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Employment Law *Trending Now*

The DOL Issues a New Temporary Rule, Effective Immediately, Narrowing Provisions of The FFCRA and Providing Guidance on Others

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "FFCRA"). The FFCRA, which became effective on April 2, 2020, and expires Dec. 31, 2020, requires certain employers to provide qualified employees with paid sick and other leave under the expanded Family and Medical Leave Act ("EFMLA").

In the wake of an Aug. 3, 2020, ruling ("Court Ruling") from the Federal District Court for the Southern District of New York, invalidating certain provisions of the Department of Labor's ("DOL") temporary rule issued April 1, 2020, which implemented the leave provisions of the FFCRA, the DOL issued a new temporary rule ("Rule") on Sept. 11, 2020, to address the Court Ruling. **The Rule is effective immediately**.

One question the Rule answers is whether a "health care provider" can opt out of the FFCRA, and deny paid leave benefits to its employees, simply because it is a health care provider. That answer is a resounding, no. The Rule clarifies and narrows the categories of employees to which the health care provider exemption applies.

The Rule also provides important guidance about whether an employer must allow intermittent leave for e-learning or other school closures. What

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may come as a surprise to some employers is that the DOL does not classify certain leaves of absence due to e-learning or school closures as intermittent, even if leave is not taken consecutively or is taken for partial days. Because of this, employees may be entitled to take paid leave in several blocks of time without the need for employer approval.

This alert explains these and other provisions of the Rule and how they may impact an employer's administration of leave under the FFCRA.

A. Summary of the Leave Provisions of the FFCRA

The FFCRA affords eligible employees with up to 80 hours of paid sick leave for one or more of the following reasons:

1) If the employee is subject to federal, state or local government quarantine or isolation order;
2) If the employee is recommended to quarantine by a health care provider;
3) If the employee has Coronavirus symptoms or needs medical attention;
4) The employee needs to care for an individual subject to a mandatory quarantine or a recommendation to quarantine;
5) The employee needs to care for a child under 18 years of age if the school/place of care is closed, or child care provider is unavailable due to COVID-19; or
6) If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

An employee may be entitled to additional paid leave, up to 10 weeks (in addition to the 80 hours of paid sick time described above), under the EFMLA provisions of the FFCRA. The only qualified reason for paid leave under the EFMLA is #5 above.

B. The Rule

In its Rule, the DOL addressed each of the grounds that formed the basis for the Court Ruling and provided key clarification to guide future employer administration of the FFCRA.

1. The DOL reaffirmed that paid leave under the FFCRA may be taken only if the employee has work from which to take leave.

Over the course of the past several months, employers have questioned whether an employee is entitled to paid leave under the FFCRA if, due to COVID-19, the employer did not have any work for the employee. The Rule reaffirmed that, in order to be entitled to paid leave under the FFCRA, the employee must have been able to work "but for" one of the six qualifying reasons for leave described above. This means that, even if an employee needs leave for one of the qualifying reasons, if there is no work for an employee to perform (perhaps due to a temporary

shut down or the employee is furloughed), the employee would not be entitled to paid leave under the FFCRA. In this situation, the "but for" cause for the need for leave is the lack of work, not one of the COVID-related reasons enumerated above.

2. The DOL reaffirmed that, where intermittent FFCRA leave is permitted, an employee must obtain employer approval, but it explained that some leaves of absence for childcare or school closures, even if not taken in one block of time, may not be deemed intermittent and may need to be allowed without employer approval.

Intermittent leave is leave taken in separate blocks of time for a single qualifying reason. For example, if an employee has been diagnosed with cancer and needs to take time off of work one day a week for chemotherapy treatment, that leave would be intermittent. Intermittent leave is only allowed under the FFCRA for qualifying reason #5 above relating to a lack of childcare or school closures. In the Rule, the DOL reaffirmed its position in the April 1, 2020, temporary rule and explained that employer approval is required before an employee is permitted to take paid leave under the FFCRA intermittently.

Interestingly, the DOL explained that the 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) basis because such leave would not be intermittent. The DOL reasoned that 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). Intermittent leave is not needed under these circumstances because the school literally closes (as that term is used in the FFCRA) and opens repeatedly.

The DOL applied the same reasoning to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person.

This is distinguished from the scenario where the school is closed for a period of time, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require the employer's agreement. For example, if an employee's child is solely e-learning, without any in-person instruction, and the employee wanted to take a few hours of leave each day to assist his or her child with e-learning, the employee would need the employer's permission to take those few hours each day as paid leave under the FFCRA.

