



**Guidance on Families First Coronavirus Act (FFCRA) Leave
US Department of Labor's Revised Regulations
Effective September 16, 2020**

The US Department of Labor (USDOL) issued revised regulations on the Families First Coronavirus Act Leave in response to a recent federal court ruling. The revised regulations provide for the following changes to the FFCRA Leave:

- Reaffirms that employees are not eligible for FFCRA Leave if the employer has no work for them to perform. Work must be available in order for the employee to use FFCRA Leave;
- Reaffirms that intermittent leave under the FFCRA requires the employer's consent. Further clarifies that leave taken because an employee's child is required to participate in a hybrid or alternate school schedule is not considered to be intermittent leave;
- Clarifies when employers can require supporting documentation for FFCRA Leave and reaffirms that employees may be required to provide notice of a need to take expanded Family Medical Leave (FML).
- Re-defines the definition of "Health Care Providers" who are exempt from eligibility to use FFCRA Leave.

The chart below summarizes these updates. State agencies are encouraged to modify their internal agency policies and procedures to reflect these changes. These revisions are effective as of September 16, 2020 and will remain in place until December 31, 2020¹ when the FFCRA is scheduled to expire.

| Effective September 16, 2020 | |
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| Work Availability | <ul style="list-style-type: none"> • If a state agency has no work available for an otherwise eligible employee to perform on-site or via telework, then the FFCRA leave is not available to the employee. • This provision applies to temporary workforce reductions and layoffs as well as other situations. |
| Intermittent Leave | <ul style="list-style-type: none"> • Approval of intermittent use of FFCRA Leave is an Agency decision and is limited to the qualifying reasons that will not contribute to the spread of COVID-19. Intermittent leave is most appropriately applicable to Reason #5: Expanded Family Medical Leave (EFML) to care for a child whose childcare provider or school is closed due to COVID-19. • Clarification that FFCRA Leave taken in full-day increments to care for children whose schools are using a hybrid or alternate scheduling arrangement is not considered to be using leave intermittently. Rather, "each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day." • There are many alternatives to intermittent use of Expanded FML for virtual education and agencies are encouraged to be flexible. Additional USDOL guidance on virtual education is provided in a separate document. |
| Supporting Documentation | <ul style="list-style-type: none"> • Clarification that documentation need not be given <i>prior</i> to the employee taking the leave, but may be provided to the employer "as soon as practicable." In some cases this may be when the employee provides notice to the agency of their need/request to take the leave. • DHRM recommends that agencies continue to use the FFCRA Leave forms posted on the DHRM website. |

¹ Unless the regulations are revised again or the FFCRA is extended

U.S. DOL Clarification on Health Care Provider Eligibility for FFCRA Leave

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| Exempted from FFCRA Leave | <ul style="list-style-type: none"> • Anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes; <i>and</i> • Any other person 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.” |
| Ineligible for FFCRA Leave | Employees who directly assist or are supervised by a health care provider in providing patient care services. Includes nurses, nurse assistants or aides, medical technicians, direct care support staff and laboratory scientists or technicians who process test results to aid in diagnosis and treatment. |
| Eligible for FFCRA Leave | <p>Food service/dining staff including cooks, records and billing staff, administrative staff, IT, HR, building maintenance and housekeeping staff, and anyone that is <u>not providing health care services to patients</u> even if the employee’s duties could affect the provision of health care services.</p> <p>Note: There is no clear guidance from the USDOL regarding how to treat cross-trained employees who perform work that may fall into both areas. DHRM advises that agencies apply the “greater than” principle:</p> <ul style="list-style-type: none"> • If the employees’ actual work duties involve a greater likelihood of direct patient care, designate the position as a Health Care Provider. • However, if the direct patient care services are incidental and infrequent, the employee should be designated as eligible for the leave. Examples may include a Food Service Worker trained to assist in hand-feeding patients; Administrative staff trained to transport samples to and from the lab. |
| DEFINITIONS: | |
| Diagnostic Services | “Taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.” |
| Preventive Services | “Screenings, check-ups, and counseling to prevent illnesses, disease or health problems.” |
| Treatment Services | “Performing procedures, surgery or other invasive or other physical interventions; prescribing medicines, providing/administering prescribed medicines, physical therapy, and providing/assisting in breathing treatments.” |
| Integrated and necessary services | “Bathing, dressing, hand-feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.” |

*Note: The revised regulations do not address the exemptions for Emergency Responders. Positions as defined in the FFCRA as Emergency Responders will continue to be ineligible for FFCRA Leave. However, DHRM encourages agencies to exercise reasonable judgment related to situations involving positive cases or exposures to COVID-19.