



The Department of Labor's revised FFCRA regulations address the intersection of intermittent leave and a school district's use of hybrid learning models

September 18, 2020

The U.S. Department of Labor (DOL) issued revised Families First Coronavirus Response Act (FFCRA) regulations, effective on September 16, 2020. The regulations were clarified and revised in response to a decision from a federal district court in New York that struck down four parts of DOL's originally-published FFCRA regulations. The revisions, and their accompanying DOL commentary, provide additional considerations for educational institutions as they determine whether to grant or deny employees' FFCRA leave requests.

DOL's clarifications and revisions focused on four areas, with the fourth area possibly having the most impact on schools.

1. Reaffirming its work-availability rule, DOL stated that FFCRA leave is not available if an employer does not have work for the employee. DOL also reiterated that leave is only available when the specified condition for FFCRA eligibility creates the need for the leave. When an employee makes an intervening choice or creates a situation, leave is not available. For example, if the school that the employee's child attends provides the choice between in-person or remote instruction, and the employee chooses remote instruction for their child, the employee would not be eligible for FFCRA leave since the child's school is not "closed" due to COVID-19.
2. DOL narrowed the definition of "health care provider" under the FFCRA. The definition now covers only those employees who are health care providers as defined under the traditional Family and Medical Leave Act (FMLA) as well as employees

who are “employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care.” This modification primarily impacts healthcare institutions.

3. DOL also clarified that notice of an employee’s need for FFCRA leave and documentation supporting a request for leave need not be provided before taking said leave. Instead, an employee needs to provide notice and documentation “as soon as practicable” under the circumstances. A school may still request, and is entitled to receive, documentation to support an employee’s request for FFCRA leave. The required documentation continues to be limited to the employee’s name, the dates for which leave is requested, the qualifying reason for the leave, and an oral or written statement that the employee is unable to work because of that reason.
4. DOL further addressed the use of intermittent leave. Importantly, DOL affirmed that employer consent is required for an employee to use intermittent leave. For in-person employment, intermittent leave may only be used when the daycare or school of the employee’s child is closed. For remote workers, intermittent leave may be used for any of the six reasons for which the FFCRA’s Emergency Paid Sick Leave is available. However, if the school that the employee’s child attends is operating on a hybrid model, each day of school closure “constitutes a separate reason for FFCRA leave that ends when the school opens the next day.” Therefore, use of FFCRA leave due to hybrid instruction does not constitute “intermittent leave,” and employer consent is not required for an employee to use the leave a day at a time.

School districts with questions about how these new rules may impact their FFCRA leave administration should consult with their legal counsel.

Authors



Brad E. Bennett

Of Counsel

Columbus

614.227.4849

bbennett@bricker.com

Copyright © 2023 Bricker & Eckler LLP. All rights reserved.