

Weigh Risks in Using FFCRA's Small-Business Exemption

By Allen Smith, J.D.

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The Families First Coronavirus Response Act (FFCRA) offers a limited exemption for struggling small businesses. But before using it, employers should make sure they qualify and conduct a thorough risk assessment.

The exemption applies only to paid leave (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-releases-ffcra-regulations-coronavirus.aspx) due to school or child care closures or child care unavailability for coronavirus-related reasons. It can be used when such leaves would jeopardize the viability of a small business, one with fewer than 50 employees.

"A common misconception among employers is that the exemption similarly applies when paid sick leave is taken because the employee is subject to a federal, state or local quarantine or isolation order, or the employee has been advised by a health care provider to self-quarantine or any other form of statutorily permissible paid sick leave," said Alejandro Leiva, an attorney with Greenspoon Marder in Miami.

Employers that deny paid-sick-leave benefits based upon the small-business exemption without due regard to the limited availability of the exemption are inviting lawsuits and liability, he cautioned.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Qualifying for the Exemption

Karen Buesing, an attorney with Akerman in Tampa, Fla., said that to qualify for the exemption, a small business must be able to show that providing leave for school or child care closures or child care unavailability would threaten the company's ongoing viability in one of three ways:

- The leave would result in expenses exceeding available revenues, causing the business to cease operating.
- The absence of the employees requesting the leave would entail a substantial risk to the capabilities of the operations because of the employees' unique skills or responsibilities.
- There would not be enough other qualified workers available to perform the work needed to keep operating.

Risk Assessment

Feedback

"If a business can establish any of those factors, it should claim the exemption rather than risk going under," Buesing said.

Many employers are trying to provide FFCRA's emergency paid sick leave. The FFCRA makes available 80 hours of paid sick leave for each employee taking it. "But the 10 weeks of paid expanded family and medical leave is simply too much for most employers with fewer than 50 employees," she said. "Many employers with fewer than 50 employees have no alternative but to claim the exemption."

Delia Isvoranu, an attorney with Duane Morris in San Francisco, said the benefit of using the exemption is that the amount saved by claiming the exemption "could allow the small business to function for longer with smaller risks of needing to furlough, lay off or terminate their workforce."

Because employers may be eligible for reimbursement of the costs of providing paid leave through refundable tax credits, the benefits of the exemption "do not outweigh the risk of potentially having to incur significant legal defense costs because of a simple misapplication of the exemption," Leiva said.

If an employee files a claim with the U.S. Department of Labor (DOL) against an employer that claims the exemption, the DOL could disagree with the employer's basis for asserting the exemption. The employer could wind up having to pay not only the amounts owed, but also liquidated damages (doubling the award), plus attorney fees, said Sarah Platt, an attorney with Ogletree Deakins in Milwaukee.

Michael Elkins, partner and founder of MLE Law in Fort Lauderdale, Fla., noted that there are some practical risks in claiming the exemption, "the biggest one being that employees denied leave pay may be disgruntled."

John Hagan, an attorney with Hagan Law Group in Allen, Texas, explained, "Employers at first scrambled to use the exemption. Then, when it was announced that the U.S. would help employers pay for workers who were furloughed, far fewer employers saw the need for the exemption."

Platt, with Ogletree Deakins in Milwaukee, said some employers are nonetheless using the exemption, particularly with respect to skilled positions, without which the business cannot operate.

Ultimately, whether the small-business exemption's benefits outweigh potential risks "will depend on a careful analysis of all factors to determine what works best for the business," Isvoranu said.

[SHRM Resource Spotlight: Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)]

Documentation

Even if a small business has a strong case to use the exemption, the business is still required to document why it qualifies, Isvoranu said.

Buesing explained that an officer of the company should make the determination, document the reasoning and maintain it in the company's records.

The DOL has instructed businesses not to send any materials to them when seeking the small-business exemption. This puts the burden on employers to determine whether the exemption is available, Leiva said.

Other Exemptions

In addition to the small-business exemption, the FFCRA allows employers to exclude certain health care providers and emergency responders from the emergency paid sick leave and the expanded family and medical leave requirements.

The DOL has defined "health care providers" broadly to include any individual employed at a doctor's office, hospital, health care center, clinic, postsecondary 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 "emergency responder" has been defined as anyone necessary for the provision of transport, care, health care, comfort and nutrition of "such patients," or others needed for the response to COVID-19. This includes but is not limited to the military or National Guard, law enforcement officers, correctional institution staff, firefighters, emergency medical services staff, physicians, nurses, public health staff, emergency medical technicians, paramedics, emergency management staff, 911 operators, child welfare workers and services providers, public works staff, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency. The definition also includes people who employ these individuals and whose work is necessary to maintain the operation of an emergency-responder facility.

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