



The Department of Labor (DOL) issued revisions and clarifications to its existing regulations that interpret and apply the Families First Coronavirus Response Act (FFCRA) in response to a federal court decision out of the Southern District of New York back in August. The revisions were effective September 16, 2020.

The DOL's clarifications affect four areas of the regulations: (1) work availability requirement; (2) intermittent leave; (3) documentation and notice requirements; and (4) "health care provider" definition.

You can access the DOL's FFCRA Questions and Answers page [here](#) for further guidance.

**Q: If I don't have work available for an employee, is the employee eligible for FFCRA leave?**

A: The regulations still require that you have work available for an employee to be eligible for leave under the FFCRA. Employees who are furloughed or laid off are not eligible. As the employer, you cannot withhold work to prevent the employee from taking leave. There must be a legitimate, nondiscriminatory business reason for the work being unavailable.

**Q: Must my employee still get permission to take intermittent leave under the FFCRA?**

A: Yes, the DOL states it was attempting to balance the employee's need for leave with the employer's interest in avoiding disruptions by requiring agreement to take intermittent leave. In the example of hybrid learning where a child might attend school in person certain days of the week and be at home the other days, the DOL concluded that leave is not considered intermittent. If the school is closed and the days requested off by the employee are not directed by the school's schedule, but dependent on when the employee needs to be home with the child because of a lack of daycare, that would be intermittent leave and would require employer consent.

**Q: Are my employees required to provide necessary documentation prior to taking applicable leave?**

A: Documentation must be provided "as soon as practicable," which in most cases will be when the employee provides notice of the need for leave. According to the DOL, if leave is foreseeable, the employee should provide notice before taking leave. However, there may be times when leave is not foreseeable.

**Q: Has the definition of "health care provider" who may be excluded by their employer from the FFCRA changed?**

A: Yes, the DOL has significantly narrowed the definition to include only employees who: (1) meet the definition of "health care provider" under existing FMLA regulations; or (2) are "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." Health care providers are not entitled to FFCRA leave. Under the revised DOL regulations, health care providers include nurses or employees providing diagnostic, preventive, treatment, or other services "under the supervision, order, or direction of, or providing direct assistance to a health care provider." This is a significant change from the original interpretation of the FFCRA and will allow more employees to be eligible for FFCRA leave.