

DC Tax Flash: DOL Modifies FFCRA Paid Leave Rules

Tax Alert
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The Department of Labor (DOL) has [revised and reissued a temporary rule](#) first issued in April implementing the leave provisions under the Families First Coronavirus Response Act (FFCRA). The move reflects the [decision by the District Court for the Southern District of New York](#) early last month invalidating certain portions of the DOL's original rule. The revised rule is set take effect when published in the Federal Register on September 16, 2020.

The DOL summarizes its position in the [revised rulemaking](#), noting that the Department:

- Reaffirms that paid sick leave and expanded family and medical leave may be taken only if the employee has work from which to take leave and explains further why this requirement is appropriate. This temporary rule clarifies that this requirement applies to all qualifying reasons to take paid sick leave and expanded family and medical leave.
- Reaffirms that, where intermittent FFCRA leave is permitted by the Department's regulations, an employee must obtain his or her employer's approval to take paid sick leave or expanded family and medical leave intermittently under § 826.50 and explains further the basis for this requirement.
- Revises the definition of "health care provider" under § 826.30(c)(1) to mean employees who are health care providers under §§ 825.102 and 825.125 and other employees who 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.
- Revises § 826.100 to clarify that the information the employee must give the employer to support the need for his or her leave should be provided to the employer as soon as practicable.
- Revises § 826.90 to correct an inconsistency regarding when an employee may be required to give notice of expanded family and medical leave to his or her employer.

The 53-page text of the new temporary rule is [posted here](#). A DOL press release is [posted here](#).

In conjunction with these revisions, the DOL also added the following [three new FAQs](#) on the FFCRA paid leave provisions:

101. When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated?

August 3, 2020. The Department first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit *New York v. Scalia*, Civ. No. 20-3020-JPO (S.D.N.Y.). The challenged provisions were vacated when the [District Court issued its opinion and order](#) on August 3, 2020. As of August 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.

102. Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?

Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers

the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.

103. When do the revisions to the Department's FFCRA paid leave regulations become effective?

September 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on September 16, 2020. This means they are effective from September 16, 2020 through the expiration of the FFCRA's paid leave provisions on December 31, 2020.

The complete set of DOL's FAQs on paid leave under FFCRA are [posted here](#).

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