

U.S. DOL Issues Guidance on the FFCRA “Small Employer” Exemption and “Viability” Definition

Labor & Employment Law Update

on March 30, 2020

At the time of passage of the Families First Coronavirus Response Act (FFCRA), the Department of Labor (DOL) was tasked with issuing guidance on how a “small employer” might be exempt from providing paid sick leave and expanded FMLA benefits if doing so affected the business’s viability. The DOL has now issued guidance that addresses how this viability exemption can be met. Specifically, the DOL states that an employer, which includes religious or nonprofit organizations, with fewer than 50 employees (small business), is exempt from providing paid emergency sick leave and expanded FMLA paid leave pursuant to the FFCRA if doing so “would jeopardize the viability of the small business as a going concern” as determined by an authorized officer of the business. This determination is based on said officer finding that one of the three following conditions exists:

- 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 causing the small business to cease operating at a minimal capacity;**
- The **absence of 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 **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.**

In sum, a small business may be exempted from FFCRA requirements if it can show that there is not enough revenue coming in to afford the expanded benefits, not enough skilled workers to do the specialized work critical to the business, or not enough available workers to do the work to keep the business going.

It should be noted, however, that the DOL's guidance on the small employer exemption also "encourages" employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety. Also, the DOL's guidance may give the small business protection today, but time may change the analysis.

While the initial say on the business's viability is the employer's call, employers will likely be scrutinized down the road.

Bottom Line

Any business contemplating the "small employer" exemption to the FFCRA should seek advice and counsel from competent labor law counsel.

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