

Department of Labor's Latest FAQs Expand 'Health Care Providers' and Define 'Emergency Responders' Under FFCRA

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The Department of Labor has been hard at work issuing FAQs to try to explain the provisions of the Families First Coronavirus Response Act (FFCRA) before it goes into effect on April 1, 2020. The latest FAQs bring the current total to 59 and include a number of helpful provisions for employers, particularly those in the health care field, some of which are different than what had previously been reported.

Employers should keep in mind that FAQs may be considered by courts as informal guidance that do not have the force of law or even of regulations, which have not yet been issued by the DOL. As is evident by the manner in which the DOL is currently publishing the FAQs, they can also be changed by the DOL without notice. To the extent employers rely upon the guidance, before official regulations are issued by the DOL, employers should check to make sure they are reviewing the current version and print a copy of the DOL's website page containing these FAQs at that time, which may be necessary to establish good faith if the information later changes.

The FFCRA allows employers of health care providers and emergency responders to exclude these employees from the leave provisions under both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. In its definitions, the FFCRA defined "health care provider" to have the same meaning as under the FMLA (which is limited primarily to doctors and other providers). The DOL has clarified in its FAQs that the term "health care provider" actually has two different meanings in the Act. According to the DOL, the definition section which limits health care providers to doctors and specific individuals only applies to define the individual who advises an employee to self-quarantine under the second basis for paid sick leave. The DOL now provides a new, second definition of health care provider for the purpose of determining who can be excluded under the health care employee exception. Below are the relevant FAQs from the DOL on the definition of health care provider and emergency responders. Employers should consult with counsel about how these FAQs and the FFCRA apply to their company's own circumstances:

55. Who is a "health care provider" for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave?

The term "health care provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

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

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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.

To see earlier reports from Jackson Lewis attorneys on these FAQs, note the [March 24](#) and [March 27](#) posts from our [Disability, Leave and Health Management Blog](#).

[Visit our Coronavirus/COVID-19 resource page](#) to stay abreast of the developments, or contact the Jackson Lewis attorney with whom you regularly work.

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