

HR COMPLIANCE BULLETIN

Highlights

DOL Has Updated FFCRA Guidance

The DOL has added to and updated its Q&As on FFCRA employee leave.

Health Care Provider Exemption Narrowed

The new guidance includes the changed regulatory definition of exempted health care providers to individuals more closely involved with patient care.

Intermittent Leave

The updates give more explanation on using leave intermittently under FFCRA.

Important Dates

August 3, 2020

Federal court partly invalidates FFCRA regulations on employee leave.

September 11, 2020

DOL publishes updates to FFCRA Q&As.

September 16, 2020

Revisions to FFCRA regulations become effective.

DOL Updates Q&As on Employee Leave Under the FFCRA

The U.S. Department of Labor (DOL) has released three new questions and answers (Q&As) and has updated six of its existing [Q&As](#) about emergency paid sick leave and expanded Family and Medical Leave Act leave under the Families First Coronavirus Response Act (FFCRA).

The changes reflect DOL revisions to FFCRA regulations, undertaken in response to a federal court decision that invalidated part of the original regulations. The regulatory revisions became effective Sept. 16, 2020.

The three new Q&As (Q&As 101-103) concern the applicability and timing of the court decision and the regulatory revisions.

The six updated Q&As address:

- Documenting the need for leave (Q&A 16);
- Intermittent leave (Q&As 21 and 22);
- The definition of health care provider for purposes of the FFCRA leave exemption for those employees (Q&A 56); and
- Leave for “hybrid” school scenarios and voluntary remote learning options (Q&A 98-99).

The new and revised Q&As are reprinted in this Compliance Bulletin.

Action Steps

Employers subject to the leave requirements of the FFCRA should review the new and revised Q&As to ensure their policies remain compliant with the law.



New DOL Q&As on Employee Leave Under the FFCRA

101. When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated? (Added Sept. 11, 2020)

Aug. 3, 2020. The DOL first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit *New York v. Scalia, Civ. No. 20-3020-JPO (S.D.N.Y.)*. The challenged provisions were vacated when the district court issued its opinion and order on Aug. 3, 2020. As of Aug. 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.

102. Where did the district court's order vacating certain provisions of the FFCRA paid leave regulations apply? (Added Sept. 11, 2020)

Nationwide. Based on the specific circumstances in the case and language of the district court's order, the DOL considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.

103. When do the revisions to the DOL's FFCRA paid leave regulations become effective? (Added Sept. 11, 2020)

Sept. 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on Sept. 16, 2020. This means they are effective from Sept. 16, 2020 through the expiration of the FFCRA's paid leave provisions on Dec. 31, 2020.

Revised DOL Q&As on Employee Leave Under the FFCRA

16. What documents do I need to give my employer to get paid sick leave or expanded family and medical leave? [Updated to reflect the DOL's revised regulations, which are effective as of Sept. 16, 2020.]

When requesting paid sick leave or expanded family and medical leave, you must provide your employer either orally or in writing the following information as soon as practicable:

- Your name;
- The date(s) for which you request leave;
- The reason for leave; and
- A statement that you are unable to work because of the above reason.

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If you request leave because you are subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally provide the name of the government entity that issued the order. If you request leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally provide the name of the health care provider who gave advice.

If you request leave to care for your child whose school or place of care is closed, or child care provider is unavailable, you must also provide:

- The name of your child;
- The name of the school, place of care or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for your child.

In addition to the above information, you must also provide to your employer written documentation in support of your paid sick leave as specified in applicable IRS forms, instructions and information.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to [provide medical certifications](#) under the FMLA if required by your employer.

21. May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)? *[Updated to reflect the DOL's revised regulations, which are effective as of Sept. 16, 2020.]*

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a federal, state or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either: (1) use the full amount of paid sick leave, or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because, if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of the FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until Dec. 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19-related reasons. For example, if your child's school or place of care is closed, or child care provider is unavailable, for



an entire week due to COVID-19-related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday and Friday, but work Tuesday and Thursday, while another family member watches your child.

The DOL notes that if your child's school, place of care or child care provider were closed or unavailable on only Monday, Wednesday and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take leave on just the days of closure or unavailability. See [FAQ 98](#) and [99](#). However, you would still need to provide your employer with notice and documentation as soon as practicable. See [FAQ 16](#).

The DOL encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full workday for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the DOL is supportive of such voluntary arrangements.

22. May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons, if I am not teleworking? *[Updated to reflect the DOL's revised regulations, which are effective as of Sept. 16, 2020.]*

Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your child's school or place of care is closed, or child care provider is unavailable, for an entire week due to COVID-19-related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday and Friday, but work Tuesday and Thursday, while another family member watches your child.

The DOL notes that if your child's school, place of care or child care provider were closed or unavailable on only Monday, Wednesday and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take paid leave on just the days of closure or unavailability. See [FAQ 98](#) and [99](#). However, you would still need to provide your employer with notice and documentation as soon as practicable. See [FAQ 16](#). The DOL encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the DOL supports such voluntary arrangements.

56. Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave? *[Updated to reflect the DOL's revised regulations, which are effective as of Sept. 16, 2020.]*

For the purposes of defining the set of employees who may be excluded from taking paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider includes two groups.

This first group is anyone who is a licensed doctor of medicine, nurse practitioner or other health care provider permitted to issue a certification for [purposes of the FMLA](#).

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The second group is any other person who 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. This group includes employees who provide direct diagnostic, preventive, treatment or other patient care services, such as nurses, nurse assistants and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment or other patient care services. Finally, employees who do not provide direct health care services to a patient but are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

A person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants and billers are not health care providers, even if they work at a hospital or a similar health care facility.

To minimize the spread of the virus associated with COVID-19, the DOL encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.

98. My child’s school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances? (Added Aug. 27, 2020) [Updated to reflect the DOL’s revised regulations, which are effective as of Sept. 16, 2020.]

Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively “closed” to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child’s remote-learning days. [FAQs 20–22](#) further address this scenario.

99. My child’s school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances? (Added Aug. 27, 2020) [Updated to reflect the DOL’s revised regulations, which are effective as of the Sept. 16, 2020.]

No, you are not eligible to take paid leave under the FFCRA because your child’s school is not “closed” due to COVID-19-related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See [FAQ 63](#).

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Also, as explained more fully in [FAQ 98](#), if your child’s school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child’s remote-learning days because the school is effectively “closed” to your child on those days. [FAQs 20–22](#) further address this scenario.