

DOL Defines the “Health Care Provider” Exemption Under FFCRA

With the April 1, 2020 effective date of the Families First Coronavirus Response Act (“FFCRA”) around the corner, the Department of Labor has issued critical new guidance defining which employees can be considered a “health care provider” and thus exempted by employers from the provisions of the FFCRA making employees eligible for paid sick leave and paid leave for employees unable to work because of the closure of their child’s school or care provider.

As health care entities no doubt know, both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act of the FFCRA contained provisions giving the Secretary of Labor authority to issue regulations to exclude “certain health care providers” from both leave provisions. In addition, the FFCRA contained language stating that employers of “health care providers” may elect to exclude such employees from these provisions.

The parameters of the exemption were unclear, and without further guidance it seemed the definition of “health care provider” might carry over from the definition under the existing Family and Medical Leave Act (“FMLA”). While physicians, nurse practitioners, and physician assistants fall within the existing FMLA definition of “health care provider,” that definition does not include other categories of providers such as LPNs, RNs, and CNAs, nor would it include employees who, while not providers, are key to the operation of a health care facility.

With the logistical implications of this looming, health care entities will be relieved by the new guidance the Department of Labor issued over the weekend in an update to its [Families First Coronavirus Response Act: Questions and Answers](#) guidance to address the scope of the “health care provider” exemption, which provides as follows:

57. 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

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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.

Health care entities should take note that this expanded definition of “health care provider” applies to both paid sick leave and the expanded family and medical leave. The definition is broad enough to encompass all employees of a covered entity, which includes doctor’s offices, hospitals, health care centers, clinics, nursing facilities, retirement facilities, nursing homes, and home health care providers.