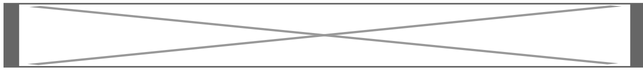

Insights

What Employers Need to Know about the Revised FFCRA Regulations

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On September 11, 2020, the Department of Labor (DOL) revised certain provisions of the Families First Coronavirus Response Act (FFCRA) regulations in light of a recent federal court decision by the U.S. District Court for the Southern District of New York ("District Court").[1] The **revised FFCRA** regulations took effect on Wednesday, September 16, 2020. Employers should carefully review the changes to comply with the revised FFCRA regulations going forward.

Summary of Changes

Some of the changes were minor, while others have a more considerable impact on how employers approach FFCRA leave in general. The DOL's revisions provide the following changes, as explained in further detail below:

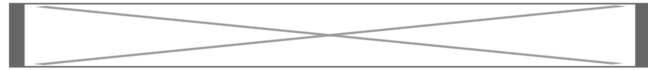
- Revise the definition of "health care provider" as it relates to the ability of employers to exclude certain employees from the leave provisions under the FFCRA because such employees are necessary for the provision of patient care;
- Clarify that employees are only eligible for FFCRA leave under a qualifying reason if the employees have work to perform;
- Specify that an employee's ability to take intermittent leave is at the discretion of the employer; and,
- Clarify the notice requirements for taking FFCRA leave.

FFCRA Revisions and Effect on Employers

The FFCRA requires employers with 500 or fewer employees to provide paid leave under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) to eligible employees.

Definition of Health Care Provider

Much confusion and debate have existed concerning the definition of a "health care provider" under the FFCRA, particularly with respect to the fact that there is an exemption available to employers such that even if the employer is covered by FFCRA and the employee would otherwise be eligible for leave under the FFCRA, the employee can be denied such leave because he or she is a health care provider. When Congress passed the FFCRA, it borrowed the definition of "health care provider" from the Family and Medical Leave Act, which is a very narrow definition. However, when the Department of Labor issued its regulations on the FFCRA, the



term “health care provider” was expanded significantly. In August, the District Court ruled that the definition of “health care provider” set forth in the regulations was invalid because it did not include “at least a minimally role-specific determination” as to which persons are “capable of providing healthcare services” as required in the FMLA’s definition of “health care provider.”[2]

As a result of the District Court decision, the DOL has revised its definition of “health care provider” in the FFCRA regulations. As revised, the term includes those employees who are both capable of providing and 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. It is insufficient to merely be employed by an entity that provides health care services. The revised rule now includes not only doctors, nurse practitioners, and physicians’ assistants, but also nurses, nurse assistants, medical technicians, and others who may not directly interact with a patient but nonetheless provide services that are integrated with and necessary components of patient care.

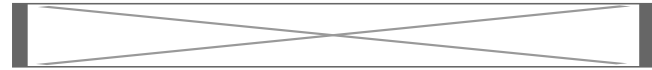
With respect to the now-articulated categories of services that would render an employee a health care provider, the DOL has explained that diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results. Preventative services include screenings, check-ups, and counseling to prevent illness, disease, or other health problems. Treatment services include performing surgery or other invasive or physician interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments. The final category of health care services, those that are sufficiently integrated with and necessary to the other categories such that if not provided would adversely impact patient care, include such things as bathing, dressing, feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples. The DOL has specifically identified positions that are not viewed as integrated into the provision of patient care, including IT professionals, building maintenance staff, HR personnel, cooks, food service workers, records managers, consultants, and billers. It views these services to be too attenuated to the provision of patient care.

Employee Eligibility under the FFCRA

Under the EPSLA, employees are eligible for “Paid Sick Leave” if they meet one of the six qualifying reasons. Before the legal challenge to the FFCRA, three of the qualifying reasons explicitly stated that the employee was only eligible for leave if the employee was prevented from working because of the qualifying reason, i.e., that the employee had work to perform but is unable to because of the qualifying reason, the “work-availability requirement.”

