

Federal Judge Vacates Key FFCRA Regulations, Creating Compliance Challenges for Employers

The U.S. District Court for the Southern District of New York on August 3, 2020, in the *State of New York v. United States Department of Labor*, vacated several key provisions of the U.S. Department of Labor's (DOL) final rule implementing the Families First Coronavirus Response Act (FFCRA), creating a number of compliance issues for employers.

Overview

On March 18, 2020, President Trump [signed the FFCRA into law](#). The FFCRA introduced two new types of leave intended to cover employee absences related to the COVID-19 pandemic: Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFMLA). Employers with fewer than 500 employees are required to provide EPSL and EFMLA to qualifying employees.

On April 1, 2020, the DOL issued its final regulations under the FFCRA (FFCRA Regulations). Reinhart's article [Department of Labor Issues Families First Coronavirus Response Act Regulations](#) provides an overview of these regulations.

Vacated FFCRA Regulations

Shortly after the regulations were issued, the State of New York sued the DOL claiming the FFCRA Regulations exceeded the DOL's legal drafting authority and that this overreach denied FFCRA leave to otherwise eligible employees.

The Southern District of New York agreed in part with the State of New York, vacating four provisions of the FFCRA Regulations and creating a compliance headache for employers. Each vacated provision is outlined below.

• Work-Availability Requirement

- [Previous Rule](#). Under the FFCRA Regulations, employees were not eligible for FFCRA leave if their employer did not have work available for them. This provision precluded furloughed employees from qualifying for FFCRA leave.
- [New Rule](#). The court's ruling eliminated this requirement. Employees can now take FFCRA leave regardless of whether their employer has work available for them.

• Definition of Health Care Provider

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- Previous Rule. Employers can exclude employees who qualify as health care providers from leave benefits under the FFCRA. The FFCRA Regulations provided an expansive definition of "health care provider" that could be excluded from FFCRA leave.
- New Rule. The court vacated the FFCRA Regulations' definition of "health care provider," finding it was "vastly overbroad" and included employees "whose roles bear *no nexus whatsoever* to the provision of health care services." As a result, it is unclear to which employees the health care provider exception applies.
- **Intermittent Leave**
 - Previous Rule. The FFCRA Regulations limited when and why employees could take intermittent FFCRA leave and, in some instances, intermittent leave required an employer's consent.
 - New Rule. The court eliminated the requirement that employees obtain their employer's consent before taking intermittent leave to care for a child whose school or place of care is closed or whether child care is unavailable. In other words, an employee can take intermittent leave for this reason without seeking his employer's consent.
- **Documentation**
 - Previous Rule. The FFCRA Regulations required that employees submit documentation to their employer before taking FFCRA leave. Employers could deny leave if an employee failed to submit the necessary documentation.
 - New Rule. Under the recent decision, an employer may still require that its employees submit documentation required by the FFCRA. However, an employer cannot deny an employee's FFCRA leave request because the employee has not submitted documentation before taking leave. In other words, documentation cannot be a precondition of FFCRA leave.

Does This Ruling Apply to Me?

It is possible that the ruling applies to all employers and not just those in New York. Typically, a decision by a district court in a specific jurisdiction is limited to that jurisdiction. However, there are similar cases where a lower court blocked DOL regulations and the decision applied to employers nationwide. The court in this case offered no limitation on the scope of its ruling. Further, New York's



attorney general issued a [press release](#) confirming that its office considers the ruling to apply nationwide.

Next Steps

The DOL has not indicated if it will appeal the decision. It is also not clear if the DOL will issue new regulations. In the meantime, employers should begin developing strategies in preparation for multiple scenarios, including complying with new FFCRA regulations.

Employers with questions regarding FFCRA in light of this new ruling should contact [Shannon Toole](#) or a member of Reinhart's Labor and Employment Practice.

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