

## FAMILY FIRST CORONAVIRUS RESPONSE ACT CHALLENGED IN NEW YORK STATE

On August 3, 2020, published August 6, 2020, a judge writing for the Southern District of New York in the case captioned above “upended” certain provisions of the United States Department of Labor’s final Rule implementing the Families First Coronavirus Response Act (“FFCRA”). While this ruling is currently only binding in the Southern District of New York and of persuasive legal authority in the Second Circuit (Pennsylvania is the Third Circuit), the United States Department of Labor is within the appeals period. There is no indication yet what the DOL will do. The DOL’s options are to appeal the ruling, seek a stay of the implementation of the ruling, withdraw its final Rule that was the subject of the lawsuit, or issue new interim guidance or rules. It is more likely than not that, if the DOL does not appeal this ruling, many states, including Pennsylvania, may file similar challenges.

In its Opinion, the Court ruled more toward or in favor of the employee that certain portions of the U.S. Department of Labor’s final Rule were too restrictive as follows:

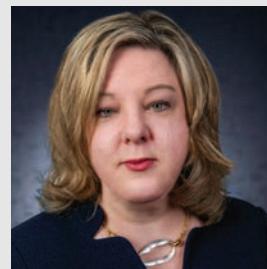
1. Furloughed employees or other employees for whom work, including telework, is not available can now, under the Court’s ruling, qualify and be paid for leave under the FFCRA where they meet one of the six bases for leave. Under the DOL’s final Rule, a furloughed employee or employee for whom work, including telework, was not available was not entitled to the leave.
2. The definition of “healthcare provider” was scaled back to include a healthcare “professional” only. Previously, the DOL final rule applied more broadly, exempting all employees

of a healthcare organization from responsibility under the FFCRA.

3. An employee requesting FFCRA leave is now permitted to request intermittent leave from the employer under this Court’s ruling where the leave requested will not contribute to the spread of infection. (In other words, leave requested as in the case to care for a child whose daycare or school is closed for CoVID-19 related reasons).
4. Finally, the Court ruled that the documentation requirements with which an employee is expected to comply under the DOL’s final Rule were too detailed, going beyond the legal reach of the statute.

### About the Author:

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Her clients include corporations, insurance companies, title agencies, municipalities, professional and recreational associations, school districts, private developers, and regional contractors and subcontractors. She has also worked on behalf of design professionals and sureties. She advises her clients on risk allocation, and risk shifting mechanisms including insurance, indemnity and bonding provisions in contract formation.