DOL Revises FFCRA Regulations to Clarify Paid Leave Rules in Wake of NY Federal Court's Decision

A COVID-19 Update from Questco – September 15th, 2020

Late on Friday, September 11, 2020, the Department of Labor (DOL) issued revised regulations to address the problems created by the NY federal district court's invalidation of several regulatory provisions under the Families First Coronavirus Response Act (FFCRA). As a quick recap, the State of NY had sued the DOL over several of its original FFCRA regulations, and on August 3, 2020, a NY federal district court agreed with much of what the State argued, entirely invalidating pieces of the FFCRA. As previously communicated, we were awaiting clarification from the DOL as to the applicability of the NY court decision on a national basis. Friday night the DOL issued revised regulations, fighting back and reinforcing its earlier positions for some matters, and making adjustments for others.

In summary, in its revised regulations set to be published and take effect on September 16, 2020, the DOL:

- Reinforced that for someone to be eligible to take FFCRA leave, the employer must have work available for that employee to actually take leave from—**maintaining the "work availability requirement";**
- Confirmed that **employer consent is required** for intermittent FFCRA leave, ***but also*** clarifying the meaning of "intermittent" for certain FFCRA purposes as time off that is less than a full day;
- Revised the **definition of exempt "health care providers**" under FFCRA (*i.e.*, health care employees who can be denied FFCRA leave because of their critical work/role in public health); and
- Explained/adjusted the rules for **how soon documentation/information must be provided** in support of an FFCRA leave.

The DOL Stands Firm on the Work Availability Requirement

Under the DOL's original rule, one of the requirements for taking FFCRA leave (under both the EPSLA and EFMLEA) is that the employer must actually have work available for the employee to perform when the need for FFCRA leave occurs. If the employee is not scheduled to work—whether due to a furlough, business closure or otherwise—there is no work from which to take leave.

In its new final rule, the DOL held firm that an employer must have work available for an employee in order for the employee to be eligible for FFCRA leave. In other words, the employee's FFCRA reason for leave must be the sole reason they are not working. In doing so, the DOL made clear:

> *". . . if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave—perhaps the employer closed the worksite (temporarily or permanently)—that qualifying reason could not be a but-for cause of the employee's inability to work. Instead, the individual would have no work from which to take leave. The Department thus reaffirms that an employee may take paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of his or her inability to work."*

Intermittent Leave Still Requires Employer Consent—But "Intermittent" May be Defined Differently than Employers Previously Thought

The DOL stood firm in these new regulations on its position that intermittent FFCRA leave is available only when the employer consents but offered an extensive rationale for its position. In contrast to the FMLA, the FFCRA itself does not address intermittent leave, giving the DOL broad regulatory authority to fill this statutory gap. In revisiting its original regulations, the DOL noted that the classic FMLA regulations generally provide for intermittent leave only for certain qualifying reasons or where the employee and employer agree to an intermittent leave arrangement. The DOL further harkened back to the classic FMLA regulations, which require that, when the need for leave is foreseeable, it must be scheduled in a way that is minimally disruptive to business operations—leading the DOL to reinforce the requirement of employer consent for FFCRA leave.

The DOL noted that FFCRA leave obligations should *"balance the employee's need for leave with the employer's interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave."*

Notably, however, the DOL's use of the term "intermittent" seems to have taken on some new substance. More specifically, the preamble to the DOL's new regulations address administration of FFCRA leave when an employee's child participates in hybrid learning in which schools operate on adjusted or alternating schedules. Here, each day of school closure *"constitutes a separate reason for FFCRA leave that ends when the school opens the next day."* As a result, intermittent leave is not necessary on these occasions because the "school literally closes . . . and opens repeatedly." In other words, a full single day of leave is not considered intermittent, and an employee does not need employer consent to take off Monday, Wednesday and Friday due to their child's school closure, because Monday, Wednesday and Friday are separate school closures, each entitling the employee to FFCRA leave. But an employee whose child participates in hybrid learning in which the school operates only in the morning or the afternoon, will still need to either take continuous leave under the FFCRA or obtain employer consent to use leave intermittently in partial-day increments to accommodate their child's school schedule.

Definition of "Health Care Provider"

The FFCRA permits employers to exclude *"health care providers"* from some or all forms of EPSLA or EFMLEA leave. In its original rule, the DOL provided an expansive definition of "health care provider" for FFCRA purposes that focused on the types of employers that could exercise the exemption.

In its new rule, the DOL crafted a definition that focuses on employees whose duties or capabilities are directly related to the provision of health care services or are so integrated to provision of such services so as to adversely impact patient care if not provided. Accordingly, the new regulations remain far broader in scope than the classic FMLA definition of health care provider, while eliminating those employees whose services are not related or integral to provision of health care services. The revised FFCRA regulations clarify the various types of services that constitute health care services by listing specific examples of what is included. In addition, the revised regulations specifically ***exclude*** those who do not actually provide health care services, 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, record managers, consultants, and billers."*

Easing Documentation and Notice Requirements in Certain Instances

The DOL tweaked the existing regulations to clarify that any documentation required need not be provided before the leave begins, but rather may be given *"as soon as practicable, which in most cases will be when the employee provides notice"* of the need for FFCRA leave. If EFMLEA leave is foreseeable, such as in instances where the employee learns in advance that school will be closed, the DOL anticipates that the employees generally will provide notice *before* taking leave.

New FAQs

In conjunction with issuing revised regulations, the DOL updated and added to its FAQs to reflect the new guidance in the following ways:

- The updated FAQs note an employee must provide their employer with the required documentation and information "as soon as practicable."
- The FAQs regarding intermittent leave under both EPSLA and EFMLEA are updated to provide that an employee whose child's school or place of care is closed, may still only take leave under the FFCRA intermittently if the employee and the employer agree. The example given is that if you have another family member watch your child on Tuesday and Thursday, but cannot work on Monday, Wednesday and Friday, you would need employer approval to use the leave intermittently. However, in line with the amendment discussed above, the FAQ notes that if an employee's child's school or place of care is closed on alternating days, leave may be used intermittently even without employer permission, because it is really being used in single, full-day increments and is not, in fact, "intermittent."
- The DOL also amended the FAQ providing "who is a 'health care provider'" to track the updated definition.
- THE DOL updated FAQs 98 – 100 addressing EFMLEA paid leave requirements for recent changes in remote and hybrid learning programs for school age children to reflect the department's revised regulations.
- The DOL added FAQs # 101-103 specifically addressing the effect of the NY court decision and the new regulations.

The full set of FFCRA FAQs published by the DOL can be found at:
https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

In Conclusion

The new rule attempts to carefully balance an employer's operational needs when an employee requests intermittent leave with the needs of the employee attempting to address personal challenges arising from the complexities of managing through the pandemic. Flexibility is key. We also recommend that our clients be mindful of the DOL's changes on the timing of notice of the need for FFCRA leave and the timing of documentation requirements.

Please reach out to your Client Success Manager if Questco can assist with any of your FFCRA compliance needs. As always, our team is here to serve you.