

**DEPARTMENT OF LABOR REVISES AND CLARIFIES
TEMPORARY RULE REGARDING FFCRA LEAVE**

To: UCCI Members
From: Jane May, O'Halloran Kosoff Geitner & Cook, LLC
Date: September 16, 2020
Re: DOL Revises and Clarifies FFCRA Temporary Rule

On September 16, 2020, the Department of Labor (DOL) published [revisions and clarifications to the temporary rule](#) issued on April 1, 2020, implementing the emergency paid sick leave (EPSL) and expanded family and medical leave (EFML) under the Families First Coronavirus Response Act (FFCRA). The revised rule is effective from September 16, 2020 through December 31, 2020. The DOL issued the clarifications and revisions in response to a [ruling issued by a federal court in the Southern District of New York](#) which struck down a few provisions of the temporary rule. Member entities should promptly examine their policies and revise them as necessary, in consultation with their State's Attorney, Corporation Counsel or legal advisor, to comply with the amended temporary rule to the FFCRA.

Healthcare Provider Exemption

Significantly, the DOL has revised and limited the definition of a "health care provider" who can be excluded from the leave provisions under the FFCRA. Previously the rule defined the term broadly to include anyone "employed at" a health care provider. In response to the New York federal court ruling, the DOL limited the definition to generally include doctors, nurse practitioners, nurses, nurse assistants, medical technicians, lab technicians, and any employee capable of providing health care services, meaning, he or she is employed to provide treatment, diagnostic or preventive services, or other services that are integrated with and necessary to the provision of patient care, and which if not provided, would adversely impact patient care. §826.30(c). The revised rule provides examples of the kinds of positions that are no longer exempt such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants and billers.

Intermittent Leave

The DOL has also reaffirmed that employer approval can be required in order for an employee to take leave on an intermittent basis. Section 826.50 permits an employee who is reporting to work at the employer's worksite to take leave intermittently only to care for the employee's child whose school or place of care is closed or unavailable due

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to COVID-19, and only with the employer's permission. The DOL has clarified, however, that if an employee needs to take leave because their child's school is operating on an alternate day basis such that the school is physically closed with respect to certain students on certain days, this would not be considered "intermittent" leave. A qualified employee would be entitled to FFCRA leave for each day of school/daycare closure without obtaining employer consent for "intermittent" leave. But when a school is closed for an extended period of time, and the employee seeks to take leave only for certain periods of time during the closure, the employee would need employer consent for intermittent leave under those circumstances.

An employee who is working remotely (and not reporting to the worksite) may also take intermittent leave for any of the FFCRA's qualifying reasons with employer consent.

Employee Notice

The DOL also revised the notice provisions under Sections 826.90 and 826.100. Notice may only be required after the first workday that an employee takes EPSL. After the first workday, it is reasonable for an employer to require notice as soon as practicable. Notice for EFML is required as soon as practicable. If the reason for EFML is foreseeable, it will be practicable to provide notice prior to the need to take EFML. §826.90. Documentation supporting the need for leave must be provided as soon as practicable, which in most cases will be when the employee provides notice of the need for leave. §826.100

Work Availability

The revised rule also reaffirms that employees may not take FFCRA leave for any of the reasons enumerated in the statute if the employer does not have work available for the employee. §826.20. The employee may take FFCRA leave only when the qualifying need for leave is the actual reason that the employee is unable to work or telework.