

# Lum, Drasco & Positan LLC

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### **U.S. DEPARTMENT OF LABOR DEFINES THE CRITERIA FOR THE SMALL BUSINESS EMPLOYER EXEMPTION FROM THE FIRST FAMILIES CORONAVIRUS RESPONSE ACT**

Information regarding the *Families First Coronavirus Response Act (FFCRA)* was detailed in two prior e-alerts on March 20, 2020 ([CLICK HERE](#)) and March 27, 2020 ([CLICK HERE](#)). The U.S. Department of Labor (U.S. DOL) had previously stated that a small business employer with less than 50 employees could be exempt from the FFCRA if compliance would “jeopardize the economic viability of the business.” We noted that still pending for determination by the U.S. DOL was the applicable criteria for a small business employer to claim exemption from the FFCRA’s Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, and its respective paid sick leave and expanded time off requirements for specific COVID-19 related reasons.

In its most recent additional guidance on the FFCRA issued on March 28, 2020, the U.S. DOL provided the awaited answer on the frequently asked question about the criteria for the small business employer exemption from the FFCRA. Set forth at Questions #s 58 and 59 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, the U.S. DOL has provided the following guidance regarding the small business employer exemption:

- **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and 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. A small business may claim this 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 I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?**

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Based on the U.S. DOL's criteria on the small business employer exemption from the FFCRA's requirements, a small business employer with less than 50 employees must make the necessary business decision prior to the effective date of the FFCRA, April 1, 2020, to determine if it will either claim the small business employer exemption from the FFCRA, or instead, comply with the FFCRA and provide emergency paid sick leave for specific COVID-19 related reasons, and provide emergency FMLA time off for an employee to care for a child due to COVID-19 related school/childcare closure, and then seek reimbursement for the monies paid to the employees in the form of a payroll tax credit.

The U.S. DOL's further expanded guidance of March 28, 2020, contains additional answers to frequently asked questions about the FFCRA, and employers are encouraged to review those questions and answers in detail at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

We remain available to address any questions relating to the small business employer exemption or otherwise related to the FFCRA's requirements, which will be in effect from April 1, 2020 through December 31, 2020.

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Tel: (973) 403-9000 | Fax: (973) 403-9021

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