



# Laura's Legal Brief of the Week: DOL Provides Additional Guidance on Small Business Exemptions Under the Families First Coronavirus Response Act

By Laura Pearce posted 17 hours ago

Follow ☆

0

Recommend

In the [blog](#) I posted recently regarding requirements of employers under the Families First Coronavirus Response Act (FFCRA), I promised to provide more information, when available, on how employers with fewer than 50 employees may be able to obtain hardship waivers with regard to the emergency paid sick leave and expanded family medical leave mandates of the Act. See below for more information provided by IIABA.

## DOL Provides Additional Guidance on the Families First Coronavirus Response Act

BY WYATT STEWART

On March 18, President Trump signed [the Families First Coronavirus Response Act](#) (FFCRA) into law and the requirements officially went into effect yesterday, April 1. The legislation requires businesses with fewer than 500 employees to provide 12 weeks of job-protected family and medical leave and two weeks of paid sick leave for coronavirus-related reasons.

While these mandates are for businesses with fewer than 500 employees, companies with fewer than 50 employees can request a hardship exemption from the Department of Labor (DOL) from certain provisions. In addition, employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.

This week, the DOL provided additional guidance on the FFCRA. Of importance to Big "I" members, they provided clarity on the provision allowing an exemption for some employers with fewer than 50 employees.

Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or childcare unavailability where the circumstances would jeopardize the ability of the business to continue operations. The DOL provided the following three examples:

- 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.
- There are not sufficient workers who are able, willing, qualified, and 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.

For more information on the requirements of FFCRA from the DOL, including helpful fact sheets, a lengthy FAQ section, and a webinar with a planned release on Friday, April 3, visit the DOL [website](#).

Additionally, the Big "I" has additional [resources](#) on implementing FFCRA requirements.

3 comments

188 views

## Permalink

<https://mycommunity.faia.com/blogs/laura-pearce/2020/04/08/lauras-legal-brief-of-the-week-dol-provides-additi>

## Comments

Add

[Laura Pearce](#)

5 minutes ago



Jim,

You can find more information at this link:

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

An excerpt from that document is below. See the last paragraph.

Section 826.40(b) describes the small employer exemption pursuant to the Secretary's regulatory authority to exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern. The American Institute of Certified Public Accountants (AICPA) allows companies to use the "ongoing concern assumption" to defer some of its prepaid expenses until future accounting periods because the entity can continue in business for the foreseeable future without the intention nor the necessity to liquidate, cease trading, or seek protection from creditors pursuant to laws or regulations. In other words, the business is considered to remain a viable business for the foreseeable future. There is no formula provided by the AICPA to determine the viability of a business as a going concern, but rather the standard considers conditions or events in the aggregate.

The Department believes it is necessary to set forth objective criteria for when a small business with fewer than 50 employees can deny an employee paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons. To that end, section 826.40(b)(1) explains that a small employer is exempt from the requirement to provide such leave when: (1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Section 826.40(b)(2) explains that if a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

Jay Newman

6 minutes ago



I second Jim Koch's comment. I looked all over the DOL website and do not see how to apply. So the question is if we are automatically exempt?

Jim Koch

an hour ago



Hi Laura, to claim the exemption do we have to submit something in writing to DOL or our employee's? If so where do we send it?

Thank you for the article.

Jim

[My Community](#) [Communities](#) [Directory](#) [Browse](#) [Participate](#) [Blogs](#)

Copyright 2019. All rights reserved.

Powered by Higher Logic