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Healthcare Employers Spared Burden of FFCRA By Last Minute DOL Guidance

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The Families First Coronavirus Response Act created a bizarre contradiction for healthcare employers. While hospitals, clinics and other patient care providers worked under great strain to care for patients, with COVID-19 and other maladies, the Act would have permitted employees of healthcare providers to be absent from work, sometimes with pay, in some situations for up to 12 weeks. Saturday afternoon, the DOL issued new guidance to greatly expand the scope of employees that healthcare providers can exclude from the leave rights under FFCRA, sparing providers from crippling staff shortages during this pandemic.

FFCRA permitted employers to elect to exclude healthcare providers and emergency responders from the leave rights created by the act. However, the act did not define emergency responder, and borrowed the FMLA's narrow definition of healthcare provider. As the act was written, healthcare employers could exclude only doctors, nurse practitioners and physicians' assistants, along with a handful of other licensed professionals, from the leave rights under the act. Notably, RNs, LPNs and CNAs were not on the list of employees that could be excluded, nor were pharmacists, pharmacy techs, any type of therapists, or any of the support staff necessary to operate a hospital, nursing home or medical practice.

DOL's Q&A greatly expanded the definitions of healthcare provider and emergency responder to permit employers to exclude a broad cross-section of employees from the leave rights:

“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.

An emergency responder is now defined as:

“. . . 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.”

These definitions appear sufficiently broad to allow a healthcare employer to exclude any employee from the leave rights under FFCRA.

Along with these expanded definitions, the DOL encourages employers of healthcare providers and emergency responders to be “judicious” when excluding employees from the leave rights under the Act because of the overarching need to minimize the spread of the virus.

The new Q&A guidance did not inform employers how to elect to exclude categories of employees. We suggest that you notify employees individually via email or memo if you intend to exclude them from exercising FFCRA leave rights, and the sooner the better in advance of the April 1 effective date. However, a general communication that identifies categories of employees who are excluded should satisfy the act's requirements for larger employers.

Keep in mind, if you have 50 or more employees, or if your entity is a public agency, you are covered by the Family and Medical Leave Act, regardless of the FFCRA. As a result, some of your employees may be eligible for leave for their own serious health condition or to care for a family member with a serious health condition, even if you exclude them from the FFCRA.

You can access the entire Q&A document [here](#).

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve.

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seek the advice of your legal counsel.

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