

BURR ALERT

Treatment of Health Care Providers Under the FFCRA

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March 2020

On Thursday, March 18, 2020, President Trump signed into law the Family First Coronavirus Response Act (“FFCRA”), which among other things, includes a mandate for Emergency FMLA (“EFMLA”) and Emergency Paid Sick Leave. This bill takes effect April 1, 2020 and will remain in effect until December 31, 2020. The FFCRA applies to all employers with less than 500 employees. Employers with less than 50 employees may also be excluded in certain situations. The FFCRA has a unique application to Health Care Providers and Emergency Responders as detailed below.

Health Care Providers:

For purposes of a Health Care Provider whose advice to self-quarantine may be relied on for Paid Sick Leave, the DOL includes in this definition only doctors of medicine, nurse practitioners, or other health care providers permitted to issue a certification for purposes of the FMLA.

Distinctly, the DOL defines Health Care Providers that can be excluded by their employers from Paid Sick Leave and/or from EFMLA to include:

- Employees of a 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;
- Employees of any facility that performs laboratory or medical testing, pharmacy;
- Any entity that contracts with any of the above institutions, employers, or entity institutions to provider services or to maintain the operation of the facility; and
- Any employee of an entity that provides medical services, produces medical products, or is otherwise involved in making COVID-19 related equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

Emergency Responders:

The DOL definition of Emergency Responders includes:

- Any employee who is necessary for care, health care, comfort, and nutrition of patients with COVID-19 or who is necessary to limit the spread of COVID-19.

- Specifically, this includes emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, among others.

Emergency FMLA & Paid Sick Leave:

The FFCRA expanded FMLA by providing “Emergency FMLA” and Paid Sick Leave for employees in certain situations. However, a Health Care Provider or Emergency Responder may be excluded from EFMLA by the Secretary of Labor or by the Health Care Provider or Emergency Responder’s employer. To date, the DOL has not issued any such exclusion.

This expansion provides that employees could be eligible for 12 weeks of EFMLA if the employee is unable to telework due to a son or daughter’s school or place of child care is closed. Also, employees could receive up to 80 hours of Paid Sick Leave if: (1) the employee is subject to federal, state, or local quarantine because of COVID-19, (2) the employee has been advised by a Health Care Provider to self-quarantine, (3) the employee is experiencing symptoms and seeking a medical diagnosis, (4) the employee is caring for an individual who is subject to a federal, state, or local quarantine or who has been advised by a Health Care Provider to self-quarantine, or (5) the employee must care for a son or daughter of an employee if the son or daughter’s school or place of care is closed or if the son or daughter’s child care provider is unavailable.

For more information on the benefits provided under the FFCRA, visit [here](#).

How Many Employees Does Your Practice Employ?

Even if employers of Health Care Providers or Emergency Responders do not choose to exclude their employees from benefits under the FFCRA, the employer is excluded from requiring EFMLA or Paid Sick Leave if the employer employs more than 500 employees.

A small business employing less than 50 people may also be exempt from EFMLA requested due to school or place of child care closures and from Paid Sick Leave requested due to school or place of child care closures if:

- (1) The provision of Paid Sick Leave or EFMLA would result in expense and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- (2) The absence of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skill, knowledge of the business, or responsibilities; or
- (3) There are not sufficient workers who are able, willing, and qualified, and who would be available at the time and place needed, to perform the labor or services provided by the employee requesting leave, and these labor services are needed for the small business to operate at minimal capacity.

In calculating the number of employees, an employer should include all employees on leave, temporary employees, and any day laborers. If an entity has an ownership interest in another corporation and the entities are considered “joint employers” under the Fair Standards Labor Act test, all of their common

employees must be counted. If two entities are considered “integrated employers” under FMLA, then employees of all integrated employers will be counted.

Application of Stay at Home Orders to Health Care Providers and Emergency Responders:

Many states have issued stay at home order requiring non-essential businesses to cease operations. States may provide their own definition of Essential Businesses or they may reference the Cybersecurity and Infrastructure Security Agency (CISA) memorandum in response to COVID-19 which defines critical infrastructure workers. Regardless, Health Care Providers and Emergency Responders will be permitted to continue to work during stay at home orders.

We will provide further information on the FFCRA and the DOL’s guidance and are monitoring updates provided by the DOL regarding further regulations. For questions regarding this guidance, please contact the Burr & Forman attorney with whom you regularly work.

To discuss this further, please contact:

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