

DOL RESPONDS TO NY COURT RULING – ISSUES NEW FFCRA RULES

as of September 16, 2020

Impacted Provision	NY RULING	DOL RESPONSE / NEW RULE
Work Availability Rule	Invalidated the requirement that FFCRA leave is available only if an employer has work for the employee to perform. In vacating this rule, the court found that the DOL did not provide a sufficient explanation as to why work must be available.	The DOL’s new rule reaffirms that FFCRA leave is only available to employees if work is otherwise available to them. If an employer does not have work for an employee to perform (i.e., because of a shutdown), then the employee will not be eligible for FFCRA leave even if they experience a qualifying event.
Employer Consent for Intermittent Leave	Invalidated the requirement that an employee can take intermittent leave only with employer consent. This aspect of the ruling became very relevant with schools anticipating hybrid schedules that use in-person learning on only certain days.	The DOL’s new rule reaffirms that intermittent leave requires employer consent. HOWEVER , the DOL’s interpretation of what constitutes intermittent leave should be noted. The DOL does not consider it intermittent leave when an employee takes leave on the days their child is scheduled to remain home. This is because “each day of school closure constitutes a separate reason for FFCRA leave.” Leave is permitted without the employer’s consent every time a new qualifying reason arises. For this reason, the employer’s consent is not required in the case of an employee taking leave for their child’s alternating school schedule.
Notice Requirements Prior to Taking Leave	Invalidated the requirement that employees who take FFCRA leave must provide employers with certain documentation before taking leave.	Under the new rule, employees must provide notice and required documentation supporting their need for FFCRA leave to their employers “as soon as practicable,” rather than prior to taking leave.
Definition of Health Care Provider	Invalidated the definition of “health care providers” who can be excluded from coverage noting that the definition was too broad and was not tailored to roles that actually involve providing healthcare services.	The DOL crafted a new definition that focuses on employees whose duties or capabilities are directly related to the providing of health care services or are so integrated to providing such services so as to adversely impact patient care if not provided.