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New York Federal District Judge Rules Department Of Labor Overstepped With Its Expanded Definition of 'Health Care Provider' in the Families First Coronavirus Recovery Act (FFCRA) - What Is In Store Now For Employers Who Relied Upon That Definition to Exclude Health Care Provider Employees From FFCRA Leaves?

On August 3, 2020, Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York issued an opinion finding that the Department of Labor's (DOL) Final Rule for The Families First Coronavirus Recovery Act (FFCRA) in four specific provisions exceeded the DOL's authority under the Administrative Procedure Act statute. *State of New York v. U.S. Department of Labor, et al.*, No. 1:20-cv-03020 (S.D. N.Y. Aug. 3, 2020).

Of particular interest for ASHA members is the court's ruling regarding the DOL's Final Rule interpretation of the "health care provider" definition. The Court found that the FFCRA's language "unambiguously forecloses the Final Rule's definition" thus placing in limbo employers who did not offer FFCRA leave benefits to workers who they categorized as health care provider employees based upon the DOL's definition.

The Background Facts

Briefly recapped, the FFCRA provides that covered employers must make available 80 hours of emergency paid sick leave to employees with one of six qualifying COVID-19-related conditions. It also provides that employees who are unable to work because they must care for a dependent child due to COVID-19 closures are eligible to take an expanded Family Medical Leave Act (FMLA) unpaid two week and then a partially paid 10 week leave. However, employers of "health care provider" employees do not have to offer the expanded FMLA and emergency paid sick leaves to their "health care provider" employees. The FFCRA used the FMLA definition of "health care provider":

> "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6).

Congress charged the DOL with administering the FFCRA, and on April 6, 2020, the DOL promulgated a Final Rule implementing the law's provisions. The DOL's Final Rule provides the following "health care provider" definition:

> anyone employed at any 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, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions, any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. Final Rule at 19,351 (§ 826.25).

As a result of this expanded health care provider definition, senior living employers were offered an exemption to making these otherwise required benefits available to employees in companies of 500 employees or less. ASHA does not have solid data to assess how many ASHA members do not provide FFCRA leave benefits to their employees.[1]

The Lawsuit

On April 14, 2020, the State of New York ("State") sued the DOL claiming that the DOL exceeded its authority by expanding the "health care provider" statutory definition when it issued its Final rule. The State argued that it had standing to bring the lawsuit (in other words it could demonstrate injury) because, without paid leave, employees must choose between taking unpaid leave and going to work even when sick . . . employees will elect the former, the State predicts, diminishing their taxable income and therefore the State's tax revenue. Some will choose the latter, escalating the spread of the virus and thereby raising the State's healthcare costs. And overall, the bind employees are left in will result in greater reliance on various state-administered programs, increasing the State's administrative burden."

The Court agreed with the State that it had standing to bring the suit finding that the "threatened injury to New York's tax revenue is sufficient to support standing."

The Federal Court Vacates the DOL's Health Care Provider Definition

Out of a 26 page opinion, the Court spent a mere two and one-half pages to explain that the DOL's authority was not so sweeping as it argued. DOL urged that its definition is consistent with the FFCRA's purpose as it serves to exempt employees who are "essential to maintaining a functioning healthcare system during the pandemic. A broad definition of "health care provider" operationalizes that goal, because employees who do not directly provide healthcare services to patients — for example, lab technicians or hospital administrators — may nonetheless be essential to the functioning of the healthcare system."

[1] Some ASHA members separately did not have to provide the benefits as the FFCRA applied to companies with 499 or less employees.

In responding to that argument in the negative, the Court took a narrow, strict view of the FFCRA's statutory language defining who is a health care provider employee. The Court ruled that the DOL's stated rationale "cannot supersede the statute's unambiguous terms." Citing to the language that defines "health care providers," the Court found that the DOL's apparent concession that an English professor, librarian, or cafeteria manager at a university with a medical school would all be "health care providers" under the Rule, demonstrates that the Final Rule is "vastly overbroad even if one accepts the agency's purposivistic approach to interpretation, in that it includes employees whose roles bear no nexus whatsoever to the provision of healthcare services, except the identity of their employers."

What Should ASHA Members Do In Light of *NYS v. DOL*?

The *NYS v. DOL* case is a federal district court case in the Southern District of New York within the Second Circuit. As a general rule, federal district court opinions do not serve as binding precedent on district judges even within the same district, and thus for now *NYS v. DOL* is a lower court case with limited reach, though a case that warrants watching. [2]

For now, the decision has limited effect, but the decision has broad implications if other states take on the challenge and other courts find the argument persuasive. ASHA members should consult with their counsel about how to proceed in light of this development and review how many of its employees may be impacted. To be sure, there is a tension between the FFCRA's intent to provide help to workers while at the same time recognizing the need to have essential workers remain in the workplace. In the meantime, DOL's attempt to strike that balance might find a more friendly audience if the State appeals the decision. We expect that the DOL will appeal this decision given the potential for far reaching impact.

[2] Courts in the same district do tend to give weight to decisions within its own district. But notably, in a recent case, *Kerr v. Hurd* (S.D. Ohio Mar. 15, 2010), the Court went further and held that "In the absence of supervening case authority from the Supreme Court or the court of Appeals, this Court is bound, under the doctrine of Stare decisis, to follow decisions of its own judges."