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IMPORTANT CLIENT UPDATE

Additional Department of Labor (DOL) Guidelines on New COVID-19 Leaves

Last weekend, the U.S. Department of Labor (DOL), through its Wage and Hour Division, issued additional “Guidance” on its website relating to the new COVID-19 required federal leaves established by the *Families First Coronavirus Response Act* (FFCRA). The changes involved included adding additional questions to their prior *Families First Coronavirus Response Act: Questions and Answers* webpage. The link to this updated Q & A webpage is at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

The DOL has added clarification as to which employees fit the definitions of “**health care provider**” and “**emergency responder**” under these new laws. The clarification is found in the new Questions 56 and 57, which state:

56. 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.

57. 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.

For counties, an excludable "**health care provider**" would then expressly include "*anyone employed at*" a "*health care center, clinic, local health department or agency, nursing facility, retirement facility, and nursing home...*".

Similarly, an excludable "**emergency responder**" would expressly include "*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, [and] public works personnel...*" As there has been some ambiguity as to whether excludable employees would be limited to only first line staff, such as paramedics, law enforcement officers, emergency room staff and firefighters, these broader interpretations, consistent with the prior guidance from the Department of Homeland Security, may aid in planning staffing for these emergency operations.

Employers of an employee considered to be a health care provider or an emergency responder **may elect to exclude** such employee from the application of the provisions in the FFCRA. As the exclusion of an employee is not automatic, employers are advised to adopt a policy or directive to clarify that any such exclusion is a policy decision being exercised. The DOL Secretary also has authority under the law exclude health care providers and emergency responders from the law, but has not yet done so.

Finally, the revised DOL guidance reaffirms the FFCRA will become effective for leaves **starting April 1, 2020** (*and not the April 2, 200 date initially indicated by many*).

Attached is an updated chart that sets forth many of the main aspects of these new leaves.

Please do not hesitate to contact our office if you have specific questions on applying these new laws.

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New Federal COVID-19 Leaves

	Emergency Family & Medical Leave (“EFMLA”) Expansion Act	Emergency Paid Sick Leave Act (“EPSLA”)
Effective Date	April 1, 2020 thru December 31,2020	April 1, 2020 thru December 31,2020
Covered Employees	All eligible public employees; but employers may elect to exclude “health care providers” and “emergency responders”	All eligible public employees; but employers may elect to exclude “health care providers” and “emergency responders”
Eligible Employees	Employees that have worked for an employer for at least 30 calendar days	Employees are eligible immediately
Leave Reason	Employee cannot work or telework due to closure of school or unavailability of child care due to COVID-19.	Employee cannot work or telework due to: (a) Employee is subject to a Federal, State, or local COVID-19 quarantine or isolation order. (b) Health care provider advises employee to self quarantine due to COVID-19. (c) Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis. (d) Employee is caring for an individual who is under quarantine. (e) Employee is caring for a son or daughter when school is closed or childcare unavailable due to COVID-19. (f) Employee is experiencing any other substantially similar condition specified by the federal Secretary of HHS.
Length of Leave	12 weeks (combined with all other FMLA leave reasons)	<i>Full-time employees:</i> 80 hours <i>Part-time employees:</i> normal schedule over a 2-week period.
Pay During Leave	<i>First 10 days:</i> unpaid; <i>then:</i> 2/3 of regular rate for an employee’s normal schedule, up to \$200/day and \$10,000/total	Employee’s regular rate (or state minimum wage, if greater) up to \$511/day and \$5,110 total for reasons listed above as (a), (b) or (c); and 2/3 of regular rate, up to \$200/day and \$2,000/total for reasons (d), (e) or (f).