

COVID-19 CLIENT ALERT

DOL Guidance on the FMLA+ and EPSLA Small Business Exemption

The Family and Medical Leave Expansion Act (“FMLA+”) and the Emergency Paid Sick Leave Expansion Act (“EPSLEA”), set to take effect on April 1st, authorize the Department of Labor (“DOL”) to issue regulations that exempt small businesses with fewer than 50 employees when providing leave would jeopardize the viability of the business as a going concern.

While implementing regulations are not expected until April 2020, the DOL has published guidance in the form of questions and answers on the [DOL's COVID-19 and the Workplace website](#). These questions include guidance on the small business exemption.

First, the exemption is only available if the leave is requested because the employee is caring for their minor child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. If the leave is requested due to school or place of care closures or child care provider unavailability for COVID-19 related reasons, a small business may claim the exemption if an authorized officer of the business has determined that:

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.

If an authorized officer of the business determines that one or more the above criteria are met, the basis for the determination should be documented.

Note that based on this guidance, the small business exemption does not apply to employees’ requests for other forms of leave under the EPSLEA. This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of EPSLEA is to provide such paid sick leave as necessary to keep employees from spreading the virus to others.

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