

## DOL Revises FFCRA Regulations in Light of New York Federal Court Decision

Article By:

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As we [previously reported](#), on August 3, 2020 the U.S. District Court for the Southern District of New York (the “District Court”) struck down four provisions of the Department of Labor’s (“DOL”) regulations interpreting employee leave eligibility and entitlement under the [Families First Coronavirus Response Act](#). On September 11, 2020, the DOL issued new regulations (the “Revised Final Rule”) in hopes of clarifying employers’ responsibilities under the FFCRA’s paid leave provisions in light of the District Court’s decision.

The [Revised Final Rule](#), which became effective on September 16, 2020, largely refutes U.S. District Judge Paul Oetken’s critique of the regulations and reinforces the DOL’s original interpretations. Specifically, the revised Final Rule does the following: (i) reaffirms the “work-availability” requirement; (ii) reaffirms employer consent for taking FFCRA leave intermittently; (iii) revises the definition of “healthcare provider”; (iv) clarifies that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable; and (v) corrects an inconsistency regarding when employees may be required to provide notice of a need to take leave. Key provisions are summarized below.

### **1. The DOL Reaffirmed the “Work-Availability” Requirement, Meaning Employees Are Not Eligible for FFCRA Leave Unless the Employer Would Otherwise Have Work for the Employee to Perform**

The District Court vacated the DOL’s mandate that conditioned FFCRA leave eligibility (at least for three of the six qualifying reasons) on the employer having work available at the time the employee sought leave. The District Court concluded that the work-availability requirement was invalid for two reasons: (1) the DOL’s differential treatment of the six qualifying conditions was unreasoned; and (2) the DOL’s “barebones explanation” for the work-availability requirement was “patently deficient” in that the agency failed to explain why an employee is only eligible for leave if there is work available for him or her to perform.

After considering the District Court’s rationale, the DOL’s original position remains largely unchanged. The Revised Final Rule reaffirmed that “paid sick leave and expanded family and medical leave may only be taken if the employee has work from which to take leave.” In the Revised

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Final Rule, the DOL clarified that the “work-availability” requirement applies to all qualifying reasons for leave (not just some), and explicitly included the “work-availability” requirement in all qualifying reasons for leave under the FFCRA.

In response to the District Court’s critique of the DOL’s “barebones explanation” for the work-availability requirement, the DOL provided a more detailed reasoning for its rationale. Specifically, the DOL explained that the language of the FFCRA provides for leave where the employee is unable to work (or telework) due to a need for leave “because” of or “due to” a qualifying reason for leave. The DOL found that the traditional meaning of “because” and “due to” establish a “but-for” standard – meaning that the qualifying reason must be the only reason that the employee was unable to work. In other words, an employee is entitled to FFCRA leave only if the qualifying reason is a “but-for” cause of the employee’s inability to work. The DOL further explained:

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 a but-for cause of the employee’s inability to work. Instead, the individual would have no work from which to take leave.

Additionally, the Revised Final Rule noted that the use of the term “leave” in the FFCRA-context is best understood to require that an employee is absent from work at a time when he or she would otherwise have been working. If an employee is not expected or required to work, he or she is not taking leave. The Revised Final Rule cautioned that removing the work-availability requirement would lead to “perverse” results. For example, some furloughed employees (who do not have an FFCRA-qualifying reason) would not receive paid leave, while other furloughed employees (who also happen to have an FFCRA-qualifying reason) would receive paid leave. The DOL does not believe Congress intended such an illogical result.

The DOL warned employers that they cannot “avoid granting FFCRA leave by purporting to lack work for an employee.” Rather, the DOL emphasized that the availability or unavailability of work must be based on legitimate, non-discriminatory and non-retaliatory business reasons.

## **2. The DOL Reaffirmed the Employer Consent Requirement for Intermittent Leave**

The District Court invalidated the portion of the DOL regulations regarding the requirement that employees obtain employer consent before taking intermittent leave, reasoning that the DOL failed to explain why a “blanket requirement” of employer consent is needed. The Revised Final Rule reaffirmed its initial interpretation, and provided further explanation for why employer approval is needed prior to taking intermittent leave in all situations in which FFCRA leave is permitted.

In its Revised Final Rule, the DOL reasoned that its original interpretation is “consistent with longstanding FMLA principles governing intermittent leave.” The DOL noted, “[d]epending on the reason for taking FMLA leave, the [FMLA] statute requires a medical need to take intermittent leave or an agreement between the employer and employee before an employee may take intermittent leave.” The DOL explained that conditioning intermittent leave on employer-approval is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate risk of COVID-19 contagion. The DOL explained that it is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid “unduly disrupting the employer’s operations.”

Further, the Revised Final Rule’s employer-consent requirement for intermittent leave is akin to the

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FMLA’s employer-consent requirement for caring for a newborn or adopted child, which, as the DOL observed, is similar to caring for a child whose school or place of care is closed because of COVID-19. Additionally, the Revised Final Rule’s employer-consent requirement for intermittent leave is consistent with its definition of “telework” as it also requires employer consent.

Of particular importance, as schools have started to reopen, the Revised Final Rule stated that “[t]he employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid attendance)” because such leave would not be considered “intermittent leave.” For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). This same reasoning applies to longer and shorter alternating schedules, such as where the employee’s child attends in-person classes for half of each school day. The DOL distinguished these examples from a scenario where a child’s school is closed for some period and the employee wishes to take leave intermittently. Under these circumstances, the employee’s FFCRA leave is intermittent and would require his or her employer’s agreement.

