# DOL Issues Updated FFCRA Regulations

## Labor & Employment Law Update

By Peter Hansen on September 14, 2020

The U.S. Department of Labor announced revised regulations interpreting the Families First Coronavirus Response Act (FFCRA) in response to a New York federal court decision declaring some FFCRA regulations invalid. The revised regulations become effective September 16, 2020, and include several changes and clarifications that employers should be aware of:

**The Health Care Provider Exception.** The DOL limited the "health care provider" exception (which excluded certain employees from FFCRA eligibility) to employees who are "capable of providing health care services," including "diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care." The DOL also provided a non-exhaustive list of employees who are not health care providers: "information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers." Accordingly, employers in the health care industry must now undertake a position-specific analysis to determine which employees meet the new definition of "health care provider."

**Requiring Documentation Before FFCRA Leave.** Employers cannot require the employee to submit documentation prior to the commencement of FFCRA leave. Employers can, however, continue to require employees to provide documentation supporting their need for FFCRA "as soon as practicable."

The DOL also doubled down on two of the four significant regulations the New York federal court invalidated:

**Work Availability Requirement.** FFCRA leave continues to be available only if the employer has work available for the employee to perform. So, if the employer has no work for the employee (due to a furlough, business closure, etc.), then the employee is not entitled to FFCRA leave even if they would otherwise qualify.

**Intermittent FFCRA Leave Only with Employer's Consent.** Intermittent use of FFCRA leave continues to be available only if the employer allows it – however, the DOL clarified that the "employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance)

basis." Put another way, "[f]or 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."

The revised regulations include additional rationale for retaining the "work availability" and "employer consent for intermittent leave" requirements, but another lawsuit challenging them is certainly possible and perhaps even likely. In the meantime, employers should consult with employment counsel on any request for FFCRA leave, especially before denying a request based upon the "health care provider" exception or lack of work available to the employee.