

## **Federal Court Invalidates Major Aspects of DOL's Rule, Expanding FFCRA to More Workers**

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In March 2020, Congress enacted the Families First Coronavirus Response Act (FFCRA), which provided emergency paid sick leave (EPSL) and emergency paid family medical leave (EPFML) to millions of workers needing time off for reasons related to the COVID-19 pandemic. In doing so, Congress authorized the Department of Labor (DOL) to enact rules and regulations to implement and interpret the law, which it did on April 1, 2020 by promulgating its Final Rule addressing the coverage, use and the administration of the law. (Our alert on the Final Rule can be found [here](#).) A few weeks later, however, the State of New York sued the DOL in the U.S. District Court for the Southern District of New York, challenging four features of the Final Rule: (1) the “work availability” requirement; (2) the definition of “health care provider”; (3) the provisions relating to intermittent leave; and (4) the documentation requirements. On August 3, 2020, the Court issued a ruling in that case, invalidating the DOL’s the work availability requirement and health care provider definition, and partially invalidating the Rule’s provisions relating to intermittent leave and documentation. As a result, until the DOL acts to address the Court’s ruling, its Rule is modified by the Court’s order.

### The “Work-Availability” Requirement

The FFCRA grants EPSL to employees who are “unable to work (or telework) due to a need for leave because” of any of six COVID-19-related criteria. The EPFML similarly applies to employees “unable to work (or telework) due to a need for leave to care for . . . [a child] due to a public health emergency.” The DOL’s Final Rule implementing each of these provisions excludes employees whose employers “do[] not have work” for them. Many have understood this portion of the Final Rule to mean that when a business temporarily shuts down due to a stay-at-home order, for example, that employees who would otherwise be eligible for leave (e.g., caring for a child out school) are no longer eligible for the benefits, because their workplace is shut down and their employer does not have work for them to do.

The Court ruled that the DOL’s explanation for its work-availability rule was not well-reasoned, particularly given its broad effect, and therefore struck this requirement down. This means if employees are unable to work for a qualifying reason, they are entitled to leave, even their employer does not have work for them.

### The Definition of “Health Care Provider”

Congress exempted certain categories of workers, including “health care providers,” from FFCRA paid leave benefits on the basis that they are essential workers whom communities are relying on during the crisis. The Final Rule defines “health care providers” broadly to include:

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.

The definition also includes:

any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility, [and] anyone

employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The State of New York argued this definition was overbroad, and the Court agreed. In particular, the Court ruled that the definition is based on the employer's business, rather than the nature of an employee's work. Based on this approach, an English professor at a medical research university would not be entitled to benefits. The Court thought this a step too far, and ruled the definition invalid.

### Intermittent Leave

The Final Rule permits "employees to take Paid Sick Leave or Expanded Family and Medical Leave intermittently (*i.e.*, in separate periods of time, rather than one continuous period) only if the Employer and Employee agree," and, then, only for a subset of the qualifying conditions (e.g., intermittent leave may be permitted to care for a child, but not if the employee has a COVID diagnosis). New York challenged the validity of the employer consent requirement, which the Court accepted, in part. Specifically, the Court held that the DOL acted reasonably in prohibiting intermittent leave when the reason for leave is tied to potential viral transmission (e.g., employee has a COVID diagnosis or his/her family member does). In this case, coming and going from work when a person is potentially contagious is dangerous. But when leave is requested for other reasons, like caring for a child out of school, the Court held that the DOL failed to provide a reasoned justification for requiring employer consent. The Court, thus, struck down the employer consent requirement.

### Documentation Requirements

Under the Final Rule, employees may be required to submit to their employer, "prior to taking [FFCRA] leave," documentation indicating their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. New York argued that the statute itself includes different notice requirements. For EPSL, "[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time." For EPFML, "[i]n any case where the necessity for [leave] is foreseeable, an employee shall provide the employer with such notice of leave as is practicable." The Court agreed that the FFCRA notice requirements conflict with the DOL's Final Rule to the extent the Rule requires documentation as a *precondition* to taking leave (e.g., before the first day of leave or unforeseeable leave). However, the Court ruled that the substance of the documentation requirements are permitted, so long as documentation is not required before leave begins.

The Final Rule covers a variety of other topics not raised in this case, and those provisions remain in effect and good law. At this time, the DOL has not issued a reaction to the Court's decision or indicated how it intends to proceed, including any appeal. Whatever the DOL's next step will be, the Court's decision has immediate, nationwide effect. All employers covered by the statute should revisit their FFCRA policies and procedures to ensure compliance with these new requirements.

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