in accordance with the FFCRA, while taking advantage of the fully refundable tax credits providing reimbursements for the costs associated with permitting such leave.

Thanks,

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