

COVID-19 Legal Update

September 29, 2020

DOL MAKES CHANGES TO FAMILIES FIRST CORONAVIRUS RESPONSE ACT PAID LEAVE RULES

By Cecilia M. Suh

In our September 9, 2020, *COVID-19 Legal Update* email, we mentioned a recent court case that invalidated certain Department of Labor (DOL) regulations for the two new paid leaves available under the Families First Coronavirus Response Act (FFCRA). In response to this decision, the DOL recently issued [revised regulations](#) regarding workers' rights and employers' responsibilities under FFCRA's paid leave provisions.

The [revised FFCRA regulations](#) went into effect on September 16, 2020. Among other rules, they discuss:

- **The DOL's original work availability rule:** The DOL reaffirmed that an employee may only take FFCRA leave if the employee has actual work from which to take leave. In other words, an employee cannot take FFCRA leave if the employer does not have work available for the employee to perform or the employee is not scheduled to work (such as during furloughs, temporary layoffs, or temporary or permanent business closures). The DOL, however, emphasized that an employer cannot avoid granting FFCRA leave by falsely claiming to lack work for an employee.
- **The DOL's original employer approval rule for intermittent leave:** The DOL reaffirmed that employees must first obtain approval from their employers to take FFCRA leave on an intermittent basis. Intermittent leave is leave taken in separate blocks of time for a single leave-qualifying reason rather than for a continuous period of time. An employee who is teleworking (and not reporting to the worksite), for example, may take intermittent leave for any of the FFCRA qualifying reasons as long as the employer consents. The DOL, however, noted that employer approval does 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) basis because this is not considered intermittent leave.
- **A revised definition of "health care provider":** The DOL limited its previously broad definition of "health care providers" that employers may exclude from eligibility for FFCRA paid leaves. The revised definition, however, still includes employees who provide diagnostic, preventive, or treatment services or other services that are integrated with and necessary to the provision of patient care.
- **Clarification that employees must provide required documentation supporting their need for FFCRA leave to their employers "as soon as practicable":** The DOL updated its documentation rule, and employees no longer need to provide supporting documentation prior to taking FFCRA leave. Instead, they may provide it as soon as practicable, which in most cases will be when the employee provides notice of the need for FFCRA leave.
- **Clarification that employees should generally provide notice before taking certain FFCRA leave if the leave is foreseeable:** The DOL clarified that employees are required to provide notice of expanded family and medical leave under the FFCRA as soon as practicable and, if the need for leave is foreseeable, that will generally mean providing notice before taking leave. For example, if an employee

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learns on Monday morning before work that school will close on Tuesday due to COVID-19, the employee should notify the employer as soon as practicable (likely on Monday at work). If the need for leave was not foreseeable (e.g., if the employee learns school is closing on Tuesday after reporting for work that same day), the employee may take leave without giving prior notice but must still give notice as soon as practicable.

The DOL has also updated its FFCRA FAQs in light of the updated regulations. These FAQs are available [here](#). If you have questions or concerns about whether the changes to FFCRA leaves may affect your business, consult your legal counsel.

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