3. The Department revised the definition of "health care provider" by limiting the employees to which the term applies.

The FFCRA contains an exemption for "health care providers" from eligibility for paid leave benefits under the FFCRA. If applicable, the entity employing the health care provider may, to such extent, opt out of providing benefits under the FFCRA. Before the Rule, there was much controversy about whether an employee who was not actually providing patient care could be exempt from the FFCRA simply because the employee worked for a hospital, doctor's office, clinic or other health care facility. The Rule addresses this question by rejecting a blanket exemption for employees simply because those employee work for an entity that provides health care services. Prior to the Rule the focus was on the employer. With the issuance of the Rule, the focus is now on the employee.

The DOL also identified employees who are health care providers by focusing on the role and duties of those employees, rather than their employers.

The Rule expressly states that an employee is a health care provider if he or she is "capable of providing health care services." A health care provider must be "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care."

Diagnostic services include, for example, taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results. According to the DOL, these services are integrated and necessary because without their provision, patient diagnosis would be undermined and individuals would not get the needed care.

Preventative services include, among other things, screenings, check-ups and counseling to prevent illnesses, disease or other health problems. As with diagnostic services, preventative services are integrated and necessary because they are an essential component of health care. For example, a nurse providing counseling on diabetes prevention or on managing stress would be providing preventative services and, therefore, would be a health care provider.

Treatment services are the third category of services that make up health care services. Treatment services include, for example, performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments.

The last category of health care services are those services that are integrated with and necessary to diagnostic, preventive or treatment services and, if not provided, would adversely impact patient care. The DOL explained that this final category is intended to cover other

integrated and necessary services that, if not provided, would adversely affect the patient's care. Such services include, for example, bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples. These tasks must be integrated and necessary to the provision of patient care, which significantly limits this category.

The DOL identified several types of employees who may qualify as "health care providers" for purposes of the FFCRA exemption:

1. Physicians;
2. Nurses;
3. Nurse assistants;
4. Medical technicians;
5. Laboratory technicians; and
6. X-ray technicians.

The DOL also identified several categories of employees who do not generally qualify as "health care providers" for purposes of the exemption:

1. Technology (IT) professionals;
2. Building maintenance staff;
3. Human Resources personnel;
4. Cooks;
5. Food service workers;
6. Records managers;
7. Consultants; and
8. Billers.

These lists are not meant to be exhaustive and other types of employees may or may not qualify as "health care providers".

4. The Department clarified that the information an employee must give the employer to support the need for leave should be provided to the employer "as soon as practicable."

Under the FFCRA, the employer may require documentation to support a qualifying need for leave, such as: (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; (4) an oral or written statement that the employee is unable to work; (5) the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19; (6) the name of the child being cared for; (7) the name of the school, place of care, or child care provider that has closed or become unavailable; and (8) a representation that no other suitable person will be caring for the child during the period for

which the employee takes leave. Some of the documentation listed above may only be appropriate for certain qualifying reasons for leave under the FFCRA.

In the Rule, the DOL clarified that this documentation does not need to be given "prior to" taking leave, but rather may be given "as soon as practicable." With that being said, advanced notice of leave under the EFMLA may be required if the need for leave is foreseeable. For example, if an employee requires leave due to a school closure on Mondays and Wednesdays every week, the employer may require the employee to provide advanced notice of the need for such leave because the need for leave is foreseeable.

C. Key Takeaways

Although the Rule addresses and clarifies a few narrow provisions of the FFCRA, those provisions are broad reaching and may apply to many employers that are covered by the FFCRA. In summary, the Rule:

- Reaffirmed that an employee is not entitled to paid leave under the FFCRA when there is no work to perform, such as when the employer has temporarily shut down or the employee has been furloughed due to lack of work;
- Reaffirmed that, in general, intermittent leave may only be permitted with employer approval;
- Clarified that some leaves of absence for childcare or school closures, even if taken a day here, a day there, or half a day here and half a day there, may not be considered intermittent leave for which employer approval is required;
- Revised the definition of "health care provider" by limiting those employees who fit within that definition for purposes of applying the health care exemption of the FFCRA; and
- Clarified that documentation to support leave must be provided "as soon as practicable," except where the need for leave is foreseeable under EFMLA. In that scenario, an employer may require documentation in advance of the leave.

*If you have any questions about this Alert, or if you would like assistance in revising your FFCRA policies, or implementing the Rule, please contact the author listed below or the **Aronberg Goldgehn attorney** with whom you work.*

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