CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Employers may Elect to Exclude Health Care Provider and Emergency Responder Employees from FFCRA Paid Leave Provisions

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Editor's Note: On September 11, 2020, the Department of Labor revised its FFCRA regulations and narrowed the definition of "health care provider." For information on the revised definition, please see here.

On March 28, 2020, the Department of Labor released additional guidance (the "Guidance") regarding which employees are included in the definition of "health care providers" and "emergency responders" that employers may elect to exclude from the paid sick leave or expanded paid family and medical leave provisions of the Families First Coronavirus Response Act ("FFCRA").

Health Care Providers

The FFCRA referenced the definition of "health care provider" under the Family Medical Leave Act. The definition of "health care provider" under the Family Medical Leave Act does not include all of the health care professionals, such as nurses, that are necessary to operate hospitals, skilled nursing facilities, home health agencies, and other health care facilities and suppliers.

However, the Department of Labor provided a broader definition of "health care provider" for which employers may elect to exclude certain employees from coverage under the FFCRA. For the purposes of the exemption, a "health care provider" employee under the FFCRA is **anyone employed at any of the following health care entities, facilities, or institutions**:

- 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;
- any facility that performs laboratory or medical testing, pharmacy; or
- any similar institution, employer, or entity.

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

We have had several inquiries related to hospice providers. While not specifically called out in the broader definition, we have reasonably concluded that hospice providers are included in the definition of "health care provider" due to their similarity to nursing facilities, nursing homes, and home health care providers.

Providers of Services to Health Care Providers

Furthermore, the Department of Labor also included in the definition of "health care provider" for purposes of the exemption **anyone employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility**. Examples of such service providers may include janitorial services, laundry services, food services, third party billing companies, call centers, and security companies.

These employees of service providers also include employees of any entities that provide medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Finally, the definition of "health care providers" includes any individual that the highest official of a state, the District of Columbia, or a territory determines is a health care provider necessary for its response to COVID-19.

Emergency Responders

The Department of Labor also provided a broad definition of emergency responder employees for which employers may elect to exclude from coverage under the FFCRA. An "emergency responder" employee under the FFCRA is any employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19.

"Emergency Responder" includes: (a) military or national guard; (b) law enforcement officers; (c) correctional institution personnel; (d) fire fighters; (e) emergency medical services personnel; (f) physicians; (g) nurses; (h) public health personnel; (i) emergency medical technicians, paramedics; (j) emergency management personnel; (k) 911 operators; (l) public works personnel; (m) and 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.

Finally, “emergency responder” includes any individual that the highest official of a state, the District of Columbia, or a territory determines is an emergency responder necessary for that its response to COVID-19.

While the scope of the health care provider and emergency responder employee exemptions are broad, employers should note that the Department of Labor still encourages employers to be judicious when using these definitions to exempt employees from FFCRA leave so that employers do their part in minimizing the spread of the virus associated with COVID-19. Employers should also note that they may not elect to use these exemptions for any employee leave under the regular Family and Medical Leave Act and state leave laws as applicable.

Employers who have questions about exempting employees from the FFCRA should contact their counsel. For more information regarding the FFCRA and the exemptions for health care providers and emergency responders, please contact a member of the Benesch Healthcare+ or Labor & Employment Practice Groups.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19’s status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

