

## CLAIMING THE SMALL BUSINESS EXEMPTION FROM PAID LEAVE FOR CHILD CARE

MARCH 31, 2020

By **Molly Ryan**

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The Families First Coronavirus Response Act (FFCRA) gave the Secretary of Labor authority to exempt small businesses with fewer than 50 employees from providing expanded FMLA and paid sick time to employees who are unable to work because they are caring for their child(ren) due to school and/or childcare closings related to COVID-19 “when the imposition of such requirements would jeopardize the viability of the business as a growing concern.” The DOL has now published guidance identifying the circumstances under which small businesses may claim this exemption. According to the DOL’s guidance, a small business may claim this exemption if an authorized officer of the business has determined that any one of the following would occur:

1. That providing paid sick leave or expanded FMLA would cause the business’s expenses and financial obligations to exceed “available business revenues and cause the small business to cease operating at a minimal capacity;”
2. That the absence of the employee(s) requesting paid sick leave or expanded FMLA “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
3. That “[t]here 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(s) requesting paid sick leave or expanded FMLA, “and these labor or services are needed for the small business to operate at a minimal capacity.”

The DOL advises that an employer claiming that the exemption applies should document the reasons it meets the criteria for an exemption. However, the DOL guidance states that employers seeking the exemption should not send any materials to the DOL at this point. Instead, the documentation will likely be considered if the DOL challenges whether an employer appropriately claimed the exemption. An employer wants to be certain that it can establish that it seriously considered the impact that providing the leave would have on its business, and did not simply default to the exemption based on the size of the business or assumptions as to the cost of providing paid leave.

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Importantly, an employer claiming the exemption is not completely relieved from the paid sick time requirements under the FFCRA. The exemption only applies where the reason for the request for paid sick time is that the employee's child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. However, even employers claiming the exemption must provide up to 80 hours of paid sick time where:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
5. The employee is caring for an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
6. The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.

Please does not hesitate to me, or any other member of our Employment Services group, if you have any questions.

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