

FAMILIES FIRST CORONAVIRUS RESPONSE ACT* EXEMPTIONS AND EXCLUSIONS

Small Employer Business Exemption.

The DOL regulations confirm that an employer, including religious or nonprofit organizations, with the 49 or fewer employees, is exempt from providing Families First Coronavirus Response Act (FFCRA) leave for childcare purposes under either Emergency Paid Sick Leave Act (EPSLA) or Emergency Paid Family and Medical Leave Act (EPFMLA) when allowing such leave would jeopardize the viability of the business. Under the regulations, employers will need to make an individualized determination that certain employee's request for such leave would jeopardize the viability of the business. To use this exemption, an authorized officer of the employer must determine **one of the three** criteria below:

1. The leave requested would result in the business's expenses **and** financial obligations to exceed all business revenues and cause the small business to cease operating at a minimal capacity; or
2. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health operational capabilities of the business because of their special skills, knowledge of the business, or responsibilities; or
3. There are no 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** the labor or services are needed for the small business to operate in a minimal capacity.

To elect the small business exemption, employers **must document** that an authorized officer made this determination and retain these records for their files. The DOL's temporary regulations clarify that even if a small business believes it will meet these criteria, the business must still post and provide employees with their notice of the rights to leave under FFCRA.

Health Care Provider Exclusion

Employers may exclude from eligibility for both EPSLA and EPFMLA health care providers, defined broadly to include anyone employed at:

- any doctor's office,
- hospital,
- health care center,
- clinic,
- post-secondary educational institution offering healthcare instruction,
- medical school,
- local health department or agency,
- nursing facility,
- retirement facility,
- nursing home,
- home health care provider,
- facility that performs laboratory or medical testing,
- pharmacy, or

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- any similar institution, employer or entity.

The definition includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

The definition includes any individuals employed by any entity that contracts with these institutions to provide services or maintain the operation of the facility.

The definition includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, test, drugs, vaccines, diagnostic vehicles, or treatments.

The definition includes any individual that the highest official of a state or territory determines as a “health care provider” necessary for that state’s response to COVID-19.

The regulations also provide that this definition is only applicable for determining employee eligibility for FFCRA, **not for purposes of the definition of health care provider under traditional FMLA** who may verify whether an individual has a “serious health condition.”

Emergency Responder Exclusion

Employers may also exclude emergency responders, defined broadly to include any employees necessary for:

- transport,
- care,
- healthcare,
- comfort and nutrition of patients, or
- whose services are otherwise needed to limit the spread of COVID-19.

This includes but is not limited to;

- military National Guard,
- law enforcement officers,
- correctional institutional personnel,
- firefighters,
- physicians,
- nurses,
- public health personnel,
- EMTs,
- emergency medical services personnel,
- paramedics,
- emergency management personnel,
- 911 operators,
- public works personnel, and

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- 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.

The definition also includes any individual whom the highest official of the state determines is an emergency responder necessary for that state's response to COVID-19.

Notably, if a covered employer chooses not to avail itself of the exclusion for healthcare providers and/or first responders, it remains entitled to the 1:1 tax break under the CARES act.

REMINDER: Employees are not entitled to leave when no work is available.

The regulations and the FAQ make clear that employees on other forms of leave, on furlough, lay-off, or who are terminated, are not eligible for EPSLA or EPFMLA. Likewise, if an employee would not have been scheduled to work, or the employer has no work available for the employee to complete, the individual is not entitled to FFCRA leave.

* Oregon Employers with 25 or more employees: There are no exemptions or exclusions to the emergency pandemic related temporary rules associated with Oregon Family Medical Leave.

Specifically, If an employee or organization is exempt or excluded from FFCRA and they are requesting leave under #5 of the FFCRA they will qualify for up to 12 weeks of unpaid leave under OFLA. Reason #5: Caring for a child whose school or place of care is closed or unavailable due to coronavirus-related reasons.

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