

Department of Labor Provides Much Needed Clarification on FFCRA Exclusions for Health Care Providers, Emergency Responders and Small Businesses

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Employment & Labor Law

03.30.2020

On Saturday, March 28, in advance of the April 1 effective date of the Families First Coronavirus Response Act (FFCRA), the Department of Labor provided the clarity sought by health care employers and small business in order to determine whether certain of their employees may be excluded from the paid sick leave and expanded family medical leave provisions of the FFCRA. Specifically, the new guidance, which can be found here, broadly defines who qualifies as an excluded “health care provider” at Question 56 and “emergency responder” at 57, while simultaneously encouraging employers to be “judicious” when applying the definition in order to minimize the spread of the virus. The responses to Questions 58 and 59 provide guidance for the exclusion for businesses with less than 50 employees.

Expansive Health Care Provider Exclusion

The Department broadly defines who is a “health care provider” in a manner that essentially allows the listed health care entities to exclude *all* of their employees from the Act’s requirements, thereby allowing them to continue to fight the pandemic. For both health care providers and emergency responders, the Department gives the state’s highest official the discretion to exclude any other health care provider or emergency responder that is necessary for the COVID-19 response. An excluded health care provider is:

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 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. (emphasis supplied).

In addition, the Department further expands the definition to include employees employed by an entity that contracts with the above institutions, employers or entities “to provide services or to maintain the operation of the facility” and 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.”

Emergency Responder Exclusion

The Department also excludes the following emergency responders from coverage:

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.

The Small Business Exemption

The FFCRA and prior DOL guidance indicated that, if providing child-care related paid sick leave and expanded family medical leave would jeopardize the viability of a private business with fewer than 50 employees as a going concern, the employer could potentially take advantage of a small business exemption. The Department’s newly issued guidance provides details regarding this exemption.

Small businesses, including religious or nonprofit organizations, with fewer than 50 employees are exempt from providing paid sick leave or expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 reasons where an authorized officer of the business determines that:

1. The provision of paid sick leave of expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave of expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; *or*
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

In sum, a small business is exempt from the mandated paid sick leave or expanded family medical leave requirements only if all of the following conditions are satisfied:

- the employer employs fewer than 50 employees;
- leave is requested because the employee has a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the Company has determined that at least one of the three conditions listed above is satisfied.

As an important aside, the Department clarified that the FFCRA adopts the FMLA's definition of who constitutes an employee's child. "Son or daughter" includes, not only the employee's own biological children under the age of 18, but also the employee's adopted, foster, and step children, legal ward, and any child for whom the employee stands *in loco parentis*. Individuals who will be deemed to stand *in loco parentis* to a child are those who provide either day-to-day care or financial support for the child. Further, employers should remember that "son or daughter" also includes an adult child who is 18 or older and who is incapable of self-care due to a mental or physical disability.

Small employers needing to take advantage of the FFCRA's small business exemption should carefully create and retain documentation evidencing that they satisfy each of the conditions set forth above. However, they should not send the documentation created to the Department.

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