

# HR Insights

## DOL Revises and Clarifies FFCRA Temporary Rule Effective September 16, 2020

The Department of Labor (DOL) revised and clarified the FFCRA temporary rule providing for emergency paid sick leave and expanded family leave. The revisions are in response to the New York federal court's decision on August 3, 2020 finding parts of the temporary rule invalid. The revisions are effective September 16 and end when the FFCRA sunsets on December 31, 2020.

### What DOL Revised and Clarified

DOL revised and clarified the following:

- Reaffirmed and explained the **work-availability requirement**
- Reaffirmed and explained the employer-approval requirement for **intermittent leave**
- Revised the **definition of "Health Care Provider"** to focus on the employee for purposes of determining whether the employee may be excluded from taking leave
- Revised the **employee notification and documentation requirements** to improve consistency

A summary of each of these follows.

### Work Availability Requirement

DOL reaffirmed and clarified that an employee is entitled to FFCRA leave only if the qualifying reason for the leave is the cause of an employee's inability to work (that is, only if the employee has work from which to take leave). Therefore, an employee is **not** entitled to FFCRA leave if the employer does not have work available for the employee. DOL also clarified that this requirement applies to all of the qualifying reasons for taking FFCRA emergency paid sick leave and expanded family and medical leave.

### Intermittent Leave and Additional Requests for Leave

DOL reaffirmed that an employer's approval is needed for an employee to take emergency paid sick leave or expanded family and medical leave. In addition, DOL explained the difference between intermittent leave and additional requests for leave.

#### *Intermittent Leave*

Under federal FMLA law, intermittent leave is leave taken in separate periods of time versus for one continuous period. FFCRA, which amended FMLA, is silent on intermittent leave but Congress gave DOL broad regulatory authority, including to ensure the consistency of the two laws. DOL took the position that the absence of the language under FFCRA did not categorically permit or prohibit intermittent leave. DOL reaffirmed that an employee reporting to a worksite can take FFCRA leave on an intermittent leave basis only when leave is to care for their child whose school, place of care, or childcare provider is unavailable due to COVID-19, and only with the employer's approval. Intermittent leave for the other qualifying reasons is not available for those working at the worksite as the other reasons for leave pose a higher risk of spreading COVID-19. However, intermittent leave may be taken with the employer's approval for any of the qualifying reasons if teleworking.

#### *Additional Requests for Leave: Children Whose Schools Operate on Alternate Day Schedule*

DOL explained that an employer's approval for intermittent leave does not apply to employees taking FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day or other hybrid-attendance schedule. DOL reasons that for FFCRA purposes, each day of school closure is a separate reason for FFCRA leave that ends when the school opens the next day and thus is treated as additional requests for leave.

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## Definition of Health Care Provider

DOL revised the definition of Health Care Provider for purposes of determining employees that can be excluded from FFCRA's entitlement to paid leave. Under the revised definition, a Health Care Provider is anyone who falls under FMLA's definition of health care provider and others employed to provide diagnostic services, preventive services, treatment services, or other services that are an integrated and necessary part of patient care. Examples of healthcare workers that can be excluded from FFCRA's entitlement to paid leave include physicians, nurse practitioners, nurses, nurse assistants, medical assistants, and laboratory technicians. Examples of employees who are not healthcare providers include IT professionals, building maintenance staff, HR staff, cooks, food service workers, records managers, consultants, and billers.

## Employee Notification and Documentation Requirements

DOL revised the employee notification and document requirements to clarify that the documentation an employee must provide the employer to support their need for leave must be provided as soon as practicable. In addition, DOL clarified that an employee must notify the employer of the need for expanded family and medical leave as soon as practicable.

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