

DOL Issues Regulation on Small Business Exemption from COVID-19 Emergency Paid Sick Leave and FMLA Leave

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Yesterday, the U.S. Department of Labor published temporary regulations describing how businesses employing less than 50 employees can take advantage of the carve-out included in the Families First Coronavirus Response Act requirement that employers provide paid sick leave and paid FMLA leave.

The regulations provide that an employer with less than 50 employees (a small employer) **is** exempt from providing Emergency Paid Sick Leave (but only for one of the six enumerated reasons) and FMLA leave (either the paid or unpaid portion) when doing so would jeopardize the viability of the business as a going-concern. The exemption applies only to the requirement that a small business provide paid sick leave and FMLA leave to an employee who is unable to work or telework due to a need for leave because the employee is caring for a son or daughter whose school/day care is closed, or whose child care provider is unavailable, because of COVID-19.

The regulations provide that a small employer is entitled to the carve-out if an authorized officer of the business determines that:

- The requested sick or FMLA leave would result in the small business's expenses and financial obligations exceeding available revenues which would cause the small business to cease to operate at minimal capacity;
- The absence of an employee or employees seeking paid sick or FMLA leave would lead to substantial risk to the financial health or operational capability of the business because of the "absence" of their unique skill, knowledge of the business operation or responsibilities; or
- There are not sufficient workers who are able, willing and qualified (and available at the time and place needed) to perform the work of the employee or employees seeking leave, and those services are needed for the small business to operate at minimal capacity.

Importantly, according to the DOL regulations, the employer seeking this exemption must document that the employer made the determination that it is exempt pursuant to these enumerated requirements. Once the determination is made and documented, the small employer retains the documentation in its possession but does not send it to the DOL. At this time, it appears that the employer must retain the documentation in the event the employer must respond to a DOL inquiry or investigation into, or an employee's claim of, an employer's alleged non-compliance with these leave laws.

Finally, regardless of whether a small employer seeks to exempt one or more employees from receiving paid sick and/or paid FMLA leave, all employers, including small employers must post (or deliver via email) the DOL's required poster informing employees of the new law's requirements. This is because a small employer must still provide paid sick leave to employees who need leave for the other enumerated reasons in the Families First Coronavirus Response Act.