

# COMPLIANCE ADVISOR

What every HR leader should know about compliance.



## FFCRA Leave Department of Labor Temporary Regulations

The U.S. Department of Labor (DOL) has released temporary regulations implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) provisions under the Families First Coronavirus Response Act (FFCRA). The EFMLEA provides qualifying employees with paid sick leave during the COVID-19 crisis to care for a child absent from school due to school closure or childcare unavailability. The EPSLA provides employees with paid sick leave for self-care and family care due to possible COVID-19 contraction and exposure, as well as paid childcare leave.

The regulations are effective April 1, 2020, through December 31, 2020, which corresponds to the effective and sunset dates for the FFCRA. The temporary regulations were issued by the DOL to provide immediate guidance prior to the publication of the FFCRA final regulations and have the force of law. For an overview of the requirements of the EFMLEA and EPSLA, please review our compliance Advisor entitled "[Families First Coronavirus Response Act](#)" and the Advisor dedicated to the [Coronavirus Aid Relief, and Economic Security Act](#).

On August 3, 2020, the U.S. District Court for the Southern District of New York (court) [invalidated](#) certain provisions of the temporary regulations implementing the EPSLA and EFMLEA.

Under the temporary regulations, an employee can only take leave under the FFCRA if the employee has a qualifying reason for leave and the employer has work available for the employee. The court invalidated this work-availability requirement with respect to the qualifying reasons for taking leave under the FFCRA. Under the court's holding, an employer is not required to have work available for an employee as a condition for an employee to be eligible for leave. This potentially opens the door for employees to claim eligibility for leave even if they are furloughed, temporarily laid off, or are not working because the employer has temporarily ceased operations.

Under the FFCRA, an employer may exclude health care providers from being eligible for leave. The court invalidated the DOL's definition of a "health care provider" which is defined as "anyone employed at any 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions[,] as well as any "individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

The court also invalidated the requirement that an employer consent to an employee seeking to take leave intermittently when allowed under the temporary regulations.

Finally, the court invalidated the requirement for employees to submit documentation to the employer prior to taking leave. The court did not invalidate the documentation requirement in totality, just the requirement that an employee provide the documentation prior to taking leave.

The court's decision did not specifically limit the scope of its ruling, so employers nationwide should consult with their attorneys regarding providing and denying leave for employees under the FFCRA that does not comply with the court's ruling. Employers should stay apprised of future developments including any potential appeals or new guidance or regulations from the DOL.

The regulations provide much needed clarity to the meaning of operative terms and to the employer mandates contained in the FFCRA.

**Download the following documents for more information on:**

[Download Part 1:](#) Covered employees, the small employer exemption, compensating teleworkers, intermittent leave and reasons for paid EPSLA.

[Download Part 2:](#) The regulations on counting employees, expanded FMLA leave, and rate of pay calculation.

[Download Part 3:](#) The health care provider and emergency responder exemption, employee notice of need for leave, health plan coverage, multiemployer collective bargaining agreements, return to work, and prohibited acts and enforcement.

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