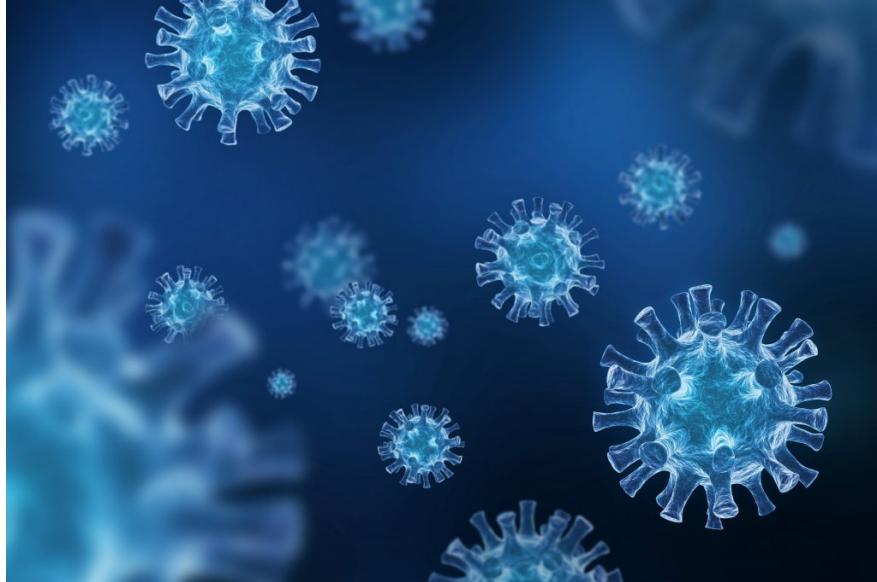




## **U.S. Dept. of Labor Revises Regulations Under FFCRA**



By: John Vering and Mark Opara

On September 11, 2020, the U.S. Department of Labor (DOL) posted revisions to its regulations implementing the paid sick leave and expanded family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA). These new regulations are in response to a ruling by the U.S. District Court for the Southern District of New York that found portions of the regulations invalid. The new regulations are effective immediately upon publication in the Federal Register on September 16, 2020 and continue in effect until the paid leave provisions of FFCRA expire on December 31, 2020, and those regulations and the explanation for why the changes were made can be found [here](#). The major changes in the regulations are summarized and explained below.

### **Change in Definition of “Health Care Provider”**

The FFCRA allows employers of “health care providers” and “first responders” to exclude some or all of those individuals from the benefits of paid sick leave and expanded family and medical leave. The original regulations defined the term “health care provider” very broadly to include all employees of many entities that provide health care services along with employees of entities that have contracts with those employers such as employees of a business that produced medical equipment.

The revised regulations are much narrower and make clear that not all employees of a hospital or doctor’s office or other provider of health care services can be exempted from the benefits of the FFCRA. Under the revised regulations, the employees that are covered include in the first group licensed doctors of medicine, nurse practitioners and other health care providers who are permitted to sign FMLA medical certifications (e.g., podiatrists, dentists, optometrists, chiropractors, nurse -midwives,

clinical social workers).

DOL has also revised its **Frequently Asked Questions and Answers (FAQ)** to summarize its new FFCRA regulations. For example, revised FAQ 56 describe the second broader group of individuals who meet the definition of health care providers as follows:

The second group is any other person who is employed to provide diagnostic services, preventive 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. This group includes employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services. Finally, employees who do not provide direct health care services to a patient but are otherwise integrated into and necessary to the provision of those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers. [The revised regulations provide more detailed definitions of diagnostic services, preventative services, and treatment services].

A person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital or a similar health care facility.

Entities that provide health care services or contract with them who have been relying on the original DOL regulations by excluding persons beyond the above two groups from paid leave and expanded FMLA benefits under the FFCRA should revise their policies effective September 16, 2020. We can be of assistance to clients in revising such policies.

The following new regulations apply to all employers subject to the FFCRA, not just employers providing health care services.

### **Clarification of Requirements for Intermittent Leave and Leave When School or Day Care is Closed or Unavailable for Only Part of a Week or Remote Learning is Optional**

In newly published FAQ 21, DOL clarifies the requirements regarding taking intermittent leave under the FFCRA as follows:

#### **21. May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)? [Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]**

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns

related to COVID-19; or

- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child's school or place of care is closed, or child care provider is unavailable, for an entire week due to COVID-19 related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday, while another family member watches your child.

The Department notes that if your child's school, place of care, or child care provider were closed or unavailable on only Monday, Wednesday, and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take leave on just the days of closure or unavailability. See FAQ 98 and 99. However, you would still need to provide your employer with notice and documentation as soon as practicable. See FAQ 16.

The Department encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements.

In FAQ 22, DOL clarifies the situation where an employee wants to take expanded family and medical leave intermittently while the parent's child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if the employee is not teleworking by explaining as follows:

Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your child's school or place of care is closed, or child care provider is unavailable for an entire week due to COVID-19 related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday, while another family member watches your child.

The Department [DOL] notes that if your child's school, place of care, or child care provider were closed or unavailable on only Monday, Wednesday, and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take

leave for a single reason intermittently. As such, you would not need employer permission to take paid leave on just the days of closure or unavailability. See FAQ 98 and 99. However, you would still need to provide your employer with notice and documentation as soon as practicable. See FAQ 16. The Department encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements.

FAQ 98 and 99 explain the new requirements when a school operates on alternative days or provides a choice between remote and in-person learning as follows:

**98. My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (added 08/27/2020) [Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]**

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days. FAQs 20–22 further address this scenario.

**99. My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances? (added 08/27/2020) [Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]**

No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID–19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See FAQ 63.

Also, as explained more fully in FAQ 98, if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child's remote-learning days because the school is effectively "closed" to your child on those days. FAQs 20–22 further address this scenario.

## **Miscellaneous**

The revised regulations reaffirm DOL's position that paid leave and expanded FMLA leave may only be taken if the employer has work available from which an employee can take leave.

Revised FAQ 16 clarifies that notice and documents need to be supplied by an employee seeking paid leave or expanded FMLA leave must be supplied as soon as practicable.

We urge our clients and friends to review these revised regulations and new guidance in the form of FAQ and seek legal advice if you have questions about interpreting your obligations or rights under these or other applicable employment laws or if you need assistance in wading through this and other extensive regulations and related guidance.

*This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's [COVID-19 Resource Center](#). Readers with legal questions should consult the authors, John Vering ([jvering@sb-kc.com](mailto:jvering@sb-kc.com)), Mark Opara ([mopara@sb-kc.com](mailto:mopara@sb-kc.com)), or other shareholders in Seigfreid Bingham's Employment Law Group, including: Shannon Johnson, Brenda Hamilton, John Neyens, Julie Parisi, Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460.*