

**ALERT¹: DEPARTMENT OF LABOR PROVIDES RELIEF TO EMPLOYERS OF
HEALTH CARE PROVIDERS
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

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The Families First Coronavirus Response Act (FFCRA or Act), which goes into effect April 1, 2020, requires certain employers to provide employees with paid sick leave and expanded family and medical leave (FMLA) for specified reasons related to COVID-19. The Department of Labor (DOL) has clarified that health care provider employees of covered employers *may be exempt* from receiving the expanded benefits under FFCRA.³

Many in the post-acute industry, including nursing homes, personal care homes, assisted living residences, home health and hospice providers, were understandably confused about how FFCRA applied to them and their employees. While it was relatively easy to determine whether their company fell within the purview of the Act (for example, less than 500 employees), it was not clear which, if any, of their employees could be exempted from the expanded benefits because they were classified as health care providers. The DOL guidance, issued in a series of FAQs released March 28, 2020, provides:

Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of *employees who may be exempted* from paid sick leave or expanded family and medical leave by their employer under the FFCRA, 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.*

¹ This Alert does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this article without first seeking the advice of counsel.

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³ This Alert examines a very narrow provision of FFCRA and is not meant to be a full analysis of all of FFCRA’s requirements.

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.*

DOL, Families First Coronavirus Response Act: Questions and Answers, FAQ 56, (emphasis added).⁴

What does this mean for post-acute providers?

Providers should carefully consider the following:

- Determine if your company is covered under the FFCRA.
- If your company is a covered employer, you must provide Notice to all your employees, regardless of whether the employees will be determined to be exempt.⁵
- Determine whether you will use the expanded definition of “health care provider” to exempt certain classifications of employees from the provisions of the FFCRA.
- If you decide to exempt employees, you may not be entitled to claim the tax credit benefits otherwise available to employers who are subject to the FFCRA.
- If you choose to exempt certain employees, you should be prepared with some sort of notice explaining the new guidance from DOL and why the employee(s) fall within the exemption.
- Review your employee handbook and any existing collective bargaining agreements and memoranda of understanding.

⁴ The FAQs are available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

⁵ The DOL Notice is available at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- Remember that existing paid leave policies and FMLA considerations still apply, as do requirements under the Americans with Disabilities Act (ADA) and the Occupational Safety and Health Administration (OSHA).
- Watch for DOL regulations, which should be forthcoming any day.
- Consult with counsel.