

**Families First Coronavirus Response Act:
Temporary Rule Updated by the United States Department of Labor
Effective September 16, 2020**

The United States Department of Labor (DOL) first issued the Family First Coronavirus Response Act (FFCRA) paid leave regulations on April 1, 2020. The leaves include the Emergency Family Medical Leave Expansion Act (EFMLEA) and Emergency Paid Sick Leave Act (EPSLA) and are discussed further on the [KLC COVID19 Resources page](#). In a recent case out of [New York](#), certain provisions of FFCRA regulations were at issue. Those challenged provisions were vacated when the District Court issued its opinion and order on August 3, 2020.

On Friday, September 11, [the DOL issued revisions and clarifications](#) to the regulations based on the August 3, 2020 court decision. Those that may affect cities include:

- Clarification that the EFMLEA and EPSLA “may be taken only if the employee has work from which to take leave and explains further why this requirement is appropriate. This temporary rule clarifies that this requirement applies to all qualifying reasons to take paid sick leave and expanded family and medical leave.” The DOL explained that “if there is no work for an individual to perform due to circumstances other than a qualifying reason for leave – perhaps the employer closed the worksite (temporarily or permanently) – that qualifying reason could not be a but-for cause of the employee’s inability to work.”
- Clarification that where intermittent leave is allowed by the regulations, “an employee must obtain his or her employer’s approval to take paid sick leave or expanded family and medical leave intermittently.” The DOL also clarified what is a request for intermittent leave based on different types of school closures:
 - The DOL states 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 because such leave would not be intermittent. In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee.” Each day of school closure constitutes a separate reason for EFMLEA and/or EPSLA that ends when the school opens again for the particular student. “The employee may take leave due to a school closure until that qualifying reason ends (*i.e.*, the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.*, school closes again the day after that).”
 - If the school is closed for a certain length of time, and the employee requests leave only for certain portions during the closure, this would be a

request for intermittent leave that would require the employer's agreement.

- Revision that any support provided to the employer, as to the need for EFMLEA and/or EPSLA, “be provided to the employer as soon as practicable.”
- Revision that notice for the need for EFMLEA or EPSLA be provided to the employer as soon as practicable.
 - “Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an employee takes paid sick leave. After the first workday, it will be reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case.”
 - Notice for taking expanded family and medical leave, in circumstances where the reason for this leave is foreseeable, “will generally be practicable to provide notice prior to the need to take leave.”

In addition to these changes, the DOL updated information in two other areas. One regarding an employer's obligation to track hours, and the second as to when an employee is entitled to EFMLEA during periods of remote learning.

In regard to the tracking hours, the Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees for all hours worked, including work that is completed without the employer's permission or knowledge. The DOL's guidance explains that the employer must pay for any work hours they should have known about through “reasonable diligence.” The DOL explains that reasonable diligence would include a reasonable time reporting process. If an employee fails to follow that process to the point that the employer is unaware of the obligation to compensate the employee, the employer will not be considered to have violated the FLSA. This is good news, as it clarifies that the employer does not have to monitor employee phone or electronic record to determine if there are any unreported work hours.

The second area clarifies whether or not an employee is entitled to FFCRA leave on remote learning days. The DOL gives these scenarios:

- If a child's school is operating on an alternate day (or hybrid) basis, the employee is eligible to take paid leave on days when their child is not permitted to attend school in person and must instead engage in remote learning, as long as the employee needs the leave to actually care for their child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA, the school is effectively “closed” to the employee's child on days that he or she cannot attend in person.
- If a child's school gives the employee a choice between in person or remote learning, the employee is not eligible to take paid leave because the child's school is not “closed” due to COVID-19 related reasons and it is open to attend. However, if, because of COVID-19, the employee's child is under a quarantine order or has been advised by a health care

provider to self-isolate or self-quarantine, the employee may be eligible to take paid leave to care for him or her.

Additional information can be found on the [DOL's Families First Coronavirus Response Act: Questions and Answers page](#). If you have any questions or if you need anything else, please contact Personnel Services Manager Andrea Shindlebower Main at ashindlebower@klc.org or by calling 800-876-4552.