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## **ARE SMALL NONPROFITS EXEMPT FROM FAMILIES FIRST CORONAVIRUS RESPONSE ACT'S PAID LEAVE REQUIREMENTS?**

The Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. Employees are eligible to take this paid leave between April 1, 2020 and December 31, 2020, and employers will be eligible for reimbursement through a refundable payroll tax credit, up to a cap, on paid leave required under the FFCRA. For more information on the paid leave required to be provided under the FFCRA, please see our legal alert "[Families First Coronavirus Response Act: What Nonprofit Employers Need to Know](#)."

For many small businesses (including nonprofits), providing the paid leave required by the FFCRA could cause a significant interruption to the organization's operations or interfere with the organization's involvement in the fight against the COVID-19 public health emergency. In these instances, the FFCRA provides a few exemptions intended to limit the impact on employers who are also facing difficulties in the wake of COVID-19, including limited staff or financial resources.

The U.S. Department of Labor (DOL) has issued guidance related to these exemptions, and continues to provide updates and implementing regulations. Visit [www.dol.gov](http://www.dol.gov) for the most recent information on the FFCRA.

### **Limited Exemption for Small Businesses**

Small businesses, including nonprofit organizations, are exempt from providing childcare-related paid sick leave or expanded family and medical leave under the FFCRA if the:

- organization employs fewer than 50 employees;
- leave is requested because an employee's child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the organization has determined that the leave would jeopardize the organization's viability as a going concern.

In order to show that paid leave requested under the FFCRA would jeopardize an organization's viability as a going concern, an authorized officer of the organization must determine that at least one of the following three conditions are satisfied:

- the provision of paid leave would result in the organization's expenses and financial obligations exceeding available business revenues and cause the organization to cease operating at a minimal capacity;
- the absence of the employee(s) requesting paid leave would entail a substantial risk to the financial health or operational capabilities of the organization because of their specialized skills, knowledge of the business, or responsibilities; or
- there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s)

requesting paid leave, and these labor or services are needed for the organization to operate at a minimal capacity.

An organization relying on this exemption should create and retain documentation as to why it meets the criteria described above. DOL has specifically stated that employers should not submit the documentation to it.

### **Exclusion for Health Care Providers and Emergency Responders**

Careful to avoid understaffing the necessary functions responding to COVID-19, the FFCRA allows employers, on a case-by-case basis, to exclude health care providers and emergency responders from being able to take paid leave under the FFCRA.

For purposes of this exclusion, the DOL definition of a “[health care provider](#)” goes well beyond medical professionals, including any individual capable of providing health care services necessary to combat the COVID-19 public health emergency, as well as other workers who are needed to keep hospitals and health care facilities operating. The definition captures “anyone employed” at a long list of health care facilities (such as hospitals, medical schools, nursing homes, pharmacies, and similar institutions), as well as employees of entities that produce COVID-19 related medical equipment, tests, vaccines, or treatments. New York State has successfully challenged this definition of “health care provider.” On August 3, 2020, a federal district court agreed with New York State that the definition of “health care provider” to include individuals who do not directly provide health care is overbroad.<sup>1</sup> Rather, the health care providers who may be excluded from taking leave are doctors of medicine or osteopathy and other professionals including podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, and other similar professionals. This decision may be appealed. See legal advice prior to denying leave to a health care provider.

DOL provides a similarly broad definition of “[emergency responders](#)” for purposes of this exclusion, including “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of [COVID-19] patients, or others needed for the response to COVID-19.” Some examples provided by the DOL include emergency medical services personnel, public health personnel, child welfare workers and service providers, public works personnel, and persons with other skills needed to provide aid in a declared emergency.

However, the DOL encourages employers to be judicious in excluding certain employees from paid sick leave, in order to minimize the spread of COVID-19. *Seek legal counsel before relying on these provisions to deny leave.*

### **Denial of Reinstatement**

Organizations with fewer than 25 employees may refuse to reinstate employees who took expanded family and medical leave if all four of the following conditions are met:

- the employee took leave to care for their own son or daughter whose school or place of care was closed, or whose child care provider was unavailable for COVID-19 related reasons;

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<sup>1</sup> *State of New York v. U.S. Dept. of Labor*, Case 1:20-cv-03020 (S.D.N.Y.), Doc. No. 4 at 16 (filed Apr. 14, 2020).

- the employee’s position no longer exists due to economic or operating conditions that affect employment and are caused by COVID-19 during the period of the employee’s leave;
- the employer made reasonable efforts to restore the employee to the same or an equivalent position; and
- if an equivalent position becomes available, the employer continues to make reasonable efforts to contact the employee for a one-year period, beginning on the earlier of the date the employee’s leave concluded or the date twelve weeks after the employee’s leave began.

### **Layoffs and Furloughs**

In most cases, an employee who is out on leave under the FFCRA will be entitled to reinstatement to the same or an equivalent position on return from leave. However, employees taking leave are still subject to employment actions, such as layoffs or furloughs, that would have affected the employee regardless of whether they took leave. This means that organizations can layoff or furlough employees who are out on leave for legitimate business reasons, such as budget issues or lack of work due to site closures or program cancellations, and these employees would no longer be eligible for paid leave under the FFCRA. However, organizations should be careful when structuring any reductions in force to avoid claims of discrimination or retaliation. For more guidance on reductions in force, please see our legal alert [“Making Staff Changes in Response to COVID-19.”](#) Also, while no longer eligible for paid leave under the FFCRA, employees that have been laid off or furloughed may be eligible for unemployment insurance.

Employers may also refuse to reinstate highly compensated “key” employees (as defined under the Family and Medical Leave Act) who have taken expanded family and medical leave, if necessary to prevent “substantial and grievous economic injury” to the operations of the employer.

### **Leave Denial for Insufficient Documentation**

A key element of the FFCRA’s new paid leave requirements is that employers will be eligible for reimbursement of these costs through refundable payroll tax credits. Therefore, if an employee fails to provide the documentation necessary to substantiate the employer’s claim for the applicable payroll tax credit, an employer is not required to provide leave. Employees must provide their employers with written documentation for leave that includes the following information to support the employer’s claim for a tax credit:

- the employee’s name;
- the date or dates for which leave is requested;
- a statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- a statement that the employee is unable to work, including by means of telework, for such reason.

Additional information is required for leave requests based on a quarantine order or self-quarantine advice, and leave requests based on a school closing or child care provider unavailability. No matter the basis for an employee’s leave request, no documentation from a third party (such as a health care provider) is required. For more information on the documentation required to substantiate an employer’s eligibility for these payroll tax credits, please visit the [Internal Revenue Service’s website](#).

Given the difficulties that many individuals are facing while New York is on “pause,” we recommend that employers give employees more than one opportunity to provide the necessary documentation before denying an employee’s request for leave.

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***This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 ext. 250 or visit our website [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information.*** Representatives of nonprofit organizations who would like information on becoming a client should contact Client Relations Associate Gina Pujols-Johnson for assistance at [gpujols-johnson@lawyersalliance.org](mailto:gpujols-johnson@lawyersalliance.org) or (212) 219-1800 ext. 278. Information about becoming a client is also available at <https://lawyersalliance.org/becoming-a-client>.

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