

Recent Rule Change Requires Healthcare Providers to Offer Paid Employee Leave... What You Need to Know

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Overview

- The Families First Coronavirus Relief Act (FFCRA)
 - Paid leave basics for health care providers
- The FFCRA “health care provider” exemption
 - What does the FFCRA law provide?
 - How *was* the exemption interpreted by the United States Department of Labor (USDOL)
 - What *is* the USDOL’s new interpretation of the exemption?
- Recommended next steps for health care providers

FFCRA Basic Leave Entitlements

The FFCRA requires employers with **fewer than 500 employees** to provide:

- Up to 80 hours of paid leave under the Emergency Paid Sick Leave Act (EPSL)
 - EPSL leave is for employees who cannot work or telework due to a number of COVID-19-related reasons
- Up to 12 weeks of leave under the Emergency Family and Medical Leave Expansion Act (EFMLA)
 - EFMLA leave is for COVID-19-related closure of a child's school or place of care
 - Weeks 10 through 12 of leave are paid, but the employee can take paid EPSL leave during Weeks 1 through 2

FFCRA Paid Leave Benefits

- EPSL paid leave
 - Paid at 100% of employee's regular rate for leave to care for him/herself (up to \$511 daily, \$5,110 total)
 - Paid at 2/3 of employee's regular rate for leave to care for others (up to \$200 daily, \$2,000 total)
- EFMLA leave paid at 2/3 of employee's regular rate (up to \$200 daily, \$12,000 total)
- Employer gets dollar-for-dollar tax credit for cost of providing EPSL and EFMLA paid leave

FFCRA Eligibility and Miscellaneous Employer Obligations

- Leave may be taken between April 1, 2020 through December 31, 2020
 - EPSL available for all employees regardless of length of employment
 - EFMLA available if person employed at least 30 days prior to leave request
- Employers must display poster. Poster can be found at:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

The FFCRA “Small Employer” Exemption Is VERY Small

- Separate from the health care provider exemption, there are certain special rules for “small employers”
- Employers with fewer than 50 employees ***may be able*** to exempt themselves from providing EPSL and EFMLA paid benefits
- To qualify, must be under 50 employees **AND** must show that leave payments would jeopardize the viability of the business as a going concern
 - Employer must fall within one of only three very specific grounds for claiming viability of business is in jeopardy

FFCRA Small Employer Exemption – Three Strikes and You’re Out

To qualify for the small employer exemption, employer must show:

1. The leave “would result in the small business’ expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity”;
2. The absence of the employee(s) “would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or
3. “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services...and these labor or services are needed for the small business to operate at a minimal capacity.”

FFCRA Exemption for Even *Smaller* Employers – *One Strike and You're Out*

Under the FFCRA, an employer with fewer than 25 employees may decline to reinstate an employee who has taken EFMLA, but only if ***all*** three of the following criteria are met:

- The employer has eliminated the employee's prior position due to COVID-19;
- The employer's attempts to place the employee in an equivalent position fail; and
- The employer offers the employee an equivalent position for one year from the earlier of (1) the date the leave concluded or (2) the date 12 weeks after the leave began

The Health Care Provider Exemption as Defined Under the FFCRA

- EPSL and EFMLA allow employer to deny paid benefits to a “health care provider”
- The FFCRA law specifically adopts FMLA definition of “health care provider”
 - Essentially limited to doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, and physician assistants
- FMLA definition does not include any other employees of medical practice, surgery center, imaging center, etc.

The Health Care Provider Exemption as Defined by USDOL (*Prior to 9/16/20*)

- USDOL interpretation of exemption much broader than explicit terms of the FFCRA (FMLA definition)
- USDOL extended exemption to also apply to:
 - ***Any employee*** of a wide array of health care-related institutions (doctor's office; hospital; health care center; clinic; post-secondary educational institution offering health care instruction; medical school; local health department or agency; nursing facility; retirement facility; nursing home; home health care provider; any facility that performs laboratory or medical testing; pharmacy; or any similar institution, employer, or entity)
- USDOL interpretation meant probably everyone on this webinar could exempt all their employees from all FFCRA paid leave obligations

The Health Care Provider Exemption as of 9/16/20...Who is Eligible?

