

GUIDANCE ON OPTING OUT YOUR EMERGENCY RESPONDERS UNDER FFCRA

March 30, 2020

OPTING OUT YOUR EMERGENCY RESPONDERS: The paid leave requirements created in the Families First Coronavirus Response Act (FFCRA) allow employers to opt out with regard to their “emergency responder” employees. Some municipalities are considering doing so in order to ensure adequate staffing/availability of emergency responders; others are not taking this step for reasons specific to the individual municipality. While the Department of Labor has yet to provide any specific guidance on how to opt these employees out of the leave benefits, we strongly recommend that municipalities who wish to take advantage of the opt out take some affirmative action. Such affirmative action could include adopting a simple policy covering the benefits provided under FFCRA, clearly stating the municipality’s decision to opt out their emergency responders, and identifying the types of employees that are considered emergency responders. Please call us if you need any help creating such a policy.

Guidance from the Dept. of Labor:

Who is an emergency responder?

For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to 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, public works personnel, 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is anyone employed at any 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.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>