

NEW DOL RULE ON FFCRA

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, NECA General Counsel

The U.S. Department of Labor has issued further guidance on the Families First Coronavirus Recovery Act (FFCRA) in the form of a rule that became effective September 16, 2020. The Rule seems to be a response to recent litigation in New York and the many formal inquiries that have been submitted on the ambiguities in the current regulations and interpretations. In sum, the rule clarifies four areas.

Employees May Take FFCRA Leave Only if Work Would Otherwise Be Available

The DOL reaffirmed that paid sick leave and expanded family and medical leave may be taken *only* if the employee has work from which to take leave. A recent federal court ruling made it appear likely that every employee subject to a stay-at-home order issued during a second wave of COVID-19 would be eligible to take leave under the Act—even if the employer's business was forced to suspend operations. Under the clarification, if the employer has no work for the employee (such as when a job shuts down, even if due to reduced demand during the pandemic), no benefits are payable.

An Employee Must Have Employer Approval to Take Intermittent FFCRA Leave

Where intermittent FFCRA leave is permitted by current law, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently. The revised rule explains that the employer-approval condition for intermittent leave under the DOL's Family Medical Leave Act (FMLA) regulations is appropriate in the context of FFCRA intermittent leave for qualifying reasons that do not exacerbate the risk of COVID-19 contagion, as it is a longstanding principle of FMLA intermittent leave that such leave should, where foreseeable, avoid "unduly disrupting the employer's operations."

More Healthcare Employees are Covered

The FFCRA allows employers to exclude employees who are "health care provider[s]" or who are "emergency responder[s]" from eligibility for expanded family and medical leave and paid sick leave in order to prevent disruptions to the health care system's capacity to respond to the COVID-19 public health emergency.

The DOL has now defined "health care provider" to include only employees who meet the definition of that term under FMLA regulations or who are employed to provide (i) diagnostic services, (ii) preventative services, (iii) treatment services, or (iv) other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.

Importantly, although NECA contractor employees are essential, they are not exempt under the FFCRA.

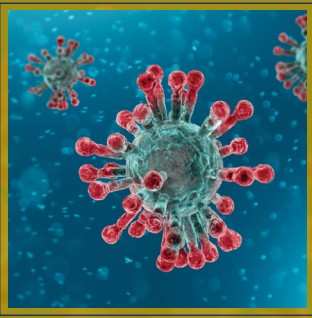


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Employees Must Provide Required Documentation Supporting Their Need for FFCRA Leave to Their Employers “as Soon as Practicable.”

Similar to the requirements of the Family Medical Leave Act (FMLA), the rule clarifies that the notice to take FFCRA leave must be provided “as soon as practicable.” The notice must contain: 1) The employee’s name; 2) The date(s) for which leave is requested; 3) The qualifying reason for the leave; and 4) An oral or a written statement that the employee is unable to work because of the qualifying reason.

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will update its resources as necessary. Please see competent legal advice for assistance with any specific factual scenarios.

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