

NEWS & INSIGHTS

Small business exemption under the Families First Coronavirus Response Act (FFCRA)

INSIGHTSLEGAL UPDATE

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The below information is current as of the publication date listed. Because COVID-19 response measures on all fronts are continually evolving, clients should stay alert to new developments and consult with counsel on any critical questions.

In anticipation of the upcoming compliance deadline, the Department of Labor (DOL) recently published updated

guidance to help employers determine obligations under the Families First Coronavirus Act (FFCRA). The guidance, by way of an expanded [Questions and Answers](#) document, gives additional insight into whether and how small businesses may claim an exemption to the FFCRA's paid leave provisions.

The guidance defines "small business" as one with fewer than 50 employees. Employers meeting this threshold may be exempt from providing (1) paid sick leave due to school or place of care closures, or child care provider unavailability for COVID-19-related reasons; and (2) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons "when doing so would jeopardize the viability of the small business as a going concern."

To show that the business's viability would be jeopardized to the extent required to elect exemption, an authorized officer of the business must be able to demonstrate one or more of the following factors:

- The provision of paid sick leave or expanded family and medical leave would cause the employer's expenses and financial obligations to exceed available business revenues and render the business unable to operate at a minimal capacity
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities
- 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity

Employers who believe they may be subject to an exemption are encouraged to document why their business meets these criteria, but at this point should refrain from sending to the DOL any documentation or materials regarding the purported exemption. Additional guidance on any formal process through which employers can avail themselves to the exemption are expected to be addressed in forthcoming DOL guidance. In the meantime, the DOL recommends employers collaborate with employees to achieve a balance of business interests and employee safety.

Saxton & Stump attorneys [Morgan Hays](#) and [Rick Hackman](#) are available to further discuss how to determine whether your organization might qualify for an exemption and how our [Labor and Employment](#) group can provide guidance to appropriately document such a determination.

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