

Federal Law Alert

FFCRA Leave – Significant Rule Changes

A federal court in New York recently struck down four federal Department of Labor (DOL) rules related to the leaves provided by the Families First Coronavirus Response Act (FFCRA). As a result, certain aspects of the FFCRA are now more favorable to employees. Unfortunately, it's not clear if the ruling applies nationwide or only in the Southern District of New York, where that court is located. Until there is further activity in the case—which may clarify whether the rules remain intact throughout the rest of the country—we recommend that employers err on the side of caution when administering FFCRA leaves and assume these particular rules no longer apply.

What is clear is that these four rules definitely do not apply to the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester (i.e., the Southern District of New York).

Here are the rules that the court invalidated:

The requirement that work be available for an employee to use leave

DOL Rule: The DOL said that for an employee to use Emergency Paid Sick Leave (EPSL) or Emergency Family and Medical Leave (EFMLA, aka EFMLEA), the employer had to have work available for them during the time they needed leave. For instance, if an employee was furloughed while sick with COVID-19, they would not be eligible for EPSL.

The Court's Ruling: Availability of work is irrelevant. If an employee is still employed, whether on the schedule or not, they should be allowed to use FFCRA leave for qualifying reasons.

The requirement that employers agree to intermittent leave

DOL Rule: Employees must get approval from their employer to use intermittent leave to care for their children when their school or place of care is unavailable because of COVID-19.

The Court's Ruling: If an employee needs intermittent leave (partial weeks or partial days off) to care for their child whose school or place of care is unavailable because of COVID-19, the employer must allow it.

The requirement that employees provide documentation *before* taking leave

DOL Rule: Employers could require that employees provide certain documentation before being allowed to take FFCRA leave or before designating the leave as EPSL or EFMLA.

The Court's Ruling: Employers can still require documentation (which is necessary to get their tax credit), but they can't prevent an employee from starting leave until the documentation is received. The law clearly states that an employee must provide notice "as is practicable" when taking EFMLA leave and after the first workday of leave when taking EPSL.

The definition of health care provider, for the purpose of exemption from leave

DOL Rule: The DOL had defined health care providers broadly, to include anyone who works for a healthcare entity and many who contract with one. (The rule was so broad that a custodian working at a drugstore or an English professor at a university with a medical school could be exempt.)

The Court's Ruling: The definition is too broad. However, the court did not provide a new definition. We recommend that employers apply the exemption only to those employees capable of directly providing healthcare services.

We will be watching closely for activity in this case and will let employers know if and when things change or become clearer.