**REVISED FFCRA RULES**

The Department of Labor (DOL) has now issued new regulations responding to the [New York Federal Court decision](https://www.felhaber.com/wp-content/uploads/2020-20351-1-2-Copy.pdf) invalidating four specific rules implementing the Families First Coronavirus Response Act (FFCRA), as [we reported](https://www.felhaber.com/federal-court-invalidates-key-elements-of-ffcra-regulations/) in August.

These revised regulations, which become effective on Wednesday, September 16, 2020, provide new guidance on two of the issues that the federal court addressed.  However, the DOL declined to back down on the other two issues, choosing instead to maintain their original interpretations and offer enhanced explanations for doing so.

The New York ruling invalidated four specific provisions:

* The health care provider definition as it relates to exclusions from FFCRA leave;
* The provision involving required documentation prior to taking FFCRA leave;
* The “work availability” requirement; and
* The provisions requiring employer approval before taking intermittent FFCRA leave.

**WHAT CHANGED?**

1. ***Revised “Health Care Provider” Definition***

The most important update for long term care is the change to the definition of health care provider in the context of an employer’s option to exclude such employees from the leave entitlement under the FFCRA. Initially, the DOL regulations defined health care provider very broadly, which essentially allowed exemptions for all employees of health care providers, regardless of the types of services employees actually provided. The Court thought this was too broad, and invalidated this definition.

Now, the DOL regulations state that health care providers are:

* Health care providers as defined by the FMLA regulations; and
* Any employee who is capable of providing health care services, meaning that the person is employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary for the provision of patient care, and, if not provided, would adversely impact patient care.

The DOL explains that this second group of employees includes only:

* Nurses, nurse assistants, medical technicians, and any other person who directly provides the above definition of health care services;
* Employees who provide health care services at the direction of or under the supervision of a health care provider; and
* Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians to process test results necessary to diagnoses and treatment.

The new DOL health care provider definition excludes employees who do not provide health care services, even if the services they do provide affect the provision of health care services, such as “IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.”

Importantly, the new regulations state that not all employees who work at nursing facilities, skilled nursing facilities, long term care facilities constitute health care providers within the definition.  Now, in order to determine whether a nursing home employee is a health care provider, employers will need to evaluate the types of services the employee actually provides.

1. ***Revised Notice and Documentation Requirements***

The new DOL regulations also relax the timelines for employees to provide documentation to their employers regarding FFCRA leave. Under the old regulations, documentation needed to be provided before the employee took the FFCRA leave.

Under the new regulations, employees are only required to provide documentation (including the reason for the leave, the duration of the leave, and the authority underlying a quarantine or isolation order), “as soon as practicable.” Essentially, documentation requests under the FFCRA will now be treated as they are under the FMLA, where employees are allowed to submit documentation after the leave commences.

1. ***Revised Work Availability Requirement***

The FFCRA allows employees to take leave if they are unable to work due to one of the specific reasons enumerated in the law. The DOL’s regulations state that employees are not eligible for leave if their employers do not have work for them. Essentially, this creates abut-for test, meaning that if not for the qualifying reason to take FFCRA leave, the employee would still be working.

The new regulations re-affirm this requirement, so employees are still only entitled to FFCRA leave if they cannot work because of a qualifying reason for leave. Employees are not entitled to FFCRA leave if the employer simply does not have work for them to perform.

1. ***Revised Intermittent Leave Requirement***

The new DOL regulations reaffirm that intermittent leave under the FFCRA is only available for employees whose reason for leave does not implicate risks of spreading COVID-19, such as school closures and child care issues. Intermittent leave is still unavailable for employees who need FFCRA leave for medical reasons, such as possessing an elevated risk of being infected with COVID-19 or caring for someone who is sick with COVID-19.

The new regulations also confirm that employees must still obtain employer approval for intermittent FFCRA leave. However, employer approval would not be required where an employee is taking FFCRA leave in full-day increments to care for children whose schools are operating on a hybrid attendance model. In this situation, each day that the school is closed or that the child is not attending is a separate FFCRA leave that ends when the school reopens or when the child returns to in-person attendance.  In short, hybrid schooling does not pose the need for intermittent leave.

**WHAT SHOULD YOU BE DOING?**

Employees who were previously considered ineligible for FFCRA leave – office staff and employees who were not performing health care services as defined above will now be eligible for FFCRA (EPSL and E-FMLA leave).

Are employers required to notify employees of their eligibility? This is a complicated question with no clear answer. The new rules are not retroactive, so you are only required to apply them going forward. Other considerations include have you specifically told employees they are not eligible? If so, you may have an obligation to notify those employees of the new rules. However, if you’ve not issued any communications about the FFCRA, you certainly can let employees know that they are now eligible or you can wait until an employee requests leave.

Please feel free to send follow up questions and we will try to answer them.