



MEMORANDUM

From: Loveless Law Firm, LLP
Date: April 13, 2020
Re: Small Business Carveout for new COVID-19 Emergency Leave Rules

The U.S. Department of Labor released a rule recently to help employers and workers navigate the recent paid sick leave expansion, saying the law makes up to 61 million workers eligible for time off and detailing which small businesses are eligible for an exemption.

The rule lays out three circumstances that would exempt businesses with fewer than 50 workers from the law's long-term leave requirement, all centering on whether absences would disrupt companies' operations. It otherwise expands on a growing trove of guidance the agency has issued on the Families First Coronavirus Response Act in the weeks since its March 18 signing. The rule is effective Wednesday and expires on Dec. 31, as does the FFCRA.

It makes employers with 500 or fewer employees provide workers up to two weeks off at full pay — subject to certain caps — if they are directly affected by the virus, and at partial pay to care for affected family members. It also provides workers up to 10 weeks off at partial pay to care for children whose schools or childcare centers have closed due to the virus, after two unpaid weeks.

The long-term leave portion of the law includes a provision exempting businesses with fewer than 50 workers for whom granting leave would “jeopardize the viability of the business as a going concern.”

The new regulation lays out three circumstances that qualify an employer for this exemption. Under the rule, these small employers will not have to provide leave:

- (1) if doing so would raise expenses above revenue such that the employer would “cease operating at a minimal capacity”;
- (2) the absence would “pose a substantial risk” to the employer’s financial health or operations because of the requesting worker’s skills, knowledge or duties; or
- (3) the employer cannot find enough workers to perform the work of the employee requesting an absence, the agency said in Wednesday’s rule.

Such employers are not exempt from the two-week sick time requirement unless the worker is requesting time off to care for a child whose school has closed, however.

The law lays out six “qualifying reasons” that let workers use the two-week benefit, including if they can't work because of a quarantine or isolation order or have COVID-19 symptoms and are seeking a diagnosis. Wednesday’s guidance clarifies these circumstances.

For example, workers can take time off if they are isolated because of “a broad range of governmental orders,” including stay-at-home orders or mandates that “otherwise restrict” their mobility. **But they will only qualify if the order is what prevents them from working, the DOL said: A worker cannot take leave if they can telework or if they would not have work even without the isolation order, such as if they work for a coffee shop that has shuttered because of low business.**

Among other things, the rule also explains that workers can use leave intermittently by agreement with employers and that employers can make workers take accrued vacation days or other paid time off at the same time they take leave to care for a child.

Disclaimer: This policy template is meant to provide general guidelines and should be used as a reference.

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