

HR Bulletin

• September 25, 2020 •

Families First Coronavirus Act (FFCRA) Regulation Revisions

After the Families First Coronavirus Act (FFCRA) was implemented on April 1, 2020, the Department of Labor (DOL) sought to clarify many of the lingering questions on how to carry out the provisions of the Act by issuing one hundred [FAQs](#). After about four months, presumably seeking to aid employees in gaining more benefits and flexibility regarding taking leave, a federal court in New York then vacated **four key provisions** of the DOL's Final Rule that implemented the FFCRA. As a result, on September 11, and **effective September 16**, the DOL announced revisions and clarification to the FFCRA regulations in the following four areas:



ONE. The Definition of a Healthcare Provider was REVISED

The FFCRA permits employers to exclude "health care providers" and "emergency responders", but the original definition for a health care provider relied more on the employer's line of business than the employee's function within the organization; this rendered many employees ineligible for leave. Therefore, the DOL narrowed its definition of a health care provider in order to align with the true intent of the exemption that seeks to prevent disruptions to the health care system's capacity to respond to the COVID-19 public health emergency and other critical public health and safety needs. The following positions are deemed exempt from the FFCRA:

- Physicians and others who make medical diagnoses
- Individuals employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of health care

Examples of exempt roles would be "doctors of medicine and osteopathy" such as podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse

midwives, clinical social workers, physician assistants, and those in similar work. In addition, nurses, nurse assistants, medical technicians, and laboratory technicians would be exempt.

Individuals performing the following duties would also be exempt:

- **Diagnostic Services.** Taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic test or procedures (including the interpretation of test results)
- **Preventive Services.** Screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems
- **Treatment Services.** Performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments
- **Other Integrated and Necessary Services.** Performing bathing, dressing, and hand feeding; taking vital signs; setting up medical equipment for procedures; and transporting patients and samples

Alternately, employees in the following positions **MAY** qualify for FFCRA leave:

- Information Technology (IT) professionals
- Building Maintenance staff
- Human Resources personnel
- Cooks and other food service workers
- Records managers
- Consultants
- Billers



TWO. The Work-Availability Requirement was REAFFIRMED and CLARIFIED

The DOL maintained that employees may take FFCRA paid sick leave or expanded family and medical leave only if the employee has work available and cannot work due to one of the FFCRA qualifying reasons for leave. Therefore, a furloughed employee is not eligible for FFCRA leave benefits. The FFCRA's purpose was to discourage employees who may be infected with COVID-19 from reporting to work and to protect infected employees from retaliation for missing work.

Employees who are furloughed, however, may still be eligible for unemployment benefits and they would have no need for protection from retaliation while on furlough. Similar to traditional FMLA, if a furloughed employee finds himself in a situation that falls under one of the six reasons for FFCRA, the employee need not exhaust his/her leave allotment while on furlough.



THREE. The Intermittent Leave Employer Consent Requirement was REAFFIRMED and CLARIFIED

The DOL reaffirmed that an employee must still obtain his/her employer's approval prior to taking FFCRA leave on an intermittent basis. The Department further clarified that the FFCRA only permits intermittent leave when taking care of one's child whose school, place of care, or child care provider is closed or unavailable due to COVID-19. Per the regulations, allowing unrestricted intermittent leave for the other FFCRA qualifying reasons (i.e. leave for an employee who is ill, directed to quarantine, or is caring for someone who is ill) relate to a higher risk of spreading the virus and would not support the goal of preventing the spread of the illness. However, an employee who is teleworking may take intermittent leave for any of the FFCRA's qualifying reasons as long as the employer consents.

Interestingly, employer approval is not needed when an employee is taking FFCRA leave in full-day increments to care for a child because of closure or unavailability of school, place of care, or child care provider. For example, if a school is only closed on Tuesday and Thursday, under the FFCRA, this arrangement is not considered "intermittent" because the school opens and closes intermittently. Similarly, if a child conducts school online in the afternoons only, because of the school's required schedule, the parent need not seek approval from the employer to qualify.



FOUR. The Notice and Documentation Timing Requirements were REVISED

The original language of the regulations stated that employers could not require advance notice of the need for Emergency Paid Sick Leave (EPSL) or Emergency Family and Medical Leave (EFMLA). However, the DOL revised the regulations to distinguish between the two types of leave. For EPSL, employees must provide notice only after the first workday (or partial workday) of leave. For EFMLA, if the necessity for leave is foreseeable, an employee shall provide the employer with such notice as soon as it is practicable.

To remain consistent with the notice requirements, the documentation requirement timing was also revised. Originally, the DOL required employees to provide the following to employers **PRIOR TO** taking the leave: **(1)** the employee's name, **(2)** the dates for which leave is requested, **(3)** the qualifying reason for the leave, and **(4)** an oral or written statement that the employee is unable to work. For certain qualifying reasons, additional documentation is required. The Department has now determined that the documentation need not be presented to the employer prior to the leave; the employee should provide that documentation "as soon as practicable". Depending on the reason for leave, this could be in advance if the leave is foreseeable or after the first workday of leave, if the leave is unforeseen and/or related to EPSL.

While there may still be challenges to these changes, employers should plan on proceeding with these new rules. They should specifically look at who is eligible for leave and how they are responding to the requests for leave from an administrative point of view. In addition, employers should pay attention to the projected **sunset date** for the Act (**December 31, 2020**) and whether any extensions will be proposed and granted.