

# Revised Department of Labor Regulations Necessitate Job-Specific Assessment by Health Care Providers for Employees' Potential FFCRA Leave Entitlement

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In April 2020, the Department of Labor (DOL) issued regulations excluding “Health Care Providers” from the reach of the Families First Coronavirus Response Act’s (FFCRA) leave entitlements, both as to expanded sick leave and expanded FMLA leave. At that time, the focus of the exclusion was on the entity itself, thereby broadly excluding health care entities from its reach. However, effective September 16, following a New York federal judge striking down certain provisions of the regulation, DOL has significantly narrowed the definition under a new “temporary” rule. The revised unpublished regulations are available here. No longer does the definition hinge on the identity of the employer, but, rather, on the specific role and duties of the employee. Thus, private health care entities with between 50 and 500 employees and public agency/governmental health care entities should immediately conduct a job-specific analysis to determine whether they need to provide certain of their employees with such leave between September 16 and December 31.

## Healthcare Employees Still Excluded from the FFCRA Leave Entitlement

The FFCRA, which applies to most employers with fewer than 500 employees, as well as public agency employers, provides employees with up to 80 hours of paid sick leave and expanded FMLA leave for employees who cannot work due to a school or daycare closure. The upshot of the new definition clarifies that the following health care providers remain excluded from the reach of FFCRA’s leave entitlement and, thus, health care entities still do not have to provide them with expanded FFCRA leave, to ensure continuity of critical care during the pandemic:

1. Health care providers, to include physicians and those who make medical diagnoses (also nurses, nurse assistants, medical technicians and those who work under their supervision, order, or direction of, or

providing direct assistance to)

1. DOL adopted the FMLA definition of “health care provider,” which includes licensed doctors of medicine and osteopathy and “any other person determined by the Secretary to be capable of providing health care services.” This also includes podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants and certain Christian Science practitioners who are permitted to issue a certification for purposes of the FMLA.
2. Those who are employed to provide
  1. diagnostic services,
    - e.g., taking or processing samples, performing or assisting in the performance of x rays, interpreting test or procedure results
  2. preventative services,
    - e.g., screenings, check-ups, counseling to prevent illnesses or diseases
  3. treatment services,
    - e.g., surgery, administering medication, breathing treatments
  4. or other services that are *integrated with and necessary for the provision of patient care and if not provided, would adversely affect patient care.*
    - e.g., bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, transporting patients and samples.

## Healthcare Employees Specifically Excluded and Therefore Newly Entitled to FFCRA Leave

Employees who are no longer excluded and who must now be provided FFCRA leave are those whose services are not, in DOL’s view, integrated into the provision of patient care. The DOL lists the following examples, careful to denote that it is illustrative and not exhaustive:

- IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants and billers.

## Compliance Tips

In order to comply with the new regulations, affected health care providers should immediately conduct a position-specific analysis of their employees who may fall within the above gray areas to make a reasoned determination regarding whether their services are truly integral to the provision of patient care. Gray areas will likely include patient food service and EMR-related services. Employees who serve patients food directly, for example, are one type of service that could arguably be integral to patient care, subject to a careful analysis. Employers should take care to document their decision-making process in this regard before denying leave requests to such employees.