

FFCRA Health Care Provider Paid Sick Leave Exemption Expanded And CARES Act Increases Unemployment Compensation Coverage

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Introduction

This week, President Trump signed two Legislative Acts that impact senior living providers' ability to remain fully staffed to care for their residents during this difficult time – the Families First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security's (CARES). On March 28, the Department of Labor (DOL) issued new guidance regarding the FFCRA stating that residential facility employees are within FFCRA's "health care provider" exemption. This now means senior providers may choose not to offer FFCRA's paid leave of absence and paid sick leave to its employees – employees who they need to provide continuing care.

Separately, the CARES's Act, signed March 27, greatly expanded unemployment insurance benefit amounts and eligibility to Corona virus affected employees. Indeed, the CARES Act increased unemployment benefits *could* result in some employees *earning more* than they would earn by continuing to work, thus, potentially incentivizing some employees to cease working.

FFCRA Health Care Provider Exemption

Effective April 1, 2020, the FFCRA requires employers with more than 50 but fewer than 500 employees to provide emergency paid sick leave and expanded Family Medical Leave Act ("FMLA") leave to employees. The DOL recently clarified that senior living provider employees may be exempted from these provisions.

However, the FFCRA exempts "health care providers" from the Family Medical Leave Act expansion and emergency paid sick leave provision. The FFCRA adopts as its definition of "health care provider" the definition set forth in the FMLA. Section 101(6) of the FMLA, 29 U.S.C. § 2611(6) defines "health care provider" as:

- (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
- (B) any other person determined by the Secretary to be capable of providing health care services.

The DOL just issued FAQ Guidance regarding the definition of "health care provider" for the purposes of employees who an employer may exempt from FFCRA paid sick leave or expanded family and medical leave. A health care provider now includes **anyone** employed at a nursing facility, retirement facility, nursing home, or any similar institution, employer, or entity (among others).

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.

The DOL encourages employers to be "judicious" when using this definition to exempt health care providers from the provisions of the FFCRA.

This is good news for senior living providers with "fewer than 500 employees" whose employees would not otherwise be encompassed by the definition of "health care provider" set forth in the FMLA and thus who would be covered under the FFCRA's new benefit provisions.

CARES Act Unemployment Insurance Benefits

Under the recently signed CARES Act, unemployed workers may be entitled to receive state unemployment insurance benefits as well as additional "Federal Pandemic Unemployment Compensation." This could incentivize employees of senior living providers to cease working.

Under the CARES Act, unemployment insurance expansion would give jobless workers an extra \$600 per week for four months on top of state benefits. State agencies will make payments of regular compensation to individuals in amounts and to the extent determined by state law plus an additional \$600 in "Federal Pandemic Unemployment Compensation."

Individuals will receive 13 weeks of extended benefits covered by the federal government (beyond unemployment checks provided by the state). To receive additional federal unemployment, the individual must not be eligible for regular compensation or extended benefits under State or Federal Law; must be able and available to work except the individual is unemployed or unable or unavailable to work because:

1. The individual has been diagnosed with COVID-19 or is experiencing symptoms and is seeking medical diagnosis
2. An individual in their household has been diagnosed with COVID-19
3. The individual is providing care for a family member in their household diagnosed with COVID-19;
4. A child or other person in the household for which the individual is a primary caregiver is unable to attend school or another facility that is closed as a direct result of the pandemic;
5. The individual is unable to reach the place of employment because of quarantine imposed as a direct result of COVID-10;

6. The individual is unable to reach the place of employment on advice of a healthcare provider to self-quarantine due to concerns related to COVID-19;
7. The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a result of the public health emergency
8. The individual has become the "breadwinner" or major support for a household because the head of the household has died as a direct result of COVID-19;
9. The individual has to quit their job as a direct result of COVID-19;
10. The individual's place of employment is closed as a result of COVID-19;
11. The individual meets any additional criteria established by the secretary for unemployment assistance; or
12. Is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular employment or extended benefits under State or Federal law or pandemic emergency unemployment compensation.

Unemployment assistance under the Act does NOT include 1) an individual who has the ability to telework with pay; or 2) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets one of the above-described qualifications.

Assistance is authorized for unemployment or inability to work caused by COVID-10 between January 27, 2020 and December 31, 2020.

The total number of weeks for which a covered individual may receive assistance shall not exceed 39 weeks and such total shall include any week for which he/she received regular compensation or extended benefits under any Federal or State law.

Unemployment assistance from the Federal pandemic unemployment compensation paid to an individual is not subject to Social Security and Medicare taxes.

States are required waive the 1 week waiting period for individuals of that state to receive unemployment compensation.

The amount of pandemic emergency unemployment compensation which shall be payable to any individual for any week of total unemployment shall be equal to 1) the amount of the regular compensation payable to the individual during such individual's benefit year under the state law for a week of unemployment; plus 2) the \$600 amount of Federal Pandemic Unemployment Compensation.

This could give unemployed workers more than the paychecks they were receiving while they were employed. However, this is a state-specific inquiry and will depend on how each state's unemployment insurance program is established. The Secretary of Labor is authorized to issue guidance in the upcoming weeks, so stay tuned for how this plays out.

Both these new laws require a studied review in conjunction with employer policies and any local or state laws that may address these same issues.