### **3. The DOL Narrowed the Definition of “Health Care Provider” to Focus on the Employee**

The FFCRA enables employers to exclude, at their option, “health care providers” from paid leave benefits. The District Court struck down the DOL Final Rule’s broad definition of “health care providers,” which encompassed virtually any employee in the health care field. The District Court took issue with this sweeping definition because it allowed employers to deny FFCRA leave to a large number of employees who are not directly engaged in providing health care services (e.g., an English professor, librarian, or cafeteria manager at a university with a medical school were all considered “health care providers” under the DOL’s initial definition). In the Revised Final Rule, the DOL has narrowed the definition of “health care provider” to include:

- Employees who meet the definition of “health care provider” under 29 CFR 825.102 and 825.125 of FMLA, which generally includes podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and certain Christian Science Practitioners; and
- 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 and that, if not provided, would adversely impact patient care.

Consistent with the District Court’s opinion, the Revised Final Rule’s definition of a “health care provider” now focuses on the role and duties of the employee, as opposed to whether the employer identifies as a health care provider. The Revised Final Rule sets forth a non-exhaustive list of the types of employees who may continue to be excluded from taking FFCRA leave, which includes: (1) nurses, nurse assistants, medical technicians and any other persons who directly provide diagnostic, preventive, treatment or other integrated services; (2) employees providing such services “under the supervision, order, or direction of, or providing direct assistance to” a health care provider; and (3) employees who are “otherwise integrated into and necessary to the provision of health care services,” such as laboratory technicians who process test results necessary to diagnoses and

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treatment.

The Revised Final Rule specifically excludes employees who do not actually provide health care services, “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 DOL reminds employers that the “health care provider” exemption is not work-place dependent. The Revised Final Rule provides a non-exhaustive list of facilities where health care providers may work, including temporary health care facilities that have been established in light of the COVID-19 pandemic. This list includes “a doctor’s office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided.” The DOL noted that a covered employee need not work at one of these enumerated facilities to be considered a health care provider under the FFCRA, and working at one of these facilities does not automatically mean an employee is a health care provider. Rather, the analysis is fact-specific.

#### **4. Employees Must Provide Documentation Supporting Leave and Notice of Leave “As Soon As Practicable”**

The District Court struck down the provision of the DOL Final Rule that required employees to provide advance documentation prior to taking leave, reasoning that it was inconsistent with the FFCRA. In the Revised Final Rule, the DOL eliminated the advance documentation mandate, and instead, requires employees to provide documentation “as soon as practicable.”

The Revised Final Rule also clarified when employees must provide notice before taking FFCRA-leave, which is different under the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLA”). Under the EPSLA, notice cannot be required in advance, it can only be required after the first workday (or portion thereof) for which an employee takes leave. After the first workday, it is reasonable to require the employee to provide notice as soon as practicable. On the other hand, under the EFMLA, notice is required as soon as practicable. Specifically, if the need for EFMLA leave is foreseeable, an employee should provide notice before taking leave. For example, if an employee learns on Monday morning before work that his or her child’s school or day care will be closed on Tuesday due to COVID-19 related reasons, the employee must notify his or her employer as soon as practicable. If the need for EFMLA was not foreseeable—for instance, if that employee learns of the school’s closure on Tuesday after reporting for work—the employee may begin to take leave without giving prior notice, but must still give notice as soon as practicable.

#### **Updated FAQs**

In addition to issuing the Revised Final Rule, the DOL has also updated and added to its [FAQs](#) to reflect its new guidance concerning the application of the FFCRA.

#### **Implications and Employer Takeaways**

While guidance and revisions to the DOL’s Final Rule were highly anticipated in light of the District Court’s decision, many questions still remain unclear. For example, it remains to be seen whether

the Revised Final Rule applies retroactively, which would mean that employers would have to grant FFCRA leave to employees who were not eligible under the DOL's original regulations, but are now eligible under the Revised Final Rule. Additionally, it is unclear whether the DOL will face additional challenges by the State of New York or possibly other jurisdictions.

While neither the District Court's order nor the Revised Final Rule explicitly addressed whether the District Court's decision applied nationwide, the DOL clarified that it viewed the decision as applying on a nationwide basis. Specifically, in [FAQ #102](#), the DOL stated that they "consider[] the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case."

In light of the nationwide applicability, employers in all states should make adjustments to their FFCRA procedures in accordance with the Revised Final Rule. Employers should be cognizant of state and/or local laws that have been enacted in light of the COVID-19 pandemic, specifically those that have interpreted or adopted portions of the DOL's Final Rule. Importantly, the Revised Final Rule has immediate impact on health care employers, particularly those that have exempted all or some of their employees from FFCRA leave as a result of the DOL's initial broad definition concerning health care providers. As explained above, it is unclear whether employers must retroactively grant paid leave benefits to employees who have now qualified under the Revised Final Rule. Good faith reliance on the former DOL Final Rule may provide a defense to any claim for retroactive benefits. Employers should continue to monitor DOL announcements regarding further updates to the Revised Final Rule and the FAQs on the FFCRA. Employers with questions about the impact of these revised regulations should consult with experienced employment counsel.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

*\*Jamie Moelis contributed to this article.*

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