

# Electronic Alert

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**DOL Revises FFCRA Regulations in  
Response to Federal Court Decision & BOLI  
Issues New Rules on the Oregon Family Leave Act**

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## **FFCRA Updates**

On September 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations under the Families First Coronavirus Response Act (FFCRA) in response to a New York federal court's August 2020 decision invalidating portions of the DOL's prior regulations. The federal court's decision took issue with four portions of the regulations, and employers nationwide were left with unanswered questions about how and whether to apply this ruling. In the recent revised regulations, the DOL stands firm on two of the four issues challenged in federal court and revised the other documentation requirement and health care provider exemption.

### Documentation Requirement (Revised)

The DOL revised the FFCRA documentation requirement for requesting leave. The initial regulation required employees to provide documentation *before* taking FFCRA leave. The DOL revised its regulations to state that an employee must provide the required information and documentation "as soon as practicable," rather than prior to and as a condition to taking leave.

### The Health Care Provider Exemption (Revised)

The DOL narrowed its definition of "health care provider," limiting the type of employees exempted from FFCRA leave. In revising its definition of "health care provider," the DOL focused on the roles and duties of employees rather than employers. Accordingly, the revised definition of "health care provider" includes only those employees who directly "provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care."

### Work-Availability Requirement

The DOL reaffirmed its position and provided additional rationale for its rule that FFCRA leave is only available to employees who are unable to work or telework due to a qualifying event. The DOL makes clear the qualifying event must be the "but-for" reason for leave since leave "is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave." In other words, employees are precluded from FFCRA leave if the employer did not have work for the employee or the employee was otherwise unscheduled to

work, regardless of whether the employee also happens to have a qualifying event. The bottom line is that employees are only entitled to FFCRA leave if their employer has work available and if the need is based on a qualifying event.

### Intermittent Leave

The DOL also stood firm and provided additional rationale on the requirement for employer consent before employees are entitled to FFCRA intermittent leave. The DOL explained that requiring employer consent is consistent with longstanding Family and Medical Leave Act (FMLA) intermittent leave principles. When intermittent leave is not required for medical reasons, leave obligations under FFCRA, like FMLA, should “balance the employee’s need for leave with the employer’s interest in avoiding disruptions by requiring agreement by the employer for the employee to take intermittent leave.”

Intermittent leave is still only appropriate for qualifying events under FFCRA that do not present a public health risk, such as when an employee needs to care for a child whose school or place of care has been closed or is unavailable (or other qualifying reasons when the employee is teleworking and not reporting to the worksite). In such an event, employers are entitled and obligated to give consent before providing FFCRA intermittent leave. Note that if the leave is also OFLA-covered, an employer must grant intermittent leave for “sick child leave” resulting from intermittent closures of the employee’s child’s school or place of care due to the pandemic.

The DOL’s revised regulations are set to take effect on September 16, 2020. The revised regulations provide more guidance on FFCRA leave and apply nationwide, but employers should still exercise care when denying an employee’s FFCRA leave request. Employers should seek advice from counsel to ensure compliance with all FFCRA regulations, especially those regarding documentation, the “health care provider” exemption, work availability, and intermittent leave.

### **OFLA Rule Updates**

On September 14, 2020, the Bureau of Labor and Industries (BOLI) issued a new permanent rule and new temporary rules for the Oregon Family Leave Act (OFLA). The new rules expand the use of OFLA sick child leave to address the ongoing closure of schools and child care providers.

The new permanent rule allows eligible employees to take OFLA sick child leave to care for an employee’s child whose school or child care provider has been closed due to a statewide public health emergency. (Note, this was previously a temporary rule through September 13, 2020.)

The temporary rule defines important terms used in the new rule. These terms include “closure,” “child care provider,” and “intermittent leave.” “Closure” means a closure that is ongoing, intermittent, or recurring and restricts physical access to the child’s school or child care provider. “Child care provider” is defined as a place of care or person who cares for a child and can include an unpaid family member. Lastly, the definition of “intermittent leave” now encompasses leave taken because of the “intermittent or recurring closure of a child’s school or child care provider due to a statewide public health emergency.”

The temporary rule also provides guidance on documentation requirements for requesting leave under OFLA’s new rules. For sick child leave due to the closure of the child’s school or child care provider, an employer may request documentation that includes the name of the child, the name of the school or child care provider, and a statement from the employee that no other family member is willing and able to care for the child. If the child is older than 14, the employer can also require a statement from

the employee that special circumstances exist requiring the employee to provide care to the child during daylight hours.

The new rules take effect immediately, and employers should seek guidance from counsel to ensure that they are properly following the new OFLA standards, especially when OFLA-leave overlaps with FFCRA or FMLA leave.

*For questions about the DOL's revised FFCRA regulations, or for any other questions about leave application in your workplace, contact Heather Fossity at 503-276-2151 or [hfossity@barran.com](mailto:hfossity@barran.com).*

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