



## **FFCRA SMALL EMPLOYER (UNDER 50) EXEMPTIONS CLARIFIED**

Today, the FFCRA (Families First Coronavirus Response Act) Paid Family Medical and Childcare leave provisions take effect. In the last 2 days, the Department of Labor released and expanded Q&A and guidance document outline previous areas of implementation that were unclear. Chief among those areas was the impact of paid leave on businesses with less than 50 employees, a segment of the economy that makes up **96%** of the total employers in the US. BHMK has been swamped with questions on the “Under 50” exemption and finally DOL has provided some answers to how it will analyze those questions.

### **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) 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. A small business may claim this exemption if an authorized officer of the business has determined that *ANY* of the following apply:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. 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; **or**
3. 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.

### **If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?**

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the 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 business has determined that at least one of the three conditions described in the section above is satisfied.

**The Department of Labor encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety. Generally, a rule of reasonableness will apply to these situations so long as employers and employees are working with each other in a spirit of cooperation.**

An effective way to do this is to involve experienced employment law counsel in your analysis and discussions as much of what the Department and the Courts will consider is “reasonable” is informed by past guidance and legal precedent. We remain active and available through email, cell phone, and social media messaging to establish contact and analyze your issues during this difficult time. Don’t go through these difficult times alone. We are here to help you find your solution.

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