

# The FFCRA: DOL Releases Additional Guidance Regarding the Small Business Exemption

March 31, 2020

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On March 28, 2020, the U.S. Department of Labor's (DOL) Wage and Hour Division released an updated set of Questions and Answers (Q&As) that provide additional guidance concerning how employers may take advantage of the small business exemption under the Emergency Family and Medical Leave Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The small business exemption is addressed in questions 4 and 58-59).



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Under the FFCRA, small businesses, including religious and nonprofit organizations, with fewer than 50 employees may be exempt from the paid sick leave and expanded family and medical leave “when the imposition of such requirements would jeopardize the viability of the business as an ongoing concern.” EFMLEA § 110(a)(3)(B) and EPSLA § 5111(2).

### **When does the exemption apply?**

According to question 58:

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:

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;

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

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.

According to question 59, the DOL “encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.” It should be noted that the DOL’s responses to question 59 is limited in its response, suggesting that the small business exemption may be limited to exempting employers from child-care-related paid leave, but possibly not emergency paid sick leave for employees to care for themselves. It is unclear at this time if this was intentional or an oversight.

### **What documentation is required to elect the exemption (Q&A 4)?**

The DOL stated that employers that elect the exemption “should document why [their] business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.” The DOL also stated that employers should not send it any materials to the “when seeking a small business exemption for paid sick leave and expanded family and medical leave.”

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