

Exemptions in the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act

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Issue

This report describes exemptions to the requirements of the federal Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA), as detailed in the [regulations](#) issued by the U.S. Department of Labor on April 6, 2020.

Summary

The federal Families First Coronavirus Response Act (FFCRA) ([P.L. No. 116-127](#)) includes, among other things, the Emergency Paid Sick Leave Act, which generally requires employers to provide employees with paid sick leave for certain reasons related to COVID-19, and the Emergency Family and Medical Leave Expansion Act, which generally requires employers to provide employees with paid family and medical leave if they cannot work because their children's school or daycare is closed due to COVID-19. Neither act, however, covers all private-sector employers and employees. Both acts exclude large employers who have at least 500 employees. They also allow exemptions for employers (1) with fewer than 50 employees, if providing leave jeopardizes the business's "viability as a going concern," and (2) of healthcare providers and emergency responders.

Families First Coronavirus Response Act

For additional information about the employment-related provisions in the FFCRA, including the EPSLA and EFMLEA, see OLR Report [2020-R-0104](#).

The implementing regulations for the acts, [published](#) on April 6, 2020, specify how to count employees for determining whether an employer meets employer-size thresholds, the criteria to apply when determining whether a small business may deny an employee EPSLA or EFMLEA leave, and what employees may be denied leave because they are considered “healthcare providers” and “emergency responders.” The regulations are effective from April 2, 2020, through December 31, 2020 (when the provisions of the two new laws also expire).

Large Employer Exemption ([29 C.F.R. § 826.40\(a\)](#))

The EPSLA and EFMLEA both apply to private-sector employers that have fewer than 500 employees (the acts apply to public sector employers regardless of their size). Employers with at least 500 employees do not have to provide their employees with either type of leave provided under the acts.

To determine whether it meets the 500-employee threshold, the regulations require an employer to count all full-time and part-time employees employed within the United States at the time an employee would take leave. The number of employees includes all (1) employees currently employed, regardless of tenure; (2) employees on leave of any kind; (3) temporary agency employees who are jointly employed by the employer, regardless of whose payroll they appear on; and (4) day laborers supplied by a temporary agency, regardless of whether the employer is the temporary agency or the client firm. The count does not include furloughed workers.

The regulations also require that all common employees of [joint employers](#) and all employees of integrated employers be counted together. Under the regulations, [29 C.F.R. § 791.2](#) controls determinations of joint employer status and [29 C.F.R. § 825.104\(c\)\(2\)](#) controls determinations of integrated employer status.

Small Business Exemption ([29 C.F.R. § 826.40\(b\)](#))

The EPSLA and EFMLEA both authorized the labor secretary to issue regulations that exempt businesses with less than 50 employees from their leave requirements if imposing them would jeopardize the business’s “viability as a going concern.” The regulations entitle such a business to the exemption if an authorized officer of the business determines that:

1. the leave requested would result in the business's expenses and financial obligations exceeding its available business revenues and cause it to cease operating at a minimal capacity;
2. the absence of the employee or employees requesting leave would entail a substantial risk to the business’s financial health or operational capabilities because of their specialized skills, knowledge of the business, or responsibilities; or

3. there are not enough workers who are able, willing, qualified, and available to perform the labor or services provided by the employee or employees requesting leave, and the business needs these labor or services to operate at a minimal capacity.

The executive summary that accompanies the regulations further explains that an employer may deny EPSLA or EFMLEA leave only to those employees whose absence would meet one of the three criteria above (p. 19336). Thus, for example, an employer cannot deny leave to all employees because the absence of one particular employee would create a substantial financial risk for the business.

To use the small business exemption, the regulations require an employer to document that a determination has been made using the above criteria. The employer does not have to send the documentation to the U.S. Department of Labor but should retain it. The business must still meet the law's and regulations' notice requirements.

Healthcare Provider and Emergency Responder Exemptions

Both acts generally allow (but do not require) employers to exclude healthcare providers and emergency responders from the acts' leave requirements. The regulations more specifically define which employees may be considered as healthcare providers or emergency responders and thus denied leave. The regulations' executive summary notes that the labor department "encourages employers to be judicious" when applying the exemptions to minimize the spread of COVID-19 (p. 19334).

***Healthcare Providers* ([29 C.F.R. § 826.30\(c\)\(1\)](#))**

Under the regulations, a "healthcare provider" who may be denied leave is anyone employed at a 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.

An entity that contracts with any of these institutions to provide services may also exclude their employees who support the facility's operation. This 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, tests, drugs, vaccines, diagnostic vehicles, or treatments.

In addition, the regulations allow any employee to be excluded if the highest state official determines that the employee is a health care provider necessary for the state's response to COVID-19.

***Emergency Responders* ([29 C.F.R. § 826.30\(c\)\(2\)](#))**

Under the regulations, an “emergency responder” who may be denied leave is anyone needed to provide transport, care, healthcare, comfort, and nutrition of COVID-19 patients, or others needed for the response to COVID-19. This includes the military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and people with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency. It also includes individuals who work for facilities that employ these individuals and whose work is necessary to maintain and operate the facility.

As with healthcare providers, the highest state official may also exempt an emergency responder by deeming him or her necessary for the state's response to COVID-19.

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