

TIP SHEET: HEALTH CARE PROVIDER EXCLUSION TO FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

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National Community Pharmacists Association is committed to providing its association of pharmacies with useful and updated information regarding new legislation that impacts the pharmacies. We have teamed with the attorneys at Brown & Fortunato to provide you with this timely update regarding the newly released Families First Coronavirus Response Act (“FFCRA”), which is the larger legislative umbrella for the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”). Both acts seemingly exclude “health care providers,” including pharmacy employees, from the terms of the EPSLA and EFMLEA. However, this exclusion is *not* an all-encompassing exemption of the pharmacy as a whole. Instead, it is a method of excluding particular employees in certain situations.

Language of Exclusion:

The FFCRA permits “an employer of an employee who is a health care provider or emergency responder” to “exclude **such employee**” from the EPSLA’s paid sick leave requirements and/or the EFMLEA’s expanded family and medical leave act requirements.

The Department of Labor has defined “health care provider” in its temporary regulations to include:

“[A]nyone 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.”

Department of Labor Guidance:

The Department of Labor has also issued a Question & Answer (“Q&A”) to provide compliance assistance to employers on their responsibilities under the FFCRA. Though this Q&A is not law, it represents guidance for employers and reflects how the Department of Labor is likely to enforce the FFCRA.

- **Requirement of Case-by-Case Analysis:** The Department of Labor, in its Q&A, states: “[I]f you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a **case-by-case basis**.”
- **Admonishment:** “To minimize the spread of the virus associated with COVID-19, the Department [of Labor] encourages employers to be **judicious** when using this definition [of health care provider] to exempt health care providers from the provisions of FFCRA.”

Representatives of the Department of Labor have informally advised Brown & Fortunato attorneys of the following. Though this advice cannot be relied on as law or a formal position of the Department of Labor, it is further evidence of the Department of Labor's likely enforcement of this exclusion.

- The Department of Labor representative advised Brown & Fortunato that the health care provider exclusion should be applied on an **individual employee basis**. This representative explained that, while the exclusion is **liberal in its definition**, it is not meant to be **broadly** applied across an organization.

Flexible Approach to Crafting FFCRA Leave Policy:

1. **Approach Leave on a Case-by-Case Basis:** Employers should analyze whether to grant leave to each employee that requests leave pursuant to the EPSLA or EFMLEA on a case-by-case basis. Employers should **not** classify their entire business as a "health care provider" and attempt to exclude all employees from the leave provisions under the EPSLA or EFMLEA.
2. **Classify Workforce as Essential and Non-Essential:** Employers should break down their workforce prior to any requested leave by any employee, if possible, into essential and non-essential personnel. For example, the classifications could include pharmacists-in-charge, pharmacists, pharmacy technicians, office staff, and retail employees. Then, employers should determine how many persons in each "essential" category are needed to keep the pharmacy operational.
3. **Advise Essential Employees of Their Status Prior to a Leave Request:** Brown & Fortunato recommends that employers advise their essential employees of their status as essential employees prior to any employee's request for leave is made.
4. **Allow Leave for Reasons 2 and 3 of the EPSLA:** Despite the above analysis, if an employee has been advised by medical personnel to self-quarantine due to COVID-19 concerns, or if an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, employers **must** allow this employee leave in order to quarantine or seek treatment. Otherwise, the employer could be violating OSHA regulations by failing to furnish a place of employment free from recognized hazards that are causing or likely to cause death or physical harm to employees. Further, the employer could be subject to a negligence claim by other employees if the employee were to appear for work and pass COVID-19 to one of his or her coworkers.
5. **Be Flexible:** Employers should not treat the health care provider exclusion as a way to require all of its workforce to appear for work regardless of the circumstances. Craft a leave policy that is flexible and takes into account the real-world ramifications of the COVID-19 pandemic. Consider remote work opportunities or other flexible scheduling arrangements to deal with the FFCRA leave requirements on a case-by-case basis.

6. **Existing Policies:** Remember, even for those employees that employers classify, on a case-by-case basis, as health care providers, the classification only exempts the employees from the provisions of the FFCRA. Employers must still allow employees leave—whether vacation leave, sick leave, or PTO—in accordance with existing policies.

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