

U.S. DOL Regulation and Guidance on FFCRA's Paid Sick Days and Paid Leave Provisions

On March 18, 2020, Congress passed the *Families First Coronavirus Response Act (FFCRA)*, providing some employees up to 10 paid sick days and up to 12 weeks of family leave (with 10 of the weeks paid), in addition to other critical measures. This was the first time Congress required federal paid leave for private sector workers—an important first step in ensuring workers earning low wages have access to these benefits during the COVID-19 pandemic. Along with other **guidance**, the U.S. Department of Labor (DOL) issued a **Temporary Rule: Paid Leave under the Families First Coronavirus Response Act**. In response to a lawsuit by the New York Attorney General challenging provisions restricting workers' access to leave, a federal district Judge **vacated** portions of the Temporary Rule. DOL issued a **Revised Rule**, effective September 16 – December 31, 2020. The Revised Rule significantly narrows the scope of "health care providers" for whom employers can deny access to paid sick days and emergency paid leave under the FFCRA.

This fact sheet provides additional information about the impact of DOL's guidance and revised regulation on employees' rights to paid sick days and paid family leave, beyond what is included in CLASP's **Paid Sick Days and Paid Leave Provisions in FFCRA and CARES Act** fact sheet.¹ As recognized by a federal district judge, many of DOL's interpretations of the FFCRA significantly undermine the law's purpose to provide crucial paid sick days and paid family leave to workers who need to care for themselves and others because of COVID-19.

Beneficial Guidance for Employees

- Employees are eligible for up to 12 weeks' paid leave to care for a **son or daughter** whose school or place of care is closed, or whose child care provider is unavailable because of COVID-19.
 - DOL interpreted **son or daughter** consistent with existing Family and Medical Leave Act (FMLA) regulations to include:
 - a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or
 - an adult son or daughter (18 years of age or older) who is incapable of self-care because of a mental or physical disability.
- Employees who are **subject to a government-mandated quarantine or isolation order** related to COVID-19 are eligible for up to 80 hours of emergency paid sick leave.
 - DOL has interpreted "**subject to a quarantine or isolation order**" broadly to include: quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority that cause the employee to be unable to work when a federal, state, or local government authority has advised categories of citizens (e.g., people of certain age ranges or with certain medical conditions) to shelter in place,

stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.

- All covered employers, including small businesses, and employers of health care providers and emergency responders, **must post a Notice of Rights**, even if they claim an exemption (as described below).

Problematic Guidance for Employees

- **Requirement that there be available work**
 - DOL has required that **an employer have work** for the employee as a precondition to taking paid sick or emergency family leave. This will significantly limit employees' ability to benefit from the FFCRA, as government orders that close businesses are often the same orders that result in employees needing leave.
 - After a federal district court judge vacated this aspect of DOL's Temporary Regulation, DOL revised the Rule to maintain this requirement, with additional explanation and justification.
 - DOL explicitly noted, however, that if employers make work unavailable in an effort to deny FFCRA leave that could be unlawful retaliation.
- **Intermittent leave requires employer consent**
 - DOL has allowed **intermittent leave only with the employer's consent**.
 - After a federal district court judge vacated this aspect of DOL's Temporary Regulation, DOL revised the Rule to maintain this requirement, with additional explanation and justification.
 - DOL noted, however, that parents taking leave to care for a child whose school is operating on an alternating in-person/virtual schedule are not taking "intermittent" leave. Such working parents, therefore, should not be required to seek employer consent for leave.
 - This limitation on employees' access to their FFCRA leave rights remains problematic. Workers will be particularly harmed by employers who fail to operate in good faith or lack a valid business reason for denying intermittent leave.
- **Emergency family leave provides a new reason for leave under the FMLA, but not an additional amount of leave**
 - DOL has specified that the 12 weeks of emergency family leave for employees who need to care for a child whose school or child care provider is closed or unavailable will be **limited** by any FMLA leave an employee has already taken during the year. For employees, such as new parents, who have already exhausted their FMLA leave, that means they may not be able to access this new benefit Congress created to respond to the pandemic, even though their employers will be reimbursed for providing the benefit, unlike regular FMLA, which is unpaid.
 - Additionally, employees who take 12 weeks to care for a child whose school is closed will not have access to any FMLA leave for the rest of the year.
- **Extensive employee documentation requirements**
 - DOL has subjected employees to numerous and extensive **documentation requirements**.
 - In response to the district court's order, DOL's revised rule clarifies that employees must provide these documents "as soon as practicable." Fortunately, employees are no longer required to provide them before employers approve their leave. These requirements are still unnecessarily onerous (particularly compared, for example, with allowing small employers to "self-certify" that they are not subject to the law's mandate).

- The documentation requirements, for example, specify that employees requesting paid sick leave for quarantines or isolation orders must provide the name of the government entity that issued the order, creating unnecessary barriers to employees' ability to take leave.

Broad Exemptions and Opt-Outs will Deny Employees Access to Benefits

- **Small Business exemption** process will result in confusion and abuse
 - The FFCRA allowed DOL to exempt small businesses with less than 50 employees from providing leave to an employee to care for a child whose school is closed or whose child care provider is unavailable, when doing so would jeopardize the viability of the business.
 - DOL initiated a process allowing small businesses to “self-certify” that they are entitled to this exemption, without requiring them to certify they meet the standard for exemption or report any information to the government. This means there will be no way to track how many employers are lawfully or unlawfully claiming the exemption.
 - DOL estimates that 96 percent of covered employers have less than 50 employees, so the impact of this decision will be far-reaching, potentially affecting up to **33 million workers** who could be denied access to leave.ⁱⁱ
- DOL has significantly revised its overly broad definition of “**health care provider**”
 - Recognizing the exigencies of the current public health emergency, Congress created a narrow exception in the FFCRA allowing employers of “health care providers” to opt out of providing their employees with paid sick days and emergency family leave. The DOL Temporary Rule significantly broadened this exception, far beyond existing FMLA regulations, essentially allowing any health-care-related employer to opt out of providing leave for its employees, even those employees who don't provide medical care. This meant that paid leave, for example, could be denied to the cashier in a hospital gift shop or the financial staffer who processes payroll for a medical school. By DOL's own estimates, this could have taken protections away from an estimated 9 million health care workers.
 - Following the district court's decision, DOL significantly revised its definition of “health care provider,” to include those authorized to practice medicine and capable of providing health care services, meaning they are employed to provide 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.
 - The revised definition includes those who directly provide patient care, such as nurses, nurse assistants, medical technicians, and employees whose work is necessary to provide health care services, such as laboratory technicians who process test results. Employers can no longer opt out of providing leave to employees who work in such settings but are not integral to medical care, such as IT professionals, building maintenance staff, human resources personnel, food services workers, and consultants.

CLASP continues to advocate for Congress to fill the gaps in FFCRA that left out millions of working people and to pass permanent, national, comprehensive, and inclusive paid sick days and paid family and medical leave.

ⁱ “Paid Sick Days and Paid Leave Provisions in FFCRA and CARES Act,” CLASP, March 20, 2020,

<https://www.clasp.org/publications/fact-sheet/paid-sick-days-and-paid-leave-provisions-ffcra-and-cares-act>.

ⁱⁱ Sarah Jane Glynn, “Coronavirus Paid Leave Exemptions Exclude Millions of Workers From Coverage,” Center for American Progress, April 17, 2020, <https://www.americanprogress.org/issues/economy/news/2020/04/17/483287/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/>.