

## DOL Holds Firm on Several FFCRA Paid Leave Provisions

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Quick on the heels of the New York federal court decision invalidating four aspects of the U.S. Department of Labor's Families First Coronavirus Response Act (FFCRA) paid sick leave and paid child-care leave regulations, the department has responded with [updated and more fully explained regulations](#).

For the most part, the department held firm on its FFCRA paid leave regulations, particularly with respect to the work availability requirement and the requirement that an employer must agree to intermittent paid sick leave and paid child-care leave where such leave is permitted.

The regulations take effect September 16.

**Work availability requirement.** In order to be eligible for paid sick leave and paid childcare leave under the FFCRA, an employer must have work available for the employee from which leave is to be taken. Employees on layoff or temporary furlough during the COVID-19 pandemic are thus not eligible for FFCRA paid leave. The department clarified the work availability requirement applies to paid sick leave requested for any of the six reasons due to COVID-19, as well as expanded family and medical leave in the event an employee's school or day care is closed or unavailable due to COVID-19 reasons. The six reasons are:

- Being subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- Being advised by a health care provider to self-quarantine due to COVID-19 concerns.
- Experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Caring for another individual who is either subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to COVID-19 concerns.
- Caring for the employee's son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID-19 related reasons.
- Experiencing any other substantially similar condition as specified by the secretary of the U.S. Department of Health and Human Services.

**FFCRA intermittent leave for child care needs employer agreement.** With regard to FFCRA leave taken due to a child's school or day care closure, requiring employer agreement avoids unduly disrupting the employer's operations. Interestingly, the department noted 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" - a continuous block of leave begins and ends on each day.

**FFCRA intermittent leave for permitted paid sick leave reasons also needs employer agreement.** The

department reaffirmed its prior position that an employee must first get the employer's agreement in all situations in which intermittent FFCRA leave is permitted. Under the FFCRA paid sick leave provisions, intermittent leave is available to employees who normally report to the physical workplace only for caring for the employee's son or daughter whose school, place of care, or child care provider is closed or unavailable due to COVID-19 related reasons. Intermittent paid sick leave is also available to employees who telework for any of the six paid sick leave reasons, above. The department reiterated its position that these employees must get employer approval for intermittent paid sick leave for a permitted reason under FFCRA.

**A more narrow definition of health care provider.** The biggest change the department made to the FFCRA rules applies to the narrowed definition of "health care provider." The department clarified that "health care providers" means employees who are medical professionals under the Family and Medical Leave Act, and other 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 that if not provided would adversely impact patient care. Included within the definition are nurses, nurse assistants, medical technicians, as well as a laboratory technician who processes test results and those who provide diagnostic health care services. Not included in this definition are information technology professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers.

**Clarification of employee notice and documentation.** Finally, the department clarified that an employee is not required to provide notice or documentation in advance of the need for leave to take FFCRA paid sick leave. Rather, notice and the information the employee must give the employer to support the need for paid sick leave should be provided to the employer as soon as practicable, after the first day of leave is taken. In the case of FFCRA paid child care leave, advanced notice of leave is required as soon as practicable. If the need for leave is foreseeable, that will generally mean providing notice before taking leave. Similarly, information supporting the need for FFCRA paid child care leave should be provided with the notice, or as soon as practicable.

The rule is temporary, as these paid sick leave and expanded family and medical leave requirements will expire December 31.

If you have questions about the new regulations, please [contact me](#) or any member of the [Barley Snyder Employment Practice Group](#).

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