

DOL Clarifies the Families First Coronavirus Response Act Small Business Exemption

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On April 1, 2020 the U.S. Department of Labor (USDOL) [announced](#) that the Department's Wage and Hour Division posted unpublished [regulations](#) on the recently-enacted Families First Coronavirus Response Act (FFCRA). The published version of the regulations is scheduled to be available on April 6, 2020. The long-awaited regulations will provide covered employers with additional clarity on their obligations to provide Expanded Family and Medical Leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) and Paid Sick Leave under the Emergency Paid Sick Leave Act (EPSLA). The regulations to the FFCRA will remain in effect from April 1, 2020 to December 31, 2020.

Significantly, the FFCRA regulations explain how small business employers may elect an exemption from certain provisions of the FFCRA. This exception for small businesses is only an exception from the obligation to provide paid leave to an employee who requests leave due to school or childcare closures. Small businesses are still obligated to provide Emergency Paid Sick Leave under the FFCRA to employees who need leave because: they themselves are subject to a quarantine or an isolation order; they have been advised by a health care provider to self-quarantine; they are experiencing COVID-19 symptoms and are seeking a medical diagnosis; or they are caring for an individual who is subject to a quarantine order or has been advised to quarantine. There is no exception for small businesses from this requirement.

In order to take advantage of the exemption, an officer of the employer must document that he or she has determined that providing leave to care for a child would jeopardize the viability of the business as a going concern because:

- the requested leave would result in the small business's expenses and financial obligations to exceed available business revenues and cause the small business to cease operating at minimal capacity; or
- the absence of the employee or employees requesting leave would entail a substantial risk to 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 who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and those labor or services are needed for the small business to operate at minimal capacity.

In its preliminary discussion of the regulations, the USDOL indicates that "the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively." This suggests that small business employers who wish to utilize the exemption must determine its availability on a case-by-case basis.

Moreover, the regulations also state that regardless of whether a small business employer exempts one or more employees, the small business employer is still required to post the FFCRA notice. This is consistent with the preliminary discussion indicating that the exemption is to be determined on a case-by-case basis and limited to the leave types for which the exemption is available.

While use of the exemption must be made on an individual basis, these regulations also make clear that a small business employer will not be required to apply for the exemption each time it is used. Instead of sending documentation to the USDOL, the employer's officer must prepare documentation explaining that one of the above-listed criteria has been met. An employer should only use the small business exemption based upon good faith and a carefully made determination that it qualifies. Any documentation prepared in support of the election must be retained for at least four years.

In determining when and how to elect this exemption, small business employers should keep a close eye on the number of employees they employ. As business conditions improve and employers cross the 50 employee threshold, the employer no longer qualifies for the small business exemption.

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