CLIENT ALERTS & INSIGHTS

# DOL Narrows "Health Care Provider" Exclusion under the FFCRA; Affirms Other Guidance Invalidated by Federal Court

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Authors: Johanna Fabrizio Parker, W. Clifford Mull

The Department of Labor has clarified and revised its temporary rule (the "Rule") implementing the Families First Coronavirus Response Act ("FFCRA") in response to a federal court's ruling that certain parts of the Rule were invalid. The revised Rule becomes effective on September 16, 2020.

The revised Rule:

- Narrows the definition of "health care provider" to include only employees who meet the definition of "health care provider" under the Family and Medical Leave Act (FMLA) 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.
- Reaffirms and provides additional explanation of the Department's position that employees may take FFCRA leave only if work would otherwise be available to them-in other words, the qualifying reason for leave must be a but-for cause of the employee's inability to work.
- Reaffirms and provides additional explanation of the requirement that employees must have employer approval to take FFCRA leave intermittently.
- Clarifies that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.

## Why is the department revising its FFCRA Rule?

President Trump signed the FFCRA into law on March 18, 2020. The FFCRA granted the Department the authority to issue regulations, which it did via the Rule on April 1, 2020. On April 14, 2020, the State of New York sued the Department in the Southern District of New York challenging certain parts of the Rule under the Administrative Procedure Act. On August 3, 2020, the District Court concluded that certain parts of the Rule were invalid. In response to the District Court's decision, the Department has changed the Rule with respect to the definition of "health care provider." Otherwise, the Department substantively reaffirmed the other provisions in the Rule that the District Court invalidated by providing additional explanation and clarification of the Department's original Rule.

## "Health care provider" definition narrowed.

The FFCRA allows employers to exclude employees who are "health care provider[s]" or who are "emergency responder[s]" from eligibility for FFCRA leave. In the original Rule, the Department provided a broad definition of "health care provider" as "*anyone* employed" at any of a number of listed health care entities, facilities, or institutions, including doctor's officers, hospitals, and nursing homes. (For the complete list, see our summary of the original Rule's definition of "health care provider" here.) Also included in the definition of "health care provider" in the original Rule was anyone employed by an entity that contracts with a covered health care entity to provide services or to maintain the operation of the facility-a definition that necessarily included janitorial services, laundry services and food services, among other contractors.

The District Court concluded that the Department's definition of "health care provider" was overly broad because it swept certain employees of health care facilities "whose roles bear *no nexus whatsoever* to the provision of healthcare services." In response, the Department considerably narrowed the reach of the definition of "health care provider" in the revised Rule. Health care providers are now limited to:

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices (the definition set forth in the FMLA regulations); and
- Employees "employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care." With respect to these covered services, the types of employees included are limited to:
    - Nurses, nurse assistants, medical technicians, and any other persons who directly provide the covered services;
    - Employees providing the covered services under the supervision, order, or direction of, or providing direct assistance to, a person directly providing a covered service (i.e., a doctor, nurse, nurse assistant, medical technician); and
    - Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

The revised Rule explains that "health care providers" *could* include employees who work at a variety of employers, including doctors' offices, hospitals, nursing facilities, nursing homes, home health care providers, and pharmacies. However, working at one of these types of facilities does not necessarily mean that an employee is a health care provider-the revised Rule focuses on the work completed by a specific employee, and not the general services provided by the employer.

**The department reaffirms that FFCRA leave may only be taken if work is otherwise available to the employee.**

The Department's original Rule stated that an employee is entitled to FFCRA leave only if the qualifying reason is a "but-for" cause of the employee's inability to work. If the employee would have

been unable to work regardless of whether he or she had a FFCRA-qualifying reason (i.e., if the employer had closed the worksite), the employee was not entitled to FFCRA leave. The District Court invalidated the Rule's work-availability requirement, holding that the Department's explanation of its decision in implementing this provision of the Rule did not meet the "minimal requirement of reasoned decision-making."

