



## **APPLICATION OF NEW DOL RULES REGARDING THE FFCRA TO CENTERS**

On Wednesday, September 16, 2020, regulations went into effect that significantly changed how provisions of the Family First Coronavirus Recovery Act apply to Centers. Up until now, Centers were exempt from the provisions granting Emergency Sick Leave and paid Family and Medical Leave because the center as an employer was exempt as a health care provider. The amendments were considered necessary in light of the August 3, 2020, decision by U.S. District Court for the Southern District of New York which held portions of the regulation invalid.

The new regulations revise the definition of healthcare provider to mean employees who are:

1. a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
2. any other person determined by the Secretary of Labor (or authorized representative) to be capable of providing health care services;
3. podiatrists, dentists, clinical psychologists, optometrists, and chiropractors, authorized to practice in the State and performing within their scope;
4. nurse practitioner, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;
5. certain Christian Science practitioners;
6. any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;
7. a health care provider of types 3-6 above who practices in a country other than the U.S., who is authorized to practice in accordance with the laws of that country, and who is performing within the scope of his or her practice as defined under such law;
8. **other employees who are employed to provide** diagnostic services, prevention services, treatment services, or other **services integrated with and necessary to the provision of patient care** and, if not provided, would adversely impact patient care. This would include case managers.

The regulations offer further clarifications regarding (8) above:

Diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.

Preventive services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

**Excluded Services:** individuals who provide services that affect, but are not integrated into the provision of patient care are not covered by the definition. Examples include: IT professionals, building maintenance staff, Human Resources personnel, cooks, food service workers.

### **Emergency Paid Sick Leave**

Emergency paid sick leave applies to all centers, regardless of how many employees you have, but centers can exempt healthcare provider employees listed above.

Paid sick leave is available for the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

## **Amount of Paid Sick Time**

1. For full-time employees, 80 hours.
2. For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

## **Rate of Pay**

In general, the employee's required compensation under this section shall be not less than the greater of the following:

The employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)); or

The minimum wage rate in effect under section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)).

## **But Cannot Exceed**

\$511 per day and \$5,110 in the aggregate for a use described in paragraph (1), (2), or (3) of the reasons above; and

\$200 per day and \$2,000 in the aggregate for a use described in paragraph (4), (5), or (6) of the reasons above.

## **Emergency Family and Medical Leave Expansion**

Emergency FMLA applies to all centers employees and an eligible employee is, for the purposes of EFMLA, one who has been employed for **30 days but is not an employee who is a healthcare provider as defined above.**

In addition to the usual reasons for taking FMLA, the following is covered:

## **Qualifying Need Related to a Public Health Emergency**

The term qualifying need related to a public health emergency, with respect to leave, means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

## **Duration of Leave**

Twelve weeks. The first 10 days are unpaid unless the employee chooses to use their accrued leave or the 10 days of Emergency Paid Sick Leave described above.

## **Rate of Pay**

An amount that is not less than two-thirds of an employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938 ([29 U.S.C. 207\(e\)](#)); and the number of hours the employee would otherwise be normally scheduled to work.

**But**

In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.

*Pam Beach, TCRMF General Counsel, September 21, 2020*