GBS Compliance

Families First Coronavirus Response Act (FFCRA) Small Business Exemption

March 31, 2020

The evolution of the COVID-19 epidemic is constantly evolving. The information in this document is based on what known at this time. As things change, we will continue to update you as it affects employee benefits compliance rules.

The Families First Coronavirus Response Act (FFCRA) provides employers under 500 (as well as public employers of any size) Emergency Family and Medical Leave (E-FMLA) and Emergency Sick Leave to employees under certain conditions. The leave is effective April 1, 2020. To help employers cover the cost of the required leave, the FFCRA provides a series of refundable tax credits.

Calculating Employer Size

An employer determines its size by calculating, at the time an employee's leave is to be taken, the number of full-time and part-time employees. This count should include employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary agency (regardless of whether the employer is the agency or client firm if there is a continuing relationship).

- A corporation, including its separate establishments or divisions, is considered a single employer. If a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/fact-sheet under the FLSA with respect to certain employees. If they are joint employers, all common employees must be counted to determine size.
- Under the FMLA, two or more entities are separate employers unless they meet the integrated employer test https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch39.pdf If so, employees of all entities making up the integrated employer will be counted to determine size.

Small Employer Exemption

An employer with under 50 employees is generally required to provide this leave, but *may* be exempt from providing E-FMLA and/or Emergency Sick Leave for a *specific* employee if: 1) ***that employee is caring for a child due to school closings or childcare unavailability,*** and 2) the provision would "jeopardize the viability of the business as a going concern." More clarification on what constitutes "jeopardizing the viability of the business" is expected in the Department of Labor (DOL) regulations, but in the meantime, the DOL added two responses on this topic under its FAQs found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions and outlined here:

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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 (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) 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:

- 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;
- 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
- 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 (above question) is satisfied.
- The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

The information is provided as educational material only and is not intended as legal, financial or tax advice. Consult your legal counsel for complete details on your compliance requirements for your plan(s).

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