

Department of Labor Updates Paid-Leave Regulations Under the FFCRA Following Court Ruling

The Families First Coronavirus Relief Act (“FFCRA”) created two new categories of paid leave for employees:

- Emergency Paid Sick Leave allowing up to two weeks (10 business days) of leave for those unable to work or telework due to the direct effect of COVID-19 illness or the indirect effect of caring for a directly affected person or for a child whose school or place of care is closed.
- Emergency Paid Family Leave allowing up to 10 additional weeks of leave for those unable to work or telework due to the indirect effect of caring for a child whose school or place of care is closed.

More general detail regarding the paid-leave requirements can be found on our website [here](#).

The U.S. Department of Labor (“DOL”) issued [regulations in April](#) to clarify the requirements of the FFCRA, but some aspects of the regulations were challenged in federal court. In August, a federal judge [invalidated](#) portions of the regulations, requiring DOL to revisit some of its conclusions.

On September 16, DOL issued revised guidance, although it re-affirmed many of the positions stated in the original regulations.

- The new rule clarifies that DOL’s position is that paid leave is only required if there is work to take leave from.¹ That is, if the employer has reason to furlough the employee for legitimate nondiscriminatory reasons, then there is no paid-leave requirement. The employer’s obligation to provide paid leave only arises if the employer has work for the employee and the employee is *unable* to work or telework due to a qualifying reason.
 - DOL clarifies that the work-availability requirement cannot be used as a pretext for denying leave by purporting to lack work. Such an action may be deemed to be retaliation against an employee for requesting leave, which is prohibited.
 - Accordingly, if the employer seeks to have the employee work but the employee is unable to work or telework due to a qualifying reason, then the paid-leave requirement will apply.
- The new rule also clarifies requirements related to “intermittent leave.” Such leave is taken in separate blocks due to a single qualifying reason, such as taking given blocks of time off during a workday or taking certain days of the week off during a leave period. The FFCRA is silent as to the availability of intermittent paid leave for one of the FFCRA qualifying reasons. The court questioned DOL’s conclusion that paid intermittent leave under the FFCRA is available only with the consent of the employer, thus raising the issue

¹ The court had questioned the fact the DOL had stated this position in certain of the justifications for paid leave, but not others. DOL responded by imposing the requirement to all cases of paid leave.

of whether employers were required to grant intermittent leave under the FFCRA in all cases in which it is requested.

- Upon reconsideration, DOL re-affirmed that employer approval is required for an employee to take employee-requested intermittent paid leave under the FFCRA.
- DOL concluded that direct COVID-related reasons for leave do not lend themselves to intermittent leave and, in fact, intermittent leave would be contrary to the goal of preventing spread of COVID-19.
- When indirect reasons for leave apply (that is, where the employee has a person under care), DOL concluded that the employee must make reasonable efforts to schedule leave in a manner that does not unduly disrupt operations. Therefore, there is no right to obtain intermittent paid leave without the cooperation of the employer.
- DOL encourages employers and employees to find agreed-upon flexible work and telework arrangements.
- The employer-approval requirement, however, does not apply when an employee is caring for a school-age child and the child's school adopts an alternate-day or hybrid-attendance model. In such a case, the employee would not be *requesting* intermittent leave, but the *qualifying reason* (caring for a school-age child whose school is closed on an intermittent basis) would arise in a non-continuous manner. In such a case, the applicable rules for paid leave under the FFCRA related to school closure would apply with the employer-approval requirement.
- In addition, DOL clarified its definition of "health care provider" – a category which employers can exclude from the paid-leave requirements. The revised definition focuses on the "role and duties" of the employees who are excluded by virtue of being a "health care provider" as related to diagnostic, preventive, treatment or other services "integrated with and necessary to the provision of patient care."
- Finally, DOL amended its "notice" requirements to clarify that documentation need not be provided by an employee to an employer "prior to" taking leave, but only "as soon as practicable.'

Employers and employees with questions about paid leave requirements under the FFCRA can contact Vandennack Weaver attorneys at 402-504-1300 or info@vwattys.com.