

Coronavirus: Legal and Practical HR Guidance for Employers – Live Q&A Webinar



Bernstein Shur's Coronavirus Labor & Employment Legal Response Specialists



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Peter is a Shareholder and Co-Chair of Bernstein Shur's Labor and Employment Practice Group. Peter has extensive experience advising businesses in all aspects of employment law, including employee leaves of absence, ADA and FMLA, reasonable accommodations, wage and hour, as well as issues related to allegations of harassment and discrimination. He has successfully defended a variety of businesses at arbitration and in state and federal courts against claims involving restrictive covenants, discrimination and retaliation, and alleged violations of wage and hour laws.



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Ann is a Shareholder in the labor and employment practice group who regularly advises both private and public sector clients on a variety of labor and employment matters including the ADA, FMLA, drug testing and marijuana in the workplace, disciplinary matters, and labor relations and negotiations. She regularly appears on behalf of her clients before the Maine Human Rights Commission, the Maine Labor Relations Board and state and federal courts. She is particularly adept at understanding her client's business needs while assuring compliance with the law.

DOL Issues Guidance on FFCRA: Definitions

An Employer may *exempt* otherwise Eligible Employees who are “health care providers” or “emergency responders”

What’s the definition of “health care providers”? What about “emergency responders”?



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Definition of “health care provider”:

“...a health care provider is **anyone employed 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, 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.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides 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. This also includes any individual 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.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.



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Definition of “emergency responder”:

“.... an emergency responder is an employee who is 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, and persons 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.



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Small Business Exemption Criteria

- Includes non-profit or religious organizations with fewer than 50 employees
- Small Businesses may be 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.



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Small Business Exemption Criteria

Criteria for determining whether paying for leave pursuant to these laws would jeopardize the viability of the small business as a going concern:

- 1) 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;
- 2) 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
- 3) 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.



Supplemental Leave

- For employees who are only entitled to 2/3 their pay under either the Emergency Paid Sick Leave or the Emergency FMLA, employers may permit the employee to supplement their federally mandated paid leave in order to make them “whole”
- May utilize existing accruals (PTO/Sick/Vacation/Personal)
- You will not receive the reimbursement for the supplemental amount, so make sure your coding/accounting for the pay accordingly
- Review your existing policies regarding use of PTO/Vacation/Sick; may need to amend for these purposes
- Do not have to permit employees to supplement



Intermittent Leave

- Is permitted if employer and employee agree
- Intermittent telework applies to both Emergency FMLA and Emergency Paid Sick Leave
- Intermittent work at **worksites** is only permitted due to school or childcare closure due to COVID-19
- If you permit intermittent leave, be sure to apply any policies equitably
- **“The Department encourages employers and employees to collaborate to achieve maximum flexibility.”**



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Paycheck Protection Program (PPP)

- Administered by the SBA
- Employers with fewer than 500 employees (must meet SBA’s “size standards”)
- Loan amounts are only available up to a maximum of 2.5 average monthly *payroll* costs. The money can be *used* for other purposes as described in the law (e.g., mortgage or rent costs, utilities, etc.)
- Self-certification process: employers need to certify that the loan is needed to continue operations.
- Loan forgiveness based on employer maintaining or quickly rehiring employees and maintaining salary levels (loan forgiveness *may* include non payroll expenses, but still unclear—stay tuned)
- Forgiveness reduced proportionally with reduction in full time headcount or decrease in wages or salaries
- Talk to your attorney and accountant!



Employee Retention Tax Credit

- Eligible employers include employers whose operations were fully or partially suspended due to a COVID-19 government-mandated shut-down order, or employers whose gross receipts declined by greater than 50 percent when compared to the corresponding calendar quarter of the prior year.
- Credit for 50% of employees' wages (up to \$10,000 per employee) for EITHER: (1) an interruption due to a federal, state, or local order requiring partial or total closure, OR (2) 50% reduction in gross receipts from the same quarter in the previous year (continuing until you reach 80% of gross receipts, i.e., you're mostly back up and running).
- May be a good option if forgiveness provisions of PPP loan will be reduced because of staffing or wage cuts
- Not eligible for this if you take an SBA PPP loan
- Talk to your attorney and accountant!



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