



## New U.S. Department of Labor Updates Concerning FFCRA

### A. Updated FAQs Concerning Eligibility for Paid Sick Leave under FFCRA pertaining to the Reopening of Schools

On August 27, 2020, The U.S. Department of Labor (“DOL”) published an updated list of frequently asked questions concerning employees’ eligibility for paid leave under the Families First Coronavirus Reponses Act (“FFCRA”) in conjunction with the reopening of schools and the various formats for learning in the midst of the COVID-19 pandemic.

The FAQs contain clarification regarding an employee’s eligibility to take paid leave under the FFCRA in instances when an employee’s child attends school on an alternate day basis, when the employee opts for his or her child’s remote learning even though an in-person learning option is available, and when a school year begins with remote learning with a contingency that it may shift to in-person instruction if conditions improve.

#### 1. Alternate Day or Other Hybrid-Attendance Basis

Where a child’s school is operating on an alternate day schedule or other hybrid attendance basis, the FAQs clarify that an employee is eligible to take paid leave under the FFCRA on days when the employee’s child is not attending school in person and must participate in remote learning. For purposes of the FFCRA, the school is considered “closed” to the child on days that he or she cannot attend in person and must instead attend remotely. A parent will be able to take paid leave under the FFCRA as long as he or she requires leave to actually care for his or her child during the time the child is required to attend school remotely and only if there is no other suitable person available to care for the child. Assuming that these requirements are met, the employee is eligible to take paid leave under the FFCRA for each day the child is required to attend school remotely.

#### 2. Parent’s Choice Between In-Person and Remote Learning

Where a school has given the option for a child to attend in person or participate in a remote learning program and the employee has chosen to have his or her child attend school remotely, the employee is not eligible to take paid leave under FFCRA. In this scenario, the child’s school is not considered “closed” due to COVID-19 related reasons because the child could have attended in person. Since the child’s participation in remote learning is based on the employee’s choice for his or her child to remain at home, the employee is not entitled to paid leave to take care of his or her child.

However, if the employee's child is home under a quarantine order or has been advised to self-isolate or self-quarantine by a health care provider, the employee may be eligible to take paid leave under FFCRA to care for his or her child.

### 3. Remote Learning With a Contingency for Returning to In-Person Learning

Where a school has opted to begin the academic year by requiring remote learning for all students but has a contingency that it may reopen for in-person learning if the COVID-19 situation improves, the employee is eligible to take paid leave under FFCRA for the time his or her child's school remains closed. However, if the school later reopens, an employee's eligibility for paid leave under FFCRA will depend on the school's operation model.

#### **B. Updated Temporary Rule on FFCRA Addresses "Health Care Provider Exemption" and Intermittent Leave for "Closed" School Days**

The DOL also recently revised its temporary rules regarding the FFCRA, originally issued on April 1, 2020. The updated rules address concerns brought by the United States District Court for the Southern District of New York in its opinion and order in the case *State of New York v. United States Department of Labor, et al.* The DOL has updated its temporary rules to limit the definition of "Health Care Provider" for the purposes of FFCRA exemption and change the rules regarding leave for school closures.

##### 1. "Health Care Provider" Definition Revisited

There is an exemption to the paid leave provisions of the FFCRA for "Health Care Providers." Originally, the FFCRA defined "Health Care Provider" in a way that allowed employers defined as "Health Care Providers" to opt not to provide emergency paid sick leave and emergency FMLA leave to all employees. In the revised temporary rules, the DOL modified the definition of "Health Care Provider" to narrow the types of employees that are considered "Health Care Providers." Now, licensed medical professionals, nurses, nurse assistants, medical technicians, employees providing services under the supervision or direction of a health care professional, and employees which "are otherwise integrated into and necessary to the provision of health care services such as laboratory technicians" are considered "Health Care Providers" for the purpose of the exemption. However, any other employees of "Health Care Providers" do not meet the definition and may not be excluded from the leave provisions of the FFCRA. This includes all employees not directly involved in patient care, such as "IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers."

## 2. Leave for “Closed” School Days May Not Require Employer Approval

Under the original temporary rules, intermittent leave was available to qualifying employees with their employer’s approval. In interpreting this rule, there were issues as to whether certain leave situations were considered intermittent, including situations where a child attends school remotely during certain days of the week. In its updated temporary rules, the DOL clarifies that, for the purposes of an employee taking paid leave under FFCRA to care for his or her child, each day that the child’s school is not open for the employee’s child counts as a separate occurrence allowing for leave without the employer’s approval, assuming that the other conditions specified in the FFCRA are met. The updated temporary rule provides that, “The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.” This leave is not considered intermittent and, therefore, an employee is not required to seek his or her employer’s approval for such leave. Furthermore, the updated rule establishes that the employee is also not required to give prior notice of the need for leave before taking the leave. Instead, notice of the need for such leave may only be required “as soon as practicable” after the first day of leave that an employee takes for this purpose.

For further information on the FFCRA, the implications of COVID-19 on labor and employment law, or other employment related questions, please contact [Christopher L. Brigham](#), Chair of the Employment Law Practice Group at Updike, Kelly & Spellacy, P.C. at (203) 786-8310 or [cbrigham@uks.com](mailto:cbrigham@uks.com), [Andrew L. Houlding](#), Principal in the Employment Law Practice Group at (203) 786-8315 or [ahoulding@uks.com](mailto:ahoulding@uks.com), [Valerie M. Ferdon](#), Associate Attorney in the Employment Law Practice Group at (860) 548-2607 or [vferdon@uks.com](mailto:vferdon@uks.com); or [Jeffrey Renaud](#), Associate Attorney in the Employment Law Practice Group at (860) 548-2629 or [jrenaud@uks.com](mailto:jrenaud@uks.com).

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