The Families First Coronavirus Response Act (FFCRA): DOL Releases Updated Guidance on Exempt Health Care Providers and Emergency Responders

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 health care providers and emergency responders (question numbers 55, 56, and 57). The Emergency Family and Medical Leave Expansion Act (EMFLEA) and the Emergency Paid Sick Leave Act (EPSLA) authorize the DOL to issue regulations to exempt health care providers and emergency responders from eligibility for coverage under the FFCRA. In addition, the FFCRA provides that employers of health care providers and emergency responders may elect to exclude these employees from coverage.

Definition of a Health Care Provider

The FFCRA states:

The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Section 29 C.F.R. 825.125 provides the definition of a health care provider under the Family and Medical Leave Act (FMLA).

Employees Excluded From Coverage Under the FFCRA

Health Care Providers

The DOL states that excluded health care providers include any of the following persons:

- Employees who work “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.”
- Employees who work at “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.”
- Employees who work for an entity who “contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.”
• Employees who work for entities providing “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.”
• Employees “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.”

Emergency Responders

The DOL states that excluded emergency responders include any of the following persons:

• Employees who are “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,”
• Employees “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.”
• Employees “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.”

The DOL “encourages employers to be judicious” when determining whether employees meet the definition of “health care providers” or “emergency responders” under the FFCRA in order “to minimize the spread of the virus associated with COVID-19.”

Fair Labor Standards Act and Health Care Industries

Overtime Exemptions—Generally

Employers should remember that the Fair Labor Standards Act (FLSA) provides exemptions from both the minimum wage and overtime provisions for certain categories of employees. Unless exempt, employees covered by the FLSA must receive overtime pay for hours worked over 40 in a workweek at a rate not less than one-and-one-half time their regular rates of pay.

Non-Exempt Employees—FFCRA

Under the FFCRA, certain health care providers and emergency responders would be classified as non-exempt from the overtime provisions under the FLSA. While not exhaustive, the following are a few examples of employees who would be entitled to overtime:

• Police officers, fire fighters and other first responders, according to the DOL’s Fact Sheet #17J: First Responders and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA).
• Licensed practical nurses and other similar health care employees and registered nurses paid by the hour (who are not registered by the appropriate state examining board), according to the DOL’s Fact #17N: Nurses and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA).

Exempt Employees—FFCRA

While not exhaustive, the following are a few examples of employees who would not be entitled to overtime compensation:

• Health care providers as defined under the FMLA.
• Other health care providers who meet the professional exemption under the FLSA, according to the DOL’s Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA).

Other Exemption Issues

The FFCRA excludes employees employed by the following entities:

• Home Health Care Providers. The DOL has provided guidance for employers regarding the applicable minimum wage and overtime exemptions for certain employees in its Fact Sheet #25: Home Health Care and the Companionship Services Exemption in the Fair Labor Standards Act (FLSA).
• Residential Care Facilities. The DOL has provided guidance for employers regarding the applicable minimum wage and overtime exemptions for certain employees in its Fact Sheet #33: Residential Care Facilities (Group Homes) Under the Fair Labor Standards Act.
• Nursing Facilities, Retirement Facilities, and Nursing Homes. The DOL has provided guidance for employers regarding the applicable minimum wage and overtime exemptions for certain employees in its Fact Sheet #31: Nursing Care Facilities Under the Fair Labor Standards Act.

Health Care Industry and Calculating Overtime Pay

The DOL states that hospitals and other institutions “primarily engaged in the care of the sick, the aged, or the mentally ill” are covered employers under Section 3(s)(1)(B) of the FLSA. Thus, hospitals, residential care establishments, skilled nursing facilities, nursing facilities, assisted living facilities, residential care facilities and intermediate care facilities for mental retardation and developmentally disabled must comply with the minimum wage, overtime and youth employment requirements of the FLSA,” according to the DOL’s Fact Sheet #53 – The Health Care Industry and Calculating Overtime Pay. This fact sheet “provides guidance regarding common FLSA violations found by the Wage and Hour Division during investigations in the health care industry relating to the failure to pay employees for all hours worked.”