

Department of Labor Updates FFCRA to Only Exclude Certain Healthcare Sector Employees

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On September 16, 2020, the U.S. Department of Labor issued a revised definition of healthcare provider, excluding certain jobs within healthcare practices. The updated definition no longer includes: **all** employees that work at a doctor's office **or** "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." Now, "healthcare provider" employees that can be excluded from receiving benefits under the Families First Coronavirus Response Act (FFCRA) are defined as follows (Revised 29 C.F.R. 826.30 (c)):

(i) *Basic definition.* For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a healthcare provider is:

(A) Any Employee who is a healthcare provider under 29 CFR 825.102 and 825.125, or;

(B) Any other Employee who is capable of providing healthcare services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

(ii) *Types of Employees.* Employees described in paragraph (c)(1)(i)(B) include only:

(A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A) of this section; and

(C) Employees who are otherwise integrated into and necessary to the provision of healthcare services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

(iii) Employees who do not provide healthcare services as described above are not healthcare providers even if their services could affect the provision of healthcare services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.

(iv) *Typical work locations.* Employees described in paragraph (c)(1)(i) of this section may include Employees who work at, for example, a doctor's office, hospital, healthcare center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar permanent or temporary institution, facility, location, or site where medical services are provided. This list is illustrative. An Employee does not need to work at one of these facilities to be a healthcare provider, and working at one of these facilities does not necessarily mean an Employee is a healthcare provider.

(v) *Further clarifications:*

(A) 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.

(B) Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

(C) 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.

(D) 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.

The revision expressly states that an employee is a healthcare provider if he or she is “capable of providing healthcare services.” Specifically, a healthcare provider must be “employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care” and if not provided, would “adversely impact patient care.” It is no longer enough that an employee works for an entity that provides healthcare services.

Although an employer’s decision to exclude certain employees from receiving the benefit of the FFCRA is permissible, it is not mandatory; 29 CFR 826.30(c) Exclusion of Employees who are healthcare providers and emergency responders states: An Employer whose Employee is a healthcare provider or an emergency responder **may** exclude such Employee from the paid sick leave requirements and/or the expanded family and medical leave requirements. As a result, requests by employees for FFCRA leave must be carefully examined.

If you have questions about this legal blog alert, please contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law team](#).

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