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DOL Updates FFCRA Guidance

The U.S. Department of Labor (DOL) continues to refine its guidance to assist employers in implementing the Families First Coronavirus Response Act (FFCRA), which rapidly became law last spring in response to the COVID-19 pandemic. In response to a [recent court decision](#) and the adoption of online learning models by many schools, the DOL published key updates via [revised regulations](#) (effective Sept. 16, 2020) and updated [FAQs](#).

Key updates include:

Work Availability. In response to a recent court decision, the DOL reaffirmed its position that, if there is no work for an employee to perform due to circumstances other than a qualifying reason for leave (e.g., furlough, worksite closure, etc.), there is no work from which to take leave and thus no requirement to provide FFCRA leave. The DOL cautioned, however, that employers cannot simply withhold work to avoid FFCRA obligations and the unavailability of work must be due to legitimate, non-discriminatory business reasons.

Expansion to Certain Employees of Health Care Providers. Under the FFCRA, employers may elect to exclude categories of employees who are “health care providers” from leave benefits. The DOL recently adopted a more specific, narrow definition of “[health care provider](#),” which includes: (a) a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA; or (b) “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.” According to the DOL, sub-part (b) includes not only those who provide direct diagnostic, preventive, treatment, or other patient care services (e.g., nurses, nurse assistants, and medical technicians), but also employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services (e.g., a laboratory technician who processes medical test results to aid in the diagnoses and treatment of a health condition). The DOL’s revised regulations include additional examples to assist in the application of each of the diagnostic, preventive, and treatment standards.

The DOL cautioned that an individual 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.” The DOL provided examples of positions still eligible for FFCRA benefits, even if employed by a hospital or similar health care facility, to include: “IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.”

Intermittent Leave. Intermittent leave under the FFCRA [still requires employer](#) consent. Notably, the DOL signaled a more flexible interpretation of what constitutes intermittent leave in certain instances. For example, [according to the DOL](#), for schools opening on a hybrid in-school/online learning model, absences for a child’s online learning days are not

intermittent leave requiring advance consent because each day of school closure constitutes a separate reason for leave. Employees are not entitled to FFCRA leave on days the child may attend school in-person.

Electing Online School. The [DOL clarified](#) that an employee is not eligible for FFCRA leave when the employee elects to homeschool despite the child's school remaining open for in-person learning. According to the DOL: "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." For schools operating on a hybrid or fully online model, FFCRA leave is available for online-only school days as the school is deemed "closed" to the child those days.



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Documentation Timing. Documentation need not be provided before leave begins, but rather may be given "[as soon as practicable](#)." When leave is foreseeable due to school closure, the DOL still expects that advance notice would be practicable.

The expiration date for the FFCRA remains Dec. 31, 2020, and it remains to be seen whether further legislative action will continue the benefit into 2021.