This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

New Families First Coronavirus Response Act (FFCRA) Regulations: Important Change to Definition of Health Care Provider and Other Clarifications

In August of 2020, a federal district court in New York issued a ruling invalidating portions of the U.S. Department of Labor's Frequently Asked Questions regarding the Families First Coronavirus Response Act ("FFCRA").

In response to this ruling, the U.S. Department of Labor ("USDOL") issued new regulations which went into effect as of Wednesday, September 16, 2020. For the most part, the USDOL disagreed with the New York court and provided further detail on its existing regulations. The New York ruling related to four provisions of FFCRA and the USDOL response are analyzed below:

- **Definition of Health Care Provider**: The revised regulations provide a narrower definition of "health care providers" who can be excluded from eligibility for FFCRA leave. The new definition focuses on employees whose duties or capabilities are directly related to the provision of health care services or are so integrated to the provision of such services that it would adversely impact patient care if they were not provided. Anyone who qualifies as a "health care provider" under Family and Medical Leave Act regulations can be excluded. This would include physicians, osteopaths, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and certain Christian Science practitioners. In addition, the FFCRA exclusion can be applied to employees who are "employed to provide" diagnostic, preventive, or treatment services, "or other services that are integrated with and necessary to the provision of patient care." This includes nurses, nurse assistants, medical technicians and laboratory technicians (viewed on a case-by-case basis), and similar categories of employees. "Integrated" services include bathing, dressing, feeding, and other tasks related to patient care. The revised regulations specifically exclude employees whose work is administrative, related to food services (as opposed to feeding patients), or building maintenance. ***As a result of this change, health care employers who are covered by the FFCRA should reconsider the prior conclusion that all of their employees are excluded from coverage and ensure that they are correctly applying the FFCRA to employees who are now eligible.***

- **Availability of Work Required**: One aspect of the prior regulations that was questioned by the New York court decision was the requirement that, in situations where no work is available, FFCRA leave also would not be available. The USDOL held firmly to its original position, explaining that if the employee is not scheduled to work—whether due to a furlough, business closure or otherwise—there is no work from which to take leave. Therefore, under the new regulations, if the employer has no work available for the employee, the employee cannot take FFCRA leave, even if the employee otherwise has a qualifying reason for using such leave. Please be aware that, although paid FFCRA would not be available, employees who have been furloughed or laid off may be eligible for unemployment benefits.

- **Intermittent Leave**: Intermittent leave is available under the FFCRA to a teleworking employee for any qualifying reason, and to a worksite employee for childcare purposes. See these FAQs for additional information. In its new regulations, the USDOL reaffirmed the employer consent requirement for intermittent leave. It also clarified what is meant by "intermittent leave" when the leave is taken for childcare purposes by an employee who is working at the employer's worksite. The USDOL indicated that time off for alternate-day school schedules is not "intermittent" leave and can be taken without the permission of the employer (For example, if a school is having in-person classes on Monday-Wednesday-Friday and remote learning on Tuesday and Thursday, it would not be "intermittent" FFCRA leave requiring employer consent if the parent took leave on Tuesday and Thursday.) The USDOL distinguishes this situation from the scenario where the school is closed on all days for some period and the employee nonetheless seeks leave on an intermittent basis. Employers should keep in mind, in administering requests for intermittent leave, that it is important to be consistent in how these requests are handled.
- **Timing of Documentation**: FFCRA regulations require employees to provide documentation to the employer of the need for leave including: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the qualifying reason for the leave; and (4) an oral or written statement that the employee is unable to work because of the qualified reason for leave. The USDOL has now clarified that notice prior to taking the leave is not required if the need for leave is not foreseeable in advance. For emergency sick leave under the FFCRA, employees are not required to provide notice prior to the leave but must provide notice to the employer after the first workday (or portion of a workday) that the employee takes sick leave. For emergency family leave under the FFCRA, notice must be provided to the employer as soon as practicable, including in advance of the leave if it is foreseeable.

If you have questions about the FFCRA or the new regulations, please contact your PBPA attorney.