

# U.S. DOL Issues Guidance on “Health Care Provider” and “Emergency Responder” Definitions for FFCRA Exclusions

## Labor & Employment Law Update

on March 30, 2020

On March 28, 2020, the U.S. Department of Labor (DOL) issued an update to its “Families First Coronavirus Response Act: Questions and Answers” to address, among other things, the Families First Coronavirus Response Act (FFCRA) provisions that allow employers of “health care providers” and “emergency responders” to exclude such employees from the FFCRA’s emergency sick leave and expanded FMLA provisions. The specific questions that address the provisions for health care providers and emergency responders shown in this article can be found on the DOL website and read as follows:

***Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?***

*For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a 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.*

*This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.*

*To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.*

The DOL also defined “emergency responder” for purposes of the FFCRA exclusions:

***Who is an emergency responder?***

*For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.*

*To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.*

Employers having employees fitting the definitions above need to remember that the health care provider and emergency responder exclusions are discretionary, not automatic. As such, and in order to avoid confusion (and litigation down the road), we recommend that employers that intend to use either exclusion provide a short, simple notice to their employees to inform them of the fact that because they are included within the DOL’s definition of “health care provider” and/or “emergency responder,” and are essential to the fight against COVID-19, they are not eligible for emergency sick leave or expanded FMLA leave under the FFCRA. Such a notice should also advise employees that these exclusions do not affect their eligibility for FMLA leave under the terms of the FMLA in place prior to FFCRA enactment.

And all employers should bear in mind that the fairly expansive definition of health care provider discussed above does not apply to the definition of a health care provider who can certify an employee’s need for FMLA leave. That definition remains limited to, essentially, licensed doctors of medicine, nurse practitioners, and certain others as discussed in FMLA regulations in place prior to FFCRA enactment.

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While there is some “chatter” from Washington concerning potential “hazard pay” for these workers, employers who use these exclusions are permitted to implement their own policies and benefit programs unique to their workers. Employers should also remember to keep in mind any local or state paid leave mandates currently in place or that may develop in the coming weeks.

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