



Small Business Exemption to the FFCRA

The Families First Coronavirus Response Act (“FFCRA”) requires certain employers to provide paid leave to employees affected by the COVID-19 pandemic. Specifically, effective April 1, 2020, employers with less than 500 employees at the time the leave is requested must provide employees with 80 hours of paid sick leave at the employee’s regular rate of pay, up to a maximum of \$511 per day, if the employee is unable to work or telework due to a need for leave because he/she:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
- has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- is experiencing symptoms of COVID-19 and is seeking medical diagnosis

Employers must provide employees with 2 weeks of paid sick leave at 2/3 of the employee’s regular rate of pay, up to a maximum of \$200 per day, if the employee is taking leave because he/she is:

- caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or
- experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services.

Employees caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons (Expanded Family and Medical Leave) are entitled to an additional 10 weeks of paid leave at 2/3 of the employee’s regular rate of pay, up to a maximum of \$200 per day.

The FFCRA contains an exemption for smaller employers with less than 50 employees. This exemption applies **ONLY** to employees seeking paid leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

To meet the exemption, in addition to having less than 50 employees, the employer must demonstrate the imposition of the FFCRA’s paid leave requirements for Expanded Family and Medical Leave would jeopardize the viability of the business as a going concern. What does this mean?

Such a “small business” must be able to demonstrate one of the following factors:

- The leave requested would result in the company's expenses and financial obligations exceeding available business revenues and cause the company to cease operating at a minimal capacity;
- The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business 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 or employees requesting leave, and these labor or services are needed for the company to operate at a minimal capacity.

If one of the above factors is relied upon to establish the company meets the exemption, the company must document that a determination has been made pursuant to the criteria set forth above and retain such documentation for four years. The company need not and should not send such documentation to the Department of Labor, but should retain the records for use later in the event the company's decision is questioned. The above determination must be made by an authorized officer of the company.