



COVID-19 Update

August 2020

Federal Court Expands FFCRA Paid Leave

On August 3, a New York district court set aside several U.S. Department of Labor (DOL) rules that interpreted and restricted eligibility for paid leave under the Families First Coronavirus Response Act (FFCRA), finding them inconsistent with the underlying FFCRA statute. As a result, the emergency paid sick leave (EPSL) and emergency family medical leave (EFML) under the FFCRA are, at least temporarily, available to more workers, subject to whether the DOL appeals the decision and the outcome of any such appeal. Based upon the court's ruling, employers can and should:

- Provide EPSL to employees who are unable to work or telework based on a qualifying reason, regardless of the availability of work.
- Provide EFML to employees of health care facilities who are not doctors or health care providers, such as office staff.
- Provide EPSL and EFML to employees intermittently for a qualifying reason even without the employer's consent.
- Provide qualifying EPSL and EFML without necessarily requiring documentation as a precondition where such notice or documentation is not practicable or reasonable.

Background and Analysis

Congress passed the FFCRA on March 18, and it was signed into law the same day. It requires employers with fewer than 500 employees to provide:

- Up to 80 hours of EPSL where the employee is unable to work because the employee (1) is quarantined per government order or advice of a health care provider related to COVID-19, (2) experiencing COVID-19 symptoms and seeking a medical diagnosis, (3) has a bona fide need to care for an individual subject to quarantine or isolation order by the government or health care provider, (4) has a bona fide need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or (5) is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.
- Up to additional 10 weeks of paid EFML where the employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Employers may receive federal tax credits for those FFCRA benefits that are paid to eligible individuals.

On April 1, the DOL issued several administrative rules, which are clarifications that have a similar effect as law. However, an agency's administrative rules must be consistent with the underlying statute, or a court may set them aside. This is precisely what the federal judge did in *New York v. United States Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 U.S. Dist. LEXIS 137116 (S.D.N.Y. Aug. 3, 2020).

As a result, specific portions of the DOL's administrative rules have been set aside and may be disregarded in applying and interpreting the FFCRA:

FFCRA Statute	DOL Administrative Rule	Ruling & Practical Effect
"An employer shall provide to each employee employed by the employer [EPSL] to the extent that the employee is unable to work (or telework) due to a need for leave...." Section 5102.	The DOL's rule limited EPSL to situations where the employer did not have work for the employee: "An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee."	The court found the rule to be contrary to the statute's language and set it aside regardless of the reason for EPSL. As a result, employers should provide EPSL to employees for qualifying reasons regardless of the availability of work.
"An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from [EFML]." Section 3105.	While the FMLA defines "health care provider" as a doctor of medicine or osteopathy or a person determined by the Secretary to be capable of providing health care services, the DOL's rule expansively defined "health care provider" as "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."	The court found the DOL's expansive rule to improperly hinge on the identity of the employer and apply overbroadly to all employees regardless of skill, role or duty. As a result, employers should provide EFML to employees of health care facilities who are not doctors or health care providers, such as office staff.
Employers shall provide 80 hours of EPSL and 10 weeks of EFML for qualifying reasons.	The FFCRA did not contain provisions on intermittent leave, but incorporated the existing FMLA guidance, which allows for intermittent leave. The DOL's rule on intermittent EFML stated: "Employees may take [EPSL] or [EFML] intermittently (i.e., in separate periods of time, rather than one continuous period) only if the Employer and Employee agree."	The court upheld the use of intermittent leave, finding that the FFCRA allows employees to take leave non-consecutively without forfeiting remaining sick time or leave. However, the employer consent requirement was "unreasoned" and contrary to the statute itself. As a result, employers should provide EPSL and EFML to employees intermittently for a qualifying reason even without the employer's consent.
"In any case where the necessity for [EFML] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." Section 110. "After the first workday (or portion thereof) an employee receives [EPSL], an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." Section 5110.	The DOL's rule stated that prior to taking EFML or EPSL, the employee is required to provide information such as dates, the reason for leave, and an oral or written statement that he or she is unable to work because of the qualified reason for leave.	Given the statute's text, which requires notice when foreseeable, the rule imposed a more stringent precondition for leave and was therefore inconsistent with the statute. As a result, employers should provide qualifying EPSL and EFML without necessarily requiring documentation as a precondition where such notice or documentation is not practicable or reasonable.

Next Steps

The DOL may appeal the decision or reissue and clarify its guidance through additional administrative rulemaking. Employers should monitor the situation carefully, as it could quickly change in the future. Employers are encouraged to consult legal counsel for specific guidance.

FOR MORE INFORMATION

For more information, please contact:

Nancy M. Barnes

216.566.5578

Nancy.Barnes@ThompsonHine.com

Eric S. Clark

513.352.6555

Eric.Clark@ThompsonHine.com

Sara Hamilton

404.407.3685

Sara.Hamilton@ThompsonHine.com

M. Scott Young

513.352.6617

202.263.4134

Scott.Young@ThompsonHine.com

or any member of our [Labor & Employment](#) group.

Additional Resources

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force](#) page for additional information and resources.

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