

The Department of Labor's Final Rule on the FFCRA

Episode II – The DOL Strikes Back

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Employee Leaves and the FFCRA

- FFCRA Leave
 - Two weeks of paid sick leave
 - Up to 10 additional weeks of paid expanded family and medical leave for qualifying reasons
- FFCRA effective April 1, 2020 to December 31, 2020

The FFCRA and Uncertain Times

- On August 3, 2020, a federal court in New York struck down major parts of the U.S. Department of Labor's Final Rule implementing the FFCRA (*State of New York vs. Department of Labor*).
- It was unclear whether the opinion applied outside of New York.
 - DOL has since said that it believed the decision applied nationwide.
- DOL has not appealed the decision.
- So what happened...

The FFCRA and Uncertain Times: The Court's Ruling

- **The Court partially struck down the intermittent leave provisions** to the extent the Final Rule requires employees to secure employer consent to take intermittent leave. Under the Court's ruling, an employee would not need permission before taking intermittent FFCRA leave.
- **The Court struck down the requirement that employees provide documentation before taking FFCRA leave.**
- **The Court struck down the “work availability” requirement**, which said that employees were not entitled to FFCRA leave if the employer did not have work available for them. This would mean employees may be eligible for FFCRA-paid leave even if there is no work for them to do.

The FFCRA and Uncertain Times: The Court's Ruling

- **The Court struck down the “vastly overbroad” definition of “health care provider” in the Final Rule.**
 - FFCRA adopts the definition of “health care provider” in the FMLA: doctors, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, Christian Science Practitioners, and any health care provider accepted by the employer’s group health plan.
 - DOL also included an expansive definition of “health care provider” that included every employee of an organization that provides health care services as well as employees of health care suppliers and contractors. In fact, “DOL concedes[d] that an English professor, librarian, or cafeteria manager at a university with a medical school would all be ‘health care providers’ under the Rule.”
 - Court explained the focus should be on the employee’s duties, not the employer’s identity.

The FFCRA and Uncertain Times: DOL Strikes Back

- On September 9, 2020, the DOL submitted a revised rule to OMB.
- On September 11, 2020, the DOL issued its new temporary rule.
- The rule became effective on September 16, and is in effect thru December 31, 2020.

The FFCRA and Uncertain Times: DOL Strikes Back

- **Health Care Provider.** DOL revises the definition to include:
 - Employees who are health care providers under the FMLA; and
 - Other employees who are employed to provide diagnostic services, preventive services, treatment services, or other services that are *integrated with and necessary to the provision of patient care.*

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- **Health Care Provider.** DOL narrowed the definition to:
 - 1. Doctors of medicine or osteopathy who are authorized to practice medicine or surgery;
 - 2. Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors;
 - 3. Nurse practitioners, nurse-midwives, clinical social workers and physician assistants;
 - 4. Christian Science Practitioners;

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- **5. Any other employee capable of providing health care services, meaning he or she is employed to provide:**
 - diagnostic services (taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results);
 - preventive services (screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems);
 - treatment services (performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments);

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- **5. Any other employee capable of providing health care services, meaning he or she is employed to provide:**
 - other services integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care (bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples). This category, in turn, only includes the following:
 - Nurses, nurse assistants, medical technicians, and other persons who directly provide services described in #5;
 - Employees providing services described in #5 under the supervision, order, or direction of, or providing direct assistance to, a person described in #1-4 above or nurses, nurse assistants, medical technicians, and other persons who directly provide services described in #5; 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.

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- Employees who do not provide health care services as described above are **not** health care providers even if their services could 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.
- Note, this definition of “health care provider” applies **only** for the purpose of determining whether an employer can exclude an employee from taking FFCRA leave.

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- **Work availability.** DOL “reaffirms” that FFCRA leave may be taken “only if the employee has work from which to take leave.”
 - This requirement applies to all qualifying reasons to take EPSL and EFML.

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- **Intermittent Leave.** Where intermittent FFCRA leave is permitted, an employee must obtain his or her employer's approval to take it.

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- **Documentation**

- For EPSL: notice may *not* be required in advance.
 - After the first workday, employer may require notice as soon as practicable
- For EFML: notice may be required as soon as practicable.
 - If the reason for this leave is foreseeable, it will generally be practicable to provide notice *prior to* the need to take leave.
- Documentation includes the name, dates of requested leave, qualifying reason, and an oral or written statement that employee is unable to work because of that reason.