

DEPARTMENT OF LABOR ISSUES REVISED FFCRA REGULATIONS

The Department of Labor ("DOL") has issued revised regulations clarifying the paid leave requirements under the Families First Coronavirus Response Act ("FFCRA"), in light of the August 3, 2020 decision by the U.S. District Court for the Southern District of New York that found portions of the regulations invalid.

Please note the following key provisions of the updated regulations affecting paid leave for coronavirus-related reasons.

- Employees may take FFCRA leave **only if work would otherwise be available to them**. In other words, the qualifying coronavirus-related reason must be the actual reason the employee is unable to work and needs leave. That is not the case if the employee would not have worked during that time for another reason (e.g., a layoff/furlough, power outage, lack of work).



- **An employee must have employer approval to take FFCRA leave intermittently.** The DOL defines intermittent leave as "leave taken in separate blocks of time due to a single qualifying reason, with the employee reporting to work intermittently during an otherwise continuous period of leave taken for a single qualifying reason." The regulations clarify that, like FMLA leave, intermittent leave under the FFCRA may only be taken intermittently if the employer consents. However, the regulations state that an employee's need to take leave in full or half-day increments to care for children whose schools are operating on an alternate day or hybrid-attendance basis is not considered intermittent, and employer consent is not required. On the other hand, if an employee wishes to take leave for only certain portions of a period for reasons other than a school's in-person instruction schedule, such leave is considered intermittent.

- **Employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.** The original section of the FFCRA required employees to provide certain documentation "prior to" taking paid leave. An employer may require the employee to furnish the following information "as soon as practicable" in the event of an employee's request for paid leave: (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work.

- The regulations correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded FMLA leave to their employers. The regulations clarify that advance notice of expanded FMLA is required as soon as practicable; if the need for leave is foreseeable, this generally means providing notice before taking leave (i.e., if a parent learns of an announcement that their child's school will close). If the need was not foreseeable, then the employee may begin to take leave without giving prior notice, but must still give notice as soon as practicable (i.e., if a child's school closes suddenly).

- The definition of "health care provider" employee is amended, and includes only employees who meet the definition of that term under the FMLA or 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 which, if not provided, would adversely impact patient care. Employers are permitted to exclude employees who are "health care providers" from eligibility for paid leave under the FFCRA.

This memo is intended only as a summary and general overview. If you have any questions or would like legal advice regarding the above or any other employment issue, please contact [David Lawrence](#) or [Stacey DiDomenico](#).