

DOL Revises Rules Governing FFCRA COVID-19 Related Leave

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On September 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations and updates regarding the implementation of the Families First Coronavirus Response Act (FFCRA). The new rule was issued in response to a recent federal court decision that invalidated certain portions of the DOL's previous relevant regulations. The revised rule clarifies certain workers' rights and employers' responsibilities with regard to the FFCRA, as discussed below.

Key Takeaways: FFCRA Regulations Revised

- The revised unpublished regulations are available here, and once published, will be available here.
- Additional information from DOL about the changes and new regulations is available here and here.
- The revised regulations are scheduled to be published and become effective on **September 16, 2020**.

In the new regulations, the DOL:

1. **Reaffirms work availability requirement** for an employee to qualify for FFCRA leave. FFCRA can only be taken by an employee who has work available to perform, from which s/he can take leave
2. **Confirms intermittent leave** under the FFCRA requires employer consent
3. **Narrows the definition of health care providers**, whose employers may exclude them from coverage by the FFCRA
4. **Clarifies the timeline** required for employee notice of leave and documentation submission. Employees must provide notice of need for leave "as soon as practicable" if reason for leave is foreseeable, and should provide documentation and information supporting the need for leave "as soon as practicable."

FFCRA Basics

As you will recall, the FFCRA requires certain employers to provide their employees with emergency paid sick leave or expanded FMLA leave for a series of specified reasons, all relating to COVID-19. The DOL originally issued regulations in March regarding interpretation and implementation of the law. Some of those original regulations have now changed or been clarified based on the DOL's new temporary rule issued on Sept. 11, which takes effect on Sept. 16, 2020. Note that the FFCRA was an emergency act, and it is still set to "sunset" or expire on Dec. 31, 2020. For an additional refresher on the FFCRA and its basic requirements and provisions, see our previous brief publication [here](#).

FFCRA Regulations Revised

1) Work Availability requirement: Reaffirms that emergency paid sick leave and expanded FMLA leave under the FFCRA are only available to employees whose employer has work available for them to perform, work from which the employees can take leave.

- No leave for employees whose employers do not have work available for them to do, for whatever reason, even if the reason is COVID-19 related.
- For example, if an employee was laid off due to reduction in force resulting from economic realities of COVID-19, or if the employer is temporarily closed due to COVID-19, these employees are not eligible for FFCRA leave because the employee does not have work from which to take leave.
- DOL explained that "leave is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave."

As explained by the DOL, to be eligible for FFCRA leave: But-for the reason for the FFCRA leave, an employee would be working for the employer:

"If there is no work for an individual to perform due to circumstances other than a qualifying reason for leave—perhaps the employer closed the worksite (temporarily or permanently)—that qualifying reason could not be the but-for cause of the employee's inability to work," (and therefore that person is not eligible for FFCRA leave). "Instead, the individual would have no work from which to take leave" under that circumstance. The DOL "thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work."

2) Employer approval required for Intermittent Leave under the FFCRA: Confirms and reiterates that intermittent leave can only be taken with employer approval.

- Intermittent leave is defined as "leave taken in separate blocks of time due to a single qualifying reason, with the employee reporting to work intermittently during an otherwise continuous period of leave taken for a single qualifying reason."

- DOL affirms that intermittent leave under the FFCRA is consistent with longstanding FMLA principles governing intermittent leave.

Interaction of school or childcare closures and intermittent leave addressed: The revised regulations address FFCRA leave to care for employee's child whose school, place of care, or child care provider is unavailable due to COVID-19, and the meaning of "intermittent" in that context.

- Not intermittent: If school is closed for full days on Monday, Wednesday, and Friday, but the child is in school for full days on Tuesday and Thursday, the employee seeking full-day FFCRA leave for the closed days is not using intermittent FFCRA leave because the "school literally closes . . . and opens repeatedly." As such, each separate school closure constitutes an independent reason for FFCRA leave. Accordingly, no employer approval is required in such circumstances (it is not considered intermittent).
- Intermittent: But if a child's school or place of care involves a different "hybrid" school arrangement, such that the school operates on partial day increments, or less than full days (i.e., half day remote, half day in person, etc.), that employee will need to either: (1) take continuous FFCRA leave (not intermittent); or (2) obtain the employer's consent to use FFCRA leave intermittently in partial-day increments to accommodate the child's school schedule.

3) Narrowing of who qualifies as a "Health Care Provider" under FFCRA: Redefined health care provider, which now covers a much narrower category of employees.

Which employees qualify as "health care providers" for purposes of the FFCRA is important because the Act states that employers of health care providers may exclude those employees from coverage (i.e., employers may make health care provider employees ineligible for both emergency paid sick leave and emergency FMLA leave under the FFCRA).

- The definition of "health care provider" definition is now much narrower and covers:
- Employees who are health care providers under *the classic FMLA* definition; and
- Other 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.**

New focus on the individual employees and their job duties for "health care provider":

"Employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

- The new health care provider definition will have an immediate impact on health care employers once effective, including those employers who exempted employees from eligibility under the FFCRA based on the DOL's previous broad definition.

4) Timing of Employee Notice of Need for Leave and Supporting Documentation: Clarifies timeline governing when an employee must provide notice of the need for leave under the FFCRA and the timeline for the employee's submission of supporting documentation.

- **Notice** of the employee's need for leave must be given to the employer “as soon as practicable” when the reason for leave is foreseeable.
- **Documentation** supporting the employee's need for leave must be provided to the employer as “soon as practicable,” which the DOL notes will “in most cases [] be when the employee provides notice.”
- **Employee supporting documentation still required.** Recall that employees must provide their employers with supporting documentation for FFCRA leave. Some qualifying reasons require additional documentation.

We recognize that employers are still juggling countless new regulations and laws relating to COVID-19. These new DOL regulations and FFCRA changes should not go unnoticed by employers subject to the FFCRA. Nexsen Pruet and its Employment and Labor Law Team remain committed to tracking all FFCRA developments. We look forward to keeping employers apprised of all changes and updates as we assist them with employment law issues during the global pandemic.