Labor & Employment Issues
Client Alert
Pitta LLP
For Clients
April 15, 2020 Edition

NY ATTORNEY GENERAL JAMES CHALLENGES DEPARTMENT OF LABOR'S INTERPRETATION OF COVID-19 LEAVE LAW

On March 18, 2020, the Families First Coronavirus Response Act ("FFCRA") was enacted in response to the COVID-19 global pandemic. The FFCRA requires employers to provide an ten weeks of paid family and medical leave to an employee unable to work due to a need to care for a child whose school or child care provider is closed or unavailable, referred to as "The Emergency Family and Medical Leave Expansion Act" ("EFMLEA"). The FFCRA also requires employers with fewer than 500 workers to provide two weeks of paid sick leave to employees unable to work because of the virus, titled "The Emergency Paid Sick Leave Act" ("EPSLA").

The EFMLEA specifies that "[a]n employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from [application.]" The EFMLEA authorizes the Secretary of Labor "to exclude certain health care providers and emergency responders from the definition of eligible employee." The EPSLA contains similar exception language. The FFCRA also defines "health care provider" with the meaning given to the term in the Family and Medical Leave Act ("FMLA").

On April 6, 2020, the United States Department of Labor ("DOL") published a temporary final rule to implement and carry out the purposes of the FFCRA ("Final Rule"). The Final Rule limits EFMLEA and EPSLA coverage in a few ways. The Final Rule provides that an employee may not take EFMLEA or, in many cases, EPSLA leave, where their employer "does not have work" for the eligible employee. Further, the Final Rule expansively defines "health care provider," including anyone employed at certain medical institutions and anyone employed by an entity involved in making COVID-19 related medical equipment, diagnostics, or treatments. The Final Rule explains that this definition applies only to leave under the EFMLEA and EPSLA and does not apply to the FMLA more generally. Additionally, the Final Rule only permits intermittent leave upon employer consent. The regulation also requires employees to provide their employers with certain documentation in order to obtain leave.

On April 14, 2020, New York Attorney General Letitia James filed a complaint in the Southern District of New York challenging the Final Rule, seeking declaratory and injunctive relief. *State of New York v. U.S. Dep't of Labor*, 20-cv-3020. Attorney General James contends that the Final Rule unlawfully narrows the FFCRA, excluding more than nine million people from an act that was designed to protect public health and provide economic security to working families. The complaint alleges that the Final Rules violates the FFCRA because the unavailable work exception and expansive health care provider definition are not authorized, and indeed conflict with, the FFCRA. Perhaps most notably, James contends that the Final Rule definition of health care provider is inconsistent with the FMLA, which has been interpreted to confine the term to licensed medical professionals. James attacks the Final Rule as expanding the exception to cover even an English professor at a college that provides health care instruction. The complaint also alleges that the DOL exceeded its statutory authority by limiting intermittent leave and mandating extensive documentation for leave.

Attorney General James simultaneously filed a brief in support of summary judgment, accusing the DOL of issuing a rule "that riddles the FFRCA's paid leave provisions with holes" and penalizing workers for staying home. James requests the court sever and vacate the challenged provisions.

The case was subsequently assigned to Judge J. Paul Oetken.

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