

Wiggin and Dana Summary of the FFCRA Regulations

April 2, 2020

The DOL issued regulations yesterday implementing FFCRA. The regulations include provisions about the health care provider exemption. The new regulations conform with the informal guidance provided in the DOL's Q&A, so there is no change or new information in terms of the scope of this exemption. The relevant regulation starts on page 99. [Link to regulations](#)

In the discussion section, there are some items that may be of interest:

- Pages 34-35 say that if an employer does take advantage of the health care provider exemption, it does not “impact an employee’s earned or accrued sick, personal, vacation, or other employer-provided leave under the employer’s established policies. Further, an employer’s exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.” This isn’t new either, but it’s a good reminder that even employees who are exempted from the FFCRA have use of accrued sick leave, vacation, etc. and remain able to use that leave in accordance with their employers’ policies.
- Confirms that “employers of health care providers and emergency responders may exclude such employees from the EFMLEA’s leave requirements, but not the FMLA’s.” (Page 47)
- Notes that an employer may have employees who qualify for the health care provider exemption and others who don’t: “Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, their employers may have some employees who do not meet this definition, so these employers may still be impacted by the provisions of the FFCRA.” (Page 65).
- There’s a note on page 77 about what could have been a very troubling alternate path that the DOL rejected:
 - [T]he Department considered using a more narrow definition of health care provider and emergency responder for purposes of excluding such employees from the EPSLA’s paid sick leave requirements and/or the EFMLEA’s expanded family and medical leave requirements. The Department considered only allowing employers to exclude those workers who directly work with COVID-19 patients, but felt that such a limitation would not provide sufficient flexibility to the health care community to make necessary staffing decisions to address the COVID-19 public health emergency. Further, a more narrow definition could leave health care facilities without staff to perform critical services needed to battle COVID-19.

- In addition to the closure of a school/day care and the unavailability of a paid child care provider, an employee may also qualify for expanded family leave/emergency sick leave if an unpaid child care provider is unavailable due to COVID-19 related reasons. Per the regulations, “the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee’s child.” (Page 84).
- The regulations also clarify that an unpaid friend, family member, or neighbor CAN be unpaid notwithstanding how the legislation defines child care provider. If an unpaid provider is unavailable due to COVID-19 related reasons, the employee may qualify for expanded family leave/emergency sick leave: “[T]he eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee’s child.”