

Critical Update for Employers: U.S. Department of Labor Significantly Narrows the Definition of “Health Care Provider” for Purposes of Exempting Employees from Paid Leave Under the Families First Coronavirus Response Act

Connecticut Health Law

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On September 11, 2020, the U.S. Department of Labor (DOL) announced revised regulations significantly narrowing the definition of “health care provider” under the Families First Coronavirus Response Act (FFCRA). The revision came in response to an August 3, 2020 decision of the U.S. District Court for the Southern District of New York, which held that the DOL’s original regulation defining “health care provider” was so expansive that it was inconsistent with the statute.

The FFCRA uses the term “health care provider” in two contexts. The first defines who qualifies as a medical professional for purposes of advising an individual to self-isolate for reasons related to COVID-19 such that he or she may take paid sick leave to follow that advice. In the second, the law permits employers to exclude employees who are “health care providers” or “emergency responders” from the FFCRA’s entitlements to paid leave. The DOL’s newly-revised definition targets the latter context.

Prior to the change, the former definition provided employers with wide discretion in excluding their “health care provider” employees from FFCRA coverage:

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.

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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.

The new definition is much narrower and significantly reduces an employer’s authority to exclude employees from paid sick leave or expanded family and medical leave under the FFCRA. Under the revised regulations, employers are now permitted to exclude only two groups of employees:

This first group is anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

The second group is any other person who is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. This group includes employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services. Finally, employees who do not provide direct health care services to a patient but are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

A person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital of a similar health care facility.

(Emphasis added.) Although the DOL “encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA,” there is still some flexibility. For example, an employer may decide to exempt such employees from leave for caring for a family member or because a child’s school or place of care is closed, but may choose to allow paid sick leave in the case of the employee’s own COVID-19 illness or treatment.

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Employers who have previously excluded employees from paid leave under the FFCRA pursuant to the health care provider exception should immediately review their policies in light of these changes. Some employees who were properly excluded under the prior definition may not qualify under the new definition, and an employer who incorrectly invokes this exclusion may be charged with improper denial or interference with an employee’s rights to leave. It is also crucial to diligently document all decisions made in this respect, including changes in policies or procedures, so that in the event of a controversy your organization can demonstrate that it was “judicious” in its approach.

Failing to comply with the FFCRA and the host of other complicated COVID-19 rules and regulations can result in significant liability for employers. Implementing comprehensive policies to address these issues and effectively communicating with employees is crucial to ensure compliance. Pullman & Comley has policy templates and other useful resources available to aid employers in navigating the confusing web of laws, regulations, and guidance.

If your organization is unsure about its obligations under the FFCRA or other COVID-19 guidance, please contact any of our Labor and Employment Law or Health Care attorneys for assistance.

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