

WHAT SMALL BUSINESSES NEED TO KNOW ABOUT THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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If your business has fewer than 50 employees, you may qualify for the small business exemption to a portion of the Families First Coronavirus Response Act (FFCRA). Specifically, small businesses with fewer than 50 employees may be exempt from the requirement to provide leave due to school closings or childcare unavailability if those FFCRA leave requirements would jeopardize the viability of the business as a going concern. In other words, the small business exemption only excuses the employer from providing paid leave for reason no. 5 on the official FFCRA Notice, which all FFCRA-covered employers are required to post regardless of whether they ultimately qualify for the FFCRA's small business exemption.

Qualifying under the fewer-than-50-employees exemption means that employers are exempt from two aspects of the FFCRA's provisions for leave reason no. 5 — (1) paid sick leave due to school closure, place of care closure or child care provider unavailability for COVID-19 related reasons; and (2) emergency paid leave under the Family and Medical Leave Act (FMLA) also related to school closure, place of care closure or child care provider unavailability for COVID-19 related reasons — when doing so would jeopardize the viability of the business. Small businesses of fewer-than-50 employees are still obligated to provide paid sick leave under the FFCRA to employees who need leave due to the other five reasons enumerated in the FFCRA Notice (*i.e.*, reasons 1-4 and 6).

Whether you can avoid compliance with leave reason no. 5 via the fewer-than-50-employees exemption is uncertain as the standards that will be applied for allowing that exemption remain to be seen. The language of the FFCRA itself regarding the small business exemption only states in vague terms that businesses with fewer than 50 employees may be exempt “when the imposition of such requirements would jeopardize the viability of the business as a going concern” and authorizes the Secretary of Labor to promulgate further regulations on this topic, which has not yet been done.

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Currently, the best guidance available for interpreting the standard for the fewer-than-50-employees exemption is from the Department of Labor (DOL). In its frequently updated guidance, the DOL says an “authorized officer” of the business must determine whether the business meets these criteria. “Authorized officer” is not defined in the guidance. Per the DOL guidance, an employer with fewer than 50 employees may claim an exemption if the authorized officer determines at least one of the following applies:

- (a) providing the leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity;
- (b) the absence of the employee(s) requesting such 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
- (c) 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(s) requesting the leave, and these labor or services are needed for the small business to operate at a minimal capacity.

See DOL Q&A Nos. 4 and 58-59. The DOL frequently updates Q&A guidance, so keep checking back.

To elect the small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the DOL, which the DOL states “will be addressed in more detail in forthcoming regulations.” The DOL did specify, however, that employers should not send it any materials “when seeking a small business exemption for paid sick leave and expanded family and medical leave” and that any documentation prepared in support of the small business exemption should be maintained by the employer for at least four years. Unfortunately, the precise documentation needed in support of the exemption is not yet specified. With so many unknowns while we await further regulations, it remains to be seen whether your business will actually qualify for the fewer-than-50 exemption.

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