

DOL NARROWS FFCRA “HEALTH CARE PROVIDER” EXEMPTION IN REVISED REGULATIONS EFFECTIVE SEPTEMBER 16, 2020

September 14, 2020

On Friday, September 11, 2020, the U.S. Department of Labor’s Wage and Hour Division (DOL) announced revisions to the regulations that govern paid sick leave and expanded family and medical leave (eFMLA) under the Families First Coronavirus Response Act (FFCRA). The revised rule was issued following an August 3, 2020, decision of the U.S. District Court for the Southern District of New York which invalidated four aspects of the original FFCRA regulations. Interestingly, the DOL essentially rejected the district court’s first two findings and reaffirmed, with further explanation, its position that: 1) paid sick leave and eFMLA only are available when an employee has work from which to take leave, and 2) employees may take FFCRA leave intermittently only with employer approval. The DOL accepted in large part the remainder of the district court’s decision and developed revised regulations that: 1) limit the employees covered by the health care provider exemption, 2) clarify when an employee must provide information supporting the need for leave, and 3) correct an inconsistency between the original regulations and the statute regarding when an employee may be required to give notice of the need for eFMLA. These changes are explained further below.

REVISED SCOPE OF HEALTH CARE PROVIDER EXEMPTION UNDER § 826.30(c)(1)

The original FFCRA regulations allowed employers to exclude employees who are health care providers from eligibility for paid sick leave or eFMLA. The expansive definition stated:

(1) Health care provider -

*(i) For the purposes of this definition Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is **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, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.*

After carefully considering the district court’s ruling which invalidated this definition, the DOL developed the following definition of health care provider for purposes of the FFCRA exemption:

(c)(1) Health care provider

(i) Basic definition. For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is

(A) Any Employee who is a health care provider under 29 CFR 825.102 and 825.125, or;

(B) Any other Employee who is capable of providing health care services, meaning he or she 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.

(ii) Types of Employees. Employees described in paragraph (c)(1)(i)(B) include only:

(A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A) of this section; and

(C) 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.

(iii) 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.

(iv) Typical work locations. Employees described in paragraph (c)(1)(i) of this section may include Employees who work at, for example, a doctor's office, hospital, health care center, clinic, 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 permanent or temporary institution, facility, location, or site where medical services are provided. This list is illustrative. An Employee does not need to work at one of these facilities to be a health care provider, and working at one of these facilities does not necessarily mean an Employee is a health care provider.

(v) Further clarifications.

(A) Diagnostic services include 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.

(B) Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

(C) Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

(D) Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

(vi) The definition of health care provider contained in this section applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, and does not otherwise apply for purposes of the FMLA or section 5102(a)(2) of the EPSLA.

29 C.F.R. § 826.30(c). While the health care provider exemption will allow FFCRA employers (those who employ fewer than 500 employees) to exempt clinicians who provide care or who are integrated with and necessary to the provision of patient care, many employees whose services are crucial to the employer's operations no longer are covered by the narrowed exemption. The categories of employees excluded from the revised definition of "health care provider" include IT, human resources, billing and coding, maintenance, medical records, dietary and similar employees. To the extent necessary, businesses with fewer than 50 employees who are impacted by the revised health care provider exemption may consider whether they qualify for the FFCRA small business exemption.

REVISED NOTICE AND DOCUMENTATION REQUIREMENTS

The FFCRA regulations originally required employees to provide documentation of the need to take FFCRA leave "prior to" taking paid sick leave or eFMLA, but this provision conflicted with the FFCRA's statutory language. Accordingly, the notice provisions in the amended regulations, 29 C.F.R. § 826.100, clarify that an employee is required to provide an employer documentation of the need for leave "as soon as practicable" rather than prior to leave. The information an employee must provide includes the employee's name, date(s) for which leave is requested, qualifying reason for the leave, and an oral or written statement that the employee is unable to work because of the qualified reason for leave. This information should allow an employer to determine whether the requested leave is covered by the FFCRA.¹

The FFCRA regulation governing the timing and delivery of notice also has been updated. See 29 C.F.R. § 826.90. The timing of notice of the need for paid sick leave remains unchanged. Such notice may not be required in advance and may only be required after the first workday (or portion thereof). However, advance notice of the need for eFMLA no longer is prohibited. The revised regulation now states that advance notice of eFMLA is required as soon as practicable. If the need for eFMLA is foreseeable, this generally will mean an employee must provide notice before taking leave.

This new temporary rule will remain in effect through December 31, 2020, when the FFCRA is currently scheduled to expire. Employers should review their FFCRA policies, procedures, and postings to ensure necessary modifications are made. Education for employees on the updated notice and documentation requirements, as well as the narrowed scope of the health care provider exemption, should be provided as soon as possible.

For questions, please contact a member of Hancock Daniel's [COVID-19 Task Force](#).

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¹ The employer may require the employee to furnish the additional documentation related to paid sick leave, eFMLA, and the information needed for the employer to obtain tax credits at the same time. 29 C.F.R. 826.100(b)-(f).