The final rule of the FFCRA provided explanations concerning the qualifying reasons for Paid Sick Leave;3 however, the District Court found that some of the explanations did not expressly state the work-availability requirement. As a result, the DOL, in its updated rule, has clarified the following qualifying reasons for Paid Sick Leave:

- *Advised by a health care provider to self-quarantine*. An employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(ii) of this section only if:
  - (i) A health care provider advises the employee to self-quarantine based on a belief that:
    - (A) The employee has COVID-19;
    - (B) The employee may have COVID-19; or
    - (C) The employee is particularly vulnerable to COVID-19; **and**
  - (ii) Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by Telework. An employee who is advised to self-quarantine by a health care provider may not take Paid Sick Leave where the employer does not have work for the employee.



- *Seeking medical diagnosis for COVID-19.* An employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(iii) of this section if the employee is experiencing any of the following symptoms:
  - (i) Fever;
  - (ii) Dry cough;
  - (iii) Shortness of breath; or
  - (iv) Any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.
  - (v) Any Paid Sick Leave taken for the reason described in paragraph (a)(1)(iii) of this subsection is limited to time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19. An employee seeking medical diagnosis for COVID-19 may not take Paid Sick Leave where the employer does not have work for the employee.
- *Substantially similar condition.* An employee may take leave for the reason described in paragraph (a)(1)(vi) of this section if he or she has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the Effective Period, April 1, 2020, to December 31, 2020. An employee may not take Paid Sick Leave for a substantially similar condition as specified by the Secretary of Health and Human Services where the employer does not have work for the employee.

Intermittent Leave

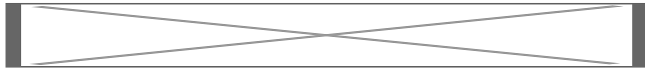
Under the FFCRA, employees may take FFCRA leave on an intermittent basis. Still, the ability to take intermittent leave depends on the employee's work location, the employee's qualifying need for leave, and, most critically, whether the employer approves intermittent leave.

If an employee is reporting to a worksite, the employee may only take "Expanded Family and Medical Leave" and Paid Sick Leave if the employee's qualifying need for leave arises from having to care for the employee's son or daughter whose school or place of care is closed or unavailable due to reasons related to COVID-19. If employees are teleworking, they can take FFCRA leave intermittently regardless of the qualifying need for leave.

The DOL clarified that FFCRA leave may only be used intermittently with the employer's consent. In discussing these changes, the DOL explicitly addressed intermittent leave, including alternate or hybrid school arrangements. The DOL reasoned that hybrid or alternate school arrangements, where students are physically present in school a few days each week and attending school via e-learning the other days, do not constitute intermittent leave. This is because each day the employee is unable to work because the school closure is a new qualifying need. As a result, employer approval is not needed because it is not intermittent leave. The same applies to shorter arrangements such as half-days physically in school and half-days via e-learning; however, this only applies when the school is physically closed for that time or to the specific student. This arrangement differs from a scenario where the school is closed for a certain period, such as a semester, and the employee chooses to use FFCRA leave for only a portion of that period, which would constitute intermittent leave and require employer approval.

Notice Requirements

The DOL clarified the timing of notice for taking FFCRA leave. For Paid Sick Leave, employees are not required to provide notice of their need for Paid Sick Leave before actually taking such leave. Instead, employees may only require notice after the first workday and as soon as practicable depending on the specific facts and circumstances surrounding such leave. Generally, if Paid Sick Leave is foreseeable, employees



should provide advance notice to employers. For Expanded Family and Medical Leave, employees must provide notice as soon as practicable.

As for documentatin supporting FFCRA leave, employees must provide documentation to their employer containing the following information as soon as practicable:

- (1) Employee's name;
- (2) Date(s) for which leave is requested;
- (3) Qualifying reason for the leave; and
- (4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

Takeaways

Employers, especially employers of health care providers, should closely evaluate these revisions and ensure that requests for FFCRA leave are handled appropriately. Employees should also encourage Human Resources professionals within their organizations to understand the implications of these changes on future requests for FFCRA leave.

If you need assistance reviewing and updating your policies related to the FFCRA, or determining how these revisions affect your business, please contact **Amy J. Adolay** or any member of Krieg DeVault LLP's Labor and Employment Law practice group.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] New York v. U.S. Dep't of Labor, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).
*[2] New York, 2020 WL 4462260, at *10.*
[3] More information on the qualifying reasons for leave can be found ***here****.*