

U.S. Department of Labor Revises Regulations to Clarify Paid Leave Requirements under the Families First Coronavirus Response Act (FFCRA) - Effective September 16, 2020 through December 31, 2020

Due to a recent federal court ruling, the Department of Labor's Wage and Hour Division issued a second set of rules on September 11th that clarify workers' rights and employers' responsibilities regarding paid leave under the FFCRA. Here are the key changes and clarifications made in the revised rule that employers need to know about, which are slated to go into effect on September 16th:

The revisions do the following:

- **Reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave.**
- **Reaffirm and provides additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently when such intermittent leave is permitted by the Department's regulations.**
 - The Department expressly created a regulation that permits an employee to take FFCRA leave on an intermittent basis only when taking leave to care for their child whose school, place of care, or child-care provider is closed or unavailable due to COVID-19. This is contingent upon the employer's consent. The Department confirmed this remains the case.
 - Even under the FMLA, foreseeable intermittent leave should not unduly disrupt the employer's operations, lending further support to the need for employer approval in certain instances.
- **Revises the definition of "health care provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. Also gives examples of employees who cannot be excluded.**
 - Under the new rule, employers may also elect to exempt nurses, nurse assistants, medical technicians, and laboratory technicians who process test results; they too are considered "health care providers."
 - The revised rule gives the following non-exhaustive list of examples of employees who may not be excluded: information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers.
- **Clarifies that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.**
 - Employers should be careful not to require supporting documentation as a precondition to providing FFCRA leave and should provide employees a reasonable opportunity to provide the required documentation.
- **Corrects an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.**

DOL revised the regulation so that the "only after" language applies solely to EPSL. It then added that to take EFMLA, an employee must provide notice as soon as practicable, which is before the first day leave begins if the need for EFMLA is foreseeable.

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