



Alerts

DOL Clarifies Exceptions under FFCRA in Updated FAQ

April 3, 2020

Insights for Employers

On March 28, the Department of Labor (DOL) issued updated FAQs which clarify, among other things, various exceptions to the Families First Coronavirus Response Act (FFCRA). An exception is available to businesses with fewer than 50 employees if providing paid sick leave or extended FMLA under the FFCRA would "jeopardize the viability of the small business as a going concern."

In order to claim this exception, an authorized officer of the business must determine that:

- Providing paid sick leave or expanded family and medical leave would result in expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
- The absence of the employee(s) requesting paid sick leave or expanded family and medical leave would substantially risk the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; *or*
- There are not sufficient workers who are able, willing, and qualified, and available to work at the time and place needed, to perform the labor/services provided by the employee(s) requesting paid sick leave or expanded family and medical leave, and such labor/services are necessary for the business to minimally operate.

While there is no formal filing requirement, a qualifying business should maintain sufficient documentation that the criteria are satisfied. Exempt small business employers are not required to provide childcare-related paid sick leave—or enhanced family and medical leave—because of a school or daycare closing, or a childcare provider being unavailable due to COVID-19. Importantly, such employers must still provide paid sick leave for other non-child care related qualifying reasons under the FFCRA.

In addition to the aforementioned small business exception, there are exceptions for health care providers and emergency responders. Prior to the DOL issuing guidance via the recent FAQs, the breadth of these exceptions was unclear. However, the FAQs clarify that an employer of a health care provider, defined as "... 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

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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," as well as "any individual employed by an entity (including staffing companies) that contracts with any of the above institutions, employers, or entities 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." An employer of health care providers can elect to exclude such providers from paid sick leave and/or enhanced family and medical leave under the FFCRA.

This exception is also applicable to an emergency responder, defined by the DOL as:

... an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. ...

Similar to employers of health care providers, employers of first responders can elect to exclude them from paid sick leave and/or enhanced family and medical leave under the FFCRA. Any such exclusions can be handled by job classification or on a case-by-case basis, so long as the employer does not engage in prohibited acts that would be considered discriminatory or retaliatory.