

FFCRA Employment Benefit Exclusions for Health Care Providers and Emergency Responders

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The Families First Coronavirus Response Act (“FFCRA” or the “Act”), which goes into effect on April 1, 2020, provides that certain “health care providers and emergency responders” may be excluded from application of the Act’s emergency family leave and emergency paid sick leave.

By way of brief background—a more complete summary of the Act’s emergency family leave and emergency paid sick leave is available [here](#)—the FFCRA provides emergency leave benefits to certain eligible employees. First, the Act’s emergency family leave provision temporarily expands the Family and Medical Leave Act (“FMLA”), requiring employers with fewer than 500 employees to provide 12 weeks of job-protected leave to eligible employees who are unable to work (or telework) due to their need to care for their minor child because the child’s school or place of care is closed, or the childcare provider is unavailable, due to the COVID-19 public health emergency. Second, the Act’s emergency paid sick leave requires employers (again, defined as those with fewer than 500 employees) to provide up to 80 hours of emergency paid sick leave to eligible employees who are unable to work (or telework) due to a need for leave for enumerated reasons. The DOL’s recently released FAQs on the FFCRA’s employer paid leave requirements is available [here](#).

The Act provides that certain employees—“health care providers and emergency responders”—may be excluded from entitlement to both emergency family leave and emergency paid sick leave. Specifically, the Act provides, “An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application” of these leave provisions. In effect, the employer is given the option to exclude certain employees on an individual basis.

The Act retains the FMLA’s definition of “health care provider,” thus, permitting employers to exclude only employees in the following positions from the Act’s emergency leave:

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- Doctors of medicine or osteopathy;
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors;
- Nurse practitioners, nurse-midwives, clinical social workers, and physician assistants.

In addition to working in one of the above positions, to qualify for the exclusion, the employee must be (1) authorized to practice in the state where practicing, meaning “the provider must be authorized to diagnose and treat physical or mental health conditions”; and (2) performing within the scope of his/her/their practice.

Based on federal law and existing regulations implementing the FMLA, other patient care providers and health care workers do not fall within the definition of “health care provider,” and, thus, do not qualify for the health care provider exclusion from FFCRA emergency leave benefits.

The Act does not define “emergency responder.” However, under a generally accepted definition of the term, such positions would include firefighters, paramedics, emergency medical technicians, and police officers.

The Act also authorizes the Secretary of Labor to issue regulations excluding health care providers and emergency responders from the emergency leave provisions. Specifically, the Secretary is authorized to issue regulations excluding “certain health care providers and emergency responders from the definition of eligible employee” for purposes of entitlement to emergency family leave. Further, as it pertains to emergency sick leave, the Secretary is authorized to issue regulations “allowing the employer of such health care providers and emergency responders to opt out.”

Lastly, the Act authorizes the Secretary to exempt small businesses with fewer than 50 employees from the FFCRA’s emergency leave requirements if the requirements would jeopardize the viability of the business as a going concern. If the Secretary issues regulations for smaller businesses, healthcare employers may be included in such an exemption.