

MEMORANDUM (SECOND UPDATE)

TO: Chuck Ingoglia, President & CEO
National Council for Behavioral Health

FROM: Adam Falcone, Partner
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DATE: September 16, 2020

RE: Families First Coronavirus Response Act Interpretation

This updated memorandum responds to your request for guidance regarding the definition of an excepted “health care provider” under the Families First Coronavirus Response Act (“FFCRA” or “the Act”), incorporating recent legal developments.

The FFCRA, which went into effect on April 1, 2020, directs public employers of any size and private employers with fewer than 500 employees to provide employees with paid sick leave and/or expanded family and medical leave for specified reasons related to COVID-19.¹ However, Sections 3102 and 3105 of the FFCRA provide an exception for employers of health care providers, stating that “[a]n employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made [in] this Act.”²

Section 5110 the Act defines “health care provider” to have the same meaning as under the Family and Medical Leave Act (“FMLA”).³ Section 5111 of the Act also provides that the Secretary of Labor may promulgate regulations to expand this definition.⁴

The DOL’s FMLA regulations define “health care provider” to mean a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or “any other person determined by the Secretary of Labor to be capable of providing health care services.”⁵ Further, these regulations define “any other person” to include podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physicians assistants, and

¹ H.R. 6201, Division E, §§ 5102, 5110(5).

² *Id.* Division C, §§ 3102, 3105.

³ *Id.* Division E, § 5110.

⁴ *Id.* § 5111.

⁵ 29 C.F.R. § 825.125.

Christian science practitioners who are authorized to practice in the State and who are performing within the scope of their practice as defined under State law.⁶

The DOL released an FAQ on March 28, 2020, further clarifying and expanding the definition of “health care provider” for the purposes of an FFCRA exception.⁷ This definition states:

“[A] health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.”

On April 1, 2020, the DOL issued regulations pursuant to the FFCRA, confirming the definition for an excepted health care provider provided in the March 28, 2020 DOL FAQ.⁸ This definition suggests that any employee of the listed organizations would meet the exception. However, the DOL provides additional guidance on page 35 of the regulation that indicates that the definition may be more restrictive. This guidance states:

“The term “health care provider” as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals

⁶ *Id.*

⁷ Families First Coronavirus Response Act: Questions and Answers, U.S. DEPARTMENT OF LABOR Wage and Hour Division, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (last visited Sep. 15, 2020).

⁸ Paid Leave under the Families First Coronavirus Response Act, 29 CFR Part 826 (April 1, 2020).

and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency. Accordingly, the Department is adopting a definition of “health care provider” that is broader than the diagnosing medical professionals under § 825.102 for the limited purpose of identifying employees whom an employer may exclude under sections 3105 and 5102(a) of the FFCRA. The definition of health care provider under § 825.102 continues to apply for other purposes of the FFCRA, such as, for instance, identifying health care providers who may advise an employee to self-quarantine for COVID-19 related reasons under section 5102(a)(2).”⁹

On page 65 of the discussion, the DOL reiterates that the exception is not necessarily meant to include all employees of the listed organizations, noting that:

“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.”¹⁰

We read this guidance to mean that the DOL’s definition of “health care provider” for the purposes of the exemption includes (1) all health care providers as defined under the DOL FMLA regulations, (2) individuals capable of providing health care services necessary to combat the COVID-19 public health emergency, and (3) other workers needed to keep hospitals and other health care facilities supplied and operational. Further, as the DOL did not provide guidance on how employers should determine which workers are needed to keep hospitals and other health care facilities supplied and operational, employers are to make such determinations using their best judgement.

Recent Legal Developments

On August 3, 2020, a federal judge in New York struck down four key provisions of regulations issued by the DOL to implement the FFCRA.¹¹ As part of its decision, the district court invalidated the definition of “health care provider” established by the DOL’s FFCRA regulations, citing the definition as overly broad. By striking down the definition, the district court limits the FFCRA’s exception to provide paid leave for health care providers to the traditional definition of “health care provider” under the FMLA.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *State of New York v. U.S. Dep’t of Labor*, No. 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020).

Despite some ambiguity in the district court's decision, the DOL has applied the decision nationwide, explaining that "[b]ased on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case."¹²

Consequently, the DOL has revised the FFCRA regulations, narrowing the definition of "health care provider" to include "only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care."¹³ The revised regulations became effective as of the date of this memorandum, September 16, 2020.

To avoid potential FFCRA paid leave claims, all employers should adopt the new DOL definition of health care provider immediately. The district court's ruling is unclear if its decision will apply retroactively to claims brought by employees arising from leave decisions made prior to August 3, 2020. If the decision applies retroactively, employers can likely claim reliance on the DOL regulations then in effect. In contrast, any claims brought by employees for denied leave based on the expanded definition of "health care provider" after August 3, 2020, but prior to the effective date of the revised regulations (September 16, 2020), are unlikely to be protected by the earlier DOL regulations.

We recommend that employers review their leave policies carefully and consult legal counsel with any questions.

Please contact Adam Falcone (afalcone@feldesmantucker.com), Molly Evans (mevans@feldesmantucker.com), or Noori Ali (nali@feldesmantucker.com) if you need any additional information.

¹² Families First Coronavirus Response Act: Questions and Answers, U.S. DEPARTMENT OF LABOR Wage and Hour Division, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (last visited September 15, 2020).

¹³ U.S. Department of Labor, Wage and Hour Division, Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57677, 57683-86 (Sep. 16, 2020), available at <https://www.federalregister.gov/d/2020-20351/p-69>.