

Labor & Employment Alert
September 15, 2020

**Department of Labor Issues Revised Temporary Rule on
Families First Coronavirus Response Act Including
New Guidance Relating to Intermittent Leave**

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On Friday, September 11, 2020, the Department of Labor issued revisions to the temporary rule regarding the federal Families First Coronavirus Response Act (“FFCRA”). Those revisions can be found here - <https://www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act>. The revisions take effect on September 16, 2020.

As most employers know, the FFCRA provides certain paid leave benefits to employees for reasons related to the COVID-19 pandemic. Employers with less than 500 employees are required to provide this new leave entitlement. The FFCRA generally provides two types of leave: Emergency Paid Sick Leave (“EPSL”) and Emergency Family and Medical Leave (“EFMLEA”). More information about these leave entitlements can be found here - <https://www.mhtl.com/wp-content/uploads/2020/03/COVID-19-Legislation-Client-Alert-3.20.2020-Final.pdf>

<https://files.constantcontact.com/c5f4073c701/62638330-01d8-4d0b-8f44-7ef614e13a8d.pdf>

The revisions to the temporary rule address four main areas and come on the heels of a decision of the U.S. District Court for the Southern District of New York wherein the Court addressed these four areas and struck down portions of the new temporary rule. The four areas are as follows:

- (1) “the requirement under § 826.20 that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave;
- (2) the requirement under § 826.50 that an employee may take FFCRA leave intermittently only with employer approval;
- (3) the definition of an employee who is a “health care provider,” set forth in § 826.30(c)(1), whom an employer may exclude from being eligible for FFCRA leave; and
- (4) the statement in § 826.100 that employees who take FFCRA leave must provide their employers with certain documentation before taking leave.”



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The revisions make the following changes/assertions:

- Reaffirm the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
- Reaffirm the requirement that an employee must have employer approval for intermittent usage of FFCRA time.
- Revise the definition of “health care provider” to include only employees who meet the definition of that term under the FMLA regulations, or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
- Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable (as opposed to the prior standard which was before the leave was required).
- Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

Focus on Intermittent Leave

While the majority of these revisions are fairly self-explanatory, the revision regarding intermittent leave makes an important distinction not previously addressed by either the temporary rule or any subsequent guidance. Specifically, the revisions state that, while employer consent is still required for intermittent usage of either the EPSL and/or the EFMLEA, arrangements where an employee’s child’s school operates remote some days a week (therefore is closed to the child) and in-person other days, is *not* intermittent usage of the EFMLEA. Specifically, the revision states:

The employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent under § 826.50. In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday

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and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person. This is distinguished from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.

Accordingly, employers who are treating the above scenario as intermittent leave should cease such practice immediately and allow employees to utilize EFMLEA on days when their child's school is unavailable, remote learning is the only option available, and there is no other suitable person available to care for the child.

This Client Alert was prepared by Sarah Spatafore and was reviewed by Nan O'Neill and Alisia St. Florian. If you have any questions about this issue, please contact Sarah Spatafore, Nan O'Neill, or the attorney responsible for your account, or call (617) 479-5000.

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