- NY Federal Court ruled that USDOL interpreted health care exemption too broadly
- As a result of court ruling, effective 9/16/20 USDOL substantially narrowed the health care provider exemption
- Effective 9/16/20 the exemption no longer applies to ***all*** employees of a health care provider
- Change in USDOL position means that, as of 9/16/20, probably everyone on this webinar obligated to provide FFCRA paid leave
 - Medical practices, ambulatory surgery centers, imaging centers, and other health care providers previously exempted almost certainly have employees now eligible FFCRA paid leave

The Health Care Provider Exemption as of 9/16/20...Who is Eligible? *(continued)*

- Effective 9/16/20, the USDOL (*in part*) adopts the more narrow definition of health care provider under FMLA
- Under the FMLA definition of health care provider, essentially FFCRA paid leave may only be denied to the following employees:
 - Licensed and practicing doctors of medicine and osteopathy
 - Licensed and practicing podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist)
 - Licensed and practicing nurse practitioners, nurse-midwives, clinical social workers, and physician assistants

USDOL Establishes Exemption for Certain “Other” Health Care Provider Employees

- USDOL regulations effective 9/16/20 also exempt certain health care providers not included in FMLA definition
- The USDOL extends exemption to “Any other Employee who is capable of providing health care services”
 - USDOL clarifies “health care services” to mean the provision of “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”

What “Other” Employees Fall Within USDOL’s Health Care Provider Exemption?

The new USDOL regulation elaborates on the “other” employee exemption, stating it ***only*** includes:

1. Nurses, nurse assistants, medical technicians, and any other persons who directly provide health care services;
2. Other employees providing health care services “under the supervision, order, or direction of, or providing direct assistance to” a health care provider (as defined by the FMLA) or a person identified in Number 1 above; and
3. “Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary for diagnoses and treatment.”

Be Careful...The “Other” Health Care Provider Exemption Has Limits

- Focus of exemption is on provision of “health care services”
- USDOL regulation states “Employees who do not provide health care services...are not health care providers even if their services could affect the provision of health care services”
- The following are identified as examples of employees who do **not** fall within the health care provider exemption and must be offered paid FFCRA leave
 - IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers

What Does It Mean to Provide “Health Care Services”?

- As stated previously, USDOL states that “health care services” means providing:
 - Diagnostic services
 - Preventative 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
- USDOL provides further clarification on what the above terms mean

USDOL Clarification on What Constitutes Health Care Services

- Diagnostic services include:
 - “Taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results”
- Preventive services include:
 - “Screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems”

USDOL Clarification on What Constitutes Health Care Services *(continued)*

- Treatment services include:
 - “Performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments”
- Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples

Next Steps

Understand your rights and obligations under the FFCRA

- Telework availability and request for intermittent leave may result in denial of FFCRA leave
- Limited documentation employers can insist upon to substantiate need for FFCRA leave
- NJ Travel Advisory likely does not trigger right to EPSL leave

Remember, the USDOL isn't always right

- USDOL's regulations and interpretations of FFCRA are not the final word
- Following USDOL rules prior and subsequent to 9/16/20 could still expose employers to litigation claims

Next Steps *(continued)*

Remember, the IRS is looking

- Must understand documentation and retention requirements for tax credit purposes

Remember also, employees (and plaintiff attorneys) will be looking

- Employees may be able to bring private right of action if denied FFCRA paid leave
- Other state and federal laws are implicated

Next Steps *(continued)*

- New Jersey Family Leave Act
 - Employers with 30 or more employees must provide leave if the school/place of care of the employee's child is closed for COVID-19-related reasons
- New Jersey Unemployment
 - Unemployment benefits available for certain COVID-19-related school closures
- New Jersey Paid Sick Leave Law
- New Jersey Executive Orders still require employers to provide telework arrangements wherever practicable
- New Jersey has expansive Whistleblower Law
- Americans with Disabilities Act/New Jersey Law Against Discrimination

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