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**U.S. Department of Labor Changes "Health Care Provider Employee" Definition, Thus Providing FFCRA leave Entitlement to Many Senior Living Provider Employees**

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Last week, the lay of the land changed dramatically for senior living providers with 499 or less employees in the area of providing emergency paid sick leave and expanded FMLA leave to their employees.

**IMPORTANT** – This new Temporary Rule take effects immediately.

**Introduction**

On September 11th, in response to *New York v. U.S. Dep't of Labor, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020)*, where a New York District Court ruled invalid the Secretary of Labor's expanded "health care provider employee" definition of an employee whom an employer may exclude from being eligible for the Families First Coronavirus Recovery Act (FFCRA) benefits, the U.S. Department of Labor (DOL) pulled back on its definition calling into question the breadth of employees certain senior care providers can still exclude from FFCRA coverage.

The DOL Temporary Rule revising the health care provider definition applies to members with communities who have 499 or less employees.

**The Change**

The DOL revised the definition of "health care provider" under § 825.30(c)(1) (which heretofore included "anyone employed at a . . . nursing facility, retirement facility, nursing home . . . .") to mean employees who are health care providers under 29 CFR 825.102 and 825.125,3 and other employees who 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.*"

Attempting to explain just what this new definition means, the DOL states:

To interpret this critical term, the Department is informed by how other parts of Federal law define this term. In one notable example, the Pandemic and All Hazards Preparedness and Advancing Innovation Act of 2019 (Pandemic Act) defines “health care service” in the context of a pandemic response to mean “any services provided by a health professional, or by any individual working under the supervision of a health care professional, that relate to (A) the diagnosis, prevention, or treatment of any human disease or impairment; or (B) the assessment or care of the health of human beings.” 42 U.S.C. § 234(d)(2).

While the DOL does still expansively read this more narrow definition that it adopted, and the rule does state that the employee need not be a licensed individual, it does specifically exclude employees who, up until now, were covered:

Individuals who provide services that affect, but are not integrated into, the provision of patient care are not covered by the definition, because employees who do not provide health care services as defined in paragraph (c)(1)(i)(B) are not health care providers. Accordingly, revised § 826.30(c)(1)(iii) provides examples of employees who are not health care providers. The Department identifies *information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers*. While the services provided by these employees may be related to patient care—e.g., a professional may enable a hospital to maintain accurate patient records—they are too attenuated to be integrated and necessary components of patient care. This list is illustrative, not exhaustive.

The DOL estimated there are 5,976,761 employers with 499 or less employees who need to review the Temporary Rule and determine how, and if, their obligations to provide FFCRA benefits have changed.

### **Member Takeaways**

It still remains that the FFCRA does not apply to employers with 500 or more employees. Thus, this DOL September 11 Temporary Rule impacts members with 499 or less employees. Because the “health care provider employee” definition no longer includes “anyone employed at a . . . nursing facility, retirement facility, nursing home . . . .” Whether the revised health care provider employee exemption applies is more of a fact based determination than ever. Speak with your counsel about how your employees might or might not meet the narrower definition.

FFCRA benefits end on December 31, 2020.