In response, the Department reaffirmed its position in the original Rule that an employee is not eligible for FFCRA leave when work is unavailable, and provided a more comprehensive explanation of its position. In its commentary provided with the revised Rule, the Department noted that removing the work-availability requirement could lead to perverse results. For example, when a business temporary closes, employees would typically not receive any paychecks during the closure because there is no work to perform. However, if there was no work-availability requirement in the FFCRA, those employees who happened to have FFCRA qualifying reasons would continue to receive paychecks, while fellow furloughed employees who did not have an FFCRA-qualifying reason would continue to be unpaid. The Department wrote that it "does not believe Congress intended such an illogical result."

The Department also clarified that the work-availability requirement for FFCRA leave should be understood in the context of the applicable anti-retaliation provisions. Employers may not make work unavailable in an effort to deny FFCRA leave, i.e., by specifically targeting employees with FFCRA-qualifying reasons for leave for furlough or for modified schedules.

**Employees must continue to have employer approval to take intermittent FFCRA leave.**

The FFCRA is silent with respect to intermittent leave-that is, leave taken for an FFCRA-qualifying reason in separate periods of time rather than one continuous period of time. In turn, the Department exercised its regulatory authority to fill this statutory gap via the original Rule. The Rule provided that the FFCRA did not prohibit intermittent leave, but limited the use of intermittent leave to:

- In the case where an employee is physically reporting to the worksite, the FFCRA-qualifying reason to care for a an employee's child whose school, place of care, or child care provider is closed or unavailable due to COVID-19, but with the employer's consent; and
- In the case where an employee is teleworking, for any FFCRA-qualifying reason, but also only with the employer's consent.

(The distinction with respect to intermittently returning to the worksite is driven by practicality; an employee who has (or potentially has) COVID should not return to the physical worksite at all-even intermittently.)

The District Court held that the Department's explanation that intermittent leave, where available, can only be taken with the employer's consent was inadequate. After considering the District Court's opinion, the Department reaffirmed its position with respect to intermittent leave, but provided additional explanation.

One clarification of note provided by the Department is with respect to employees who have to miss work in full-day increments to care for their children whose schools are operating on an alternate

day basis. The Department explained that such need for leave in full-day increments on alternating days is *not* intermittent leave, meaning that employer consent is *not required* with respect to such leave. In the Department's view, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day-in the Department's words, "the school literally closes . . . and opens repeatedly."

**Documentation supporting the need to take FFCRA leave must be provided "as soon as practicable."**

Finally, the original Rule explained that employees are required to provide certain documentation regarding the need to take FFCRA leave "prior to" taking paid sick leave or expanded family and medical leave. The District Court found this part of the Rule to be inconsistent with the FFCRA's unambiguous statutory language. In response, the revised Rule states that documentation must be provided "as soon as practicable," and not necessarily prior to leave being taken. The Department further explained that "as soon as practicable" in most cases will mean when the employer is required to provide notice of the need for FFCRA leave, which is "after the first workday (or portion thereof) for which an employee" takes paid sick leave under the FFCRA, or "as soon as practicable" for Expanded Family and Medical Leave to care for a child whose place of care or school is closed.

**Conclusion**

FFCRA-covered employers that relied on the Department's expansive definition of "health care provider" under the original Rule should carefully review the revised Rule and adjust its FFCRA policies accordingly. Otherwise, the Department's revised Rule largely reaffirmed the provisions that were called into question by the District Court's opinion and should not alter an employer's actions to implement leave under the FFCRA.

**If you have any questions, we encourage you to reach out to your Benesch contact or one of the attorneys below to discuss.**

**Corey Clay** at cclay@beneschlaw.com or 216.363.4158.

**Johanna Fabrizio Parker** at jparker@beneschlaw.com or 216.363.4585.

**W. Clifford Mull** at cmull@beneschlaw.com or 216.363.4198.