

The “Small Business Exemption” to the Families First Coronavirus Response Act (FFCRA): Who Qualifies? And What is the Exemption?

Article

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Many employers are aware that when Congress initially passed the FFCRA, it allowed the Secretary of the Department of Labor (DOL) to issue later rules exempting employers with fewer than 50 employees (“small business”) from its requirements if compliance would jeopardize “the viability of the employer’s business as a going concern.” The DOL did not initially elaborate on which employers would be exempted, what requirements of the law they could be exempted from, or how it would analyze and process exemption requests.

On Saturday, March 28th, the DOL updated its guidance to address some of these issues; unfortunately, some questions still remain.

The DOL has clarified in its guidance that small businesses (including religious and nonprofit organizations) are exempt from mandated paid sick leave or expanded family and medical leave requirements only if:

1. the employer employs fewer than 50 people,
2. the leave is requested because **the child’s school or place of care is closed or child care provider is unavailable** due to COVID-19-related reasons, **AND**
3. an authorized officer of the business has determined that at least one of the three following conditions is satisfied:
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 - The provision of paid sick leave or 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;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of

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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 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.

Note Point No. 2 above: small businesses are exempted **only** from providing leave requests due to school closures and child care unavailability. Small businesses are **not** exempt from providing leave for any of the other types of permissible requests under the FFCRA. Thus, for example, if an employee has been advised by a health care provider to self-quarantine related to COVID-19, or if an employee requests leave to care for an individual who is self-quarantining, **the small business must still provide the appropriate paid leave**, as no exemption is available for such requests.

Finally, the DOL does not provide instructions for small businesses to claim the exemption. Rather, it merely advises in its answers to Frequently Asked Questions that *"You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave."* While the DOL does not provide any explanation for this statement, it is safe to assume that the Department prefers not to be inundated with requests from small businesses seeking the exemption.

What is a small business to do, then? We recommend that an "authorized officer" of the employer simply make a record of his or her conclusion that one or more of the three qualifying reasons apply, and keep that record in its files to use in the case of an audit or challenge.

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