

INSIGHTS + NEWS

Client Alert: New DOL Regulations Narrow The FFCRA's "Health Care Provider" Exemption

BY JACOB A. TOSTI • SEPTEMBER 15, 2020

Last Friday, the U.S. Department of Labor (DOL) released revised regulations for leave under the [Families First Coronavirus Response Act](#) (FFCRA). The new regulations will take effect on September 16, 2020. Here is a summary of some important changes:

REVISED "HEALTH CARE PROVIDER" EXEMPTION

The FFCRA allows employers to exclude employees who are "health care providers" or "emergency responders" from eligibility for FFCRA expanded family and medical leave and paid sick leave. Previously, the DOL permitted employers to exclude a very broad category of employees under this exemption, encompassing "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution."

The DOL has significantly narrowed this exemption. Now, employers can only exclude two groups of employees from eligibility for FFCRA leave under the "health care provider" exemption:

1. Anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes; and
2. Any other person 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."

As a result, many employees whom employers could have previously excluded from taking FFCRA leave are now entitled to FFCRA leave. For example, the regulations make clear that employers **cannot** exclude IT professionals, building maintenance staff, human resource personnel, cooks, food service workers, records managers, consultants, and billers from receiving FFCRA leave, even if those employees work at a site that provides health care services. (This is not an exhaustive list, and only provides examples of some categories of employees whom employers can no longer exclude.)

REVISED REGULATIONS REGARDING EMPLOYEE DOCUMENTATION AND NOTICE

The FFCRA permits employers to require employees to follow reasonable notice procedures to continue to receive paid sick leave after the first workday (or portion thereof) of leave. Previously, DOL regulations required all employees

to provide the following information before taking FFCRA leave:

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

Under the new regulations, employees are not required to provide this information before taking FFCRA leave. Instead, employees must give this information "as soon as practicable."

In addition, DOL regulations previously provided that employers could not require employees to provide advance notice of FFCRA leave, and could only require notice after the first workday (or portion thereof) that leave was taken. Under the revised regulations, these notice rules still apply to FFCRA paid sick leave. However, for expanded FMLA leave, employees must now provide notice for expanded FMLA leave "as soon as practicable." Thus, if the employee's need for expanded FMLA leave is foreseeable, that will generally mean the employee should provide notice before taking leave.

CLIENT TIP

Employers should review the new regulations and revise their FFCRA leave policies and practices as needed. In addition, Employers should consult the revised regulations at § 826.30(c)(1)(v) for a non-exhaustive list of job functions that may be considered "diagnostic services," "preventive services," "treatment services," and "services that are integrated with and necessary to the provision of patient care."