The U.S. Department of Labor (DOL) has given all employers running virtually every type of health care organization the ability to exempt their employees from eligibility to take FMLA leave or paid sick leave under the Families First Coronavirus Recovery Act (FFCRA). The DOL guidance, issued on March 28, is designed to help prevent exacerbating the already existing staffing shortages caused by the COVID-19 pandemic.

The paid FMLA and paid sick leave provisions of the FFCRA both say that employers of "health care providers" can decide to not allow their employees to take such paid FMLA and paid sick leave. Congress’s goal in giving such employers this ability was to keep health care providers on the job when they are needed most, rather than allowing employees to take paid leave to stay home with their children or for other reasons covered by the new laws.

The DOL on March 28 dramatically expanded the definition of a "health care provider" for purposes of the paid FMLA and paid sick leave provisions of the FFCRA. The new definition now includes anyone employed at a doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity.

The DOL guidance also states that the definition of a "health care provider" includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility, as well as those who provide medical services and produce medical products and equipment. As a result, employees of third-party contractors that provide food services, maintenance services, or other services or goods to hospitals, nursing homes, and other employers are now also included in the definition of a "health care provider" under the paid FMLA and paid sick leave provisions of the FFCRA.

Lastly, the DOL guidance encouraged employers of health care providers to be "judicious" in deciding whether to offer employees paid FMLA and/or paid sick leave so as to minimize the spread of COVID-19.

So what does that mean for you as the employer of such health care providers?

It means that you have a choice to make by April 1.

Some employers of such health care providers may choose to issue a blanket exemption of all of their employees, rendering all such employees ineligible to take paid FMLA or paid sick leave. The advantage of issuing a blanket exemption is that it will prevent dishonest employees from deciding to take leave and stay home with their children while school is closed or daycare is unavailable, and force them to use accrued but unused PTO/vacation and sick leave under their employer's already-existing policies if they need to stay home due to illness.

Many employers of health care providers have already refused to allow employees to take PTO/vacation days during the pandemic. But remember that even if an employer of health care providers decides that its employees cannot take paid FMLA or sick leave under the FFCRA, he or she may still qualify for unpaid leave under the original FMLA if a doctor or other diagnostic professional certifies that he or she needs such FMLA leave. Most
employer FMLA policies require an employee to use accrued but unused PTO/vacation and sick days at the beginning of such unpaid FMLA leave, with the remainder of such FMLA being unpaid.

But other employers of health care providers might want to consider allowing only certain employees diagnosed with certain COVID-19-related issues to take paid sick leave under the FFCRA. The March 28 DOL guidance, as part of the answer to question 38, states that employers of health care providers "are not required to pay such employee paid sick leave or expanded family and medical leave on a case by case basis." Our best interpretation of that awkwardly written sentence is that employers of health care providers can pay sick leave under the FFCRA on a "case by case basis." If that interpretation is correct, then employers must use a legal, objective, non-discriminatory criteria to decide which employees will receive such paid leave and which employees will not.

For example, an employer could take the position that it will provide paid sick leave to an employee diagnosed with COVID-19 and under a doctor's order to self-quarantine. Such paid leave is limited in both amount and duration, but is subject to a dollar-for-dollar quarterly payroll tax credit, so it costs the employer nothing. And it provides a little extra money to the diagnosed employee, who the employer would not want to work anyway, both because of government-mandated prohibitions and for practical liability reasons.

Unfortunately, the DOL has not clarified what criteria an employer of health care providers can use to determine "on a case by case basis" which employees will receive such paid sick leave. We hope that the DOL will also clarify this issue in the immediate future.

There is no right or wrong decision to make. Rather, these are judgment calls for employers of health care providers to make, taking into account what is best for their patients, residents, and customers, how they think particular employees will react from a human resources perspective, and what is best for their companies financially.

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