

DOL outlines small-business exemption from coronavirus paid leave law

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Dive Brief:

- Employers with fewer than 50 employees may claim an exemption from the emergency paid leave provisions of the Families First Coronavirus Response Act (FFCRA), and the exemption applies specifically to leave taken for reasons of child care and school closures related to COVID-19, according to a U.S. Department of Labor (DOL) guidance [updated March 28](#).
- Small businesses with fewer than 50 employees, including religious and nonprofit organizations, are exempt from two aspects of the FFCRA's provisions — (1) paid sick leave due to school closure, place of care closure or child care provider unavailability for COVID-19 related reasons; and (2) emergency paid leave under the Family and Medical Leave Act (FMLA) — when doing so would jeopardize the viability of the business, DOL said. An "authorized officer" of the business must determine whether it meets this criteria, according to the guidance.
- Separately, DOL's Wage and Hour Division [published a Field Assistance Bulletin](#) regarding its [temporary non-enforcement of the FFCRA](#) until April 17. DOL will not bring enforcement actions against any public or private employer for FFCRA violations during this 30-day period provided the violating employer acts "reasonably" and "in good faith." The employer must also remedy any violations as soon as practicable, its violations must not be willful and DOL must receive from the employer a written commitment to comply with the law in the future.

Dive Insight:

There are a number of details included in DOL's guidance that employers impacted by the FFCRA must note, should they qualify for and seek an exemption from the law's expanded leave provisions.

One such note is the authorized officer provision. Essentially, an employer with fewer than 50 employees may claim an above exemption if the authorized officer determines at least one of the following applies:

- (a) providing the leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity;
- (b) the absence of the employee or employees requesting such leave would entail a substantial risk to the financial health or operational capabilities of the employer because of their specialized skills, knowledge of the business or responsibilities; or
- (c) 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 the leave, and these labor or services are needed for the small business to operate at a minimal capacity.

DOL's update clarifies several other elements of the FFCRA, [according to a blog post](#) by Littler Mendelson attorneys. Employers with fewer than 50 employees, even those that claim the above exemption(s), would not be exempt from providing paid sick time for other reasons, the attorneys said. Those reasons include paid sick time taken by an employee who:

- (a) is subject to a state, local or federal quarantine;
- (b) has been advised by a health care provider to self-quarantine;
- (c) is experiencing symptoms of COVID-19 and seeking a medical diagnosis,
- (d) is providing care for an individual subject to a federal, state or local quarantine or isolation; or

- (e) is dealing with a "substantially similar condition."

Other finer points include those around the law's emergency FMLA leave. Previously, sources who spoke to HR Dive speculated how the emergency leave [would interact with traditional FMLA leave](#). In the updated guidance, DOL said the total time of FMLA leave taken, whether that leave is taken as emergency paid leave as provided by the FFCRA or unpaid leave as provided by the FMLA prior to the FFCRA, may not exceed 12 workweeks in an employee's specified 12-month period.

"For example, assume you take four weeks of Expanded Family and Medical Leave in April 2020 to care for your child whose school is closed due to a COVID-19 related reason," DOL said. "These four weeks count against your entitlement to 12 weeks of FMLA leave in a 12-month period. If you are eligible for preexisting FMLA leave and need to take such leave in August 2020 because you need surgery, you would be entitled to take up to eight weeks of FMLA leave."

Eligible employees are entitled to the FFCRA's two weeks of paid sick leave regardless of how much leave they have taken under the FMLA, DOL noted.

Employees who decide to take either bucket of leave generally have a right to return to work and are protected from being fired, disciplined or otherwise discriminated against because they chose to do so, DOL said. But such employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave, the agency noted. Employers covered under the FFCRA can lay off emergency leave-taking employees for legitimate business reasons, [such as the closure of their worksite](#), DOL said.

Employers affected by the FFCRA also might need to note that [the IRS has issued a notice](#) specifying the tax credits available to employers who need to provide the expanded paid leave. There are also notice requirements around the law. Last week, [DOL issued a poster](#) that fulfills those requirements.

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