

MEMORANDUM

TO: Chuck Ingoglia, President & CEO
National Council for Behavioral Health

FROM: Adam Falcone, Partner
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DATE: April 3, 2020

RE: Families First Coronavirus Response Act Interpretation

This memorandum responds to your request for guidance regarding the definition of an excepted “health care provider” under the Families First Coronavirus Response Act (“FFCRA” or “the Act”).

The FFCRA, which went into effect on April 1, 2020, directs public employers of any size and private employers with fewer than 500 employees to provide employees with paid sick leave and/or expanded family and medical leave for specified reasons related to COVID-19.¹ However, Sections 3102 and 3105 of the FFCRA provide an exception for employers of health care providers, stating that “[a]n employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made [in] this Act.”²

Section 5110 the Act defines “health care provider” to have the same meaning as under the Family and Medical Leave Act (“FMLA”).³ Section 5111 of the Act also provides that the Secretary of Labor may promulgate regulations to expand this definition.⁴

The United States Department of Labor (“DOL”) FMLA regulations define “health care provider” to mean a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or “any other person determined by the Secretary of Labor to be capable of providing health care services.”⁵ Further, these regulations define “any other person” to include podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physicians assistants, and Christian science

¹ H.R. 6201, Division E, §§ 5102, 5110(5).

² *Id.* Division C, §§ 3102, 3105.

³ *Id.* Division E, § 5110.

⁴ *Id.* § 5111.

⁵ 29 C.F.R. § 825.125.

practitioners who are authorized to practice in the State and who are performing within the scope of their practice as defined under State law.⁶

The DOL released an FAQ on March 28, 2020, clarifying and expanding the definition of “health care provider” for the purposes of an FFCRA exception.⁷ This definition states:

“[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.

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.”

On April 1, 2020, the DOL issued regulations pursuant to the FFCRA, confirming the definition for an excepted health care provider provided in the March 28, 2020 DOL FAQ.⁸ This definition suggests that any employee of the listed organizations would meet the exception. However, the DOL provides additional guidance on page 35 of the discussion section of the regulation that indicates that the definition may be more restrictive. This guidance states:

“The term “health care provider” as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable

⁶ *Id.*

⁷ Families First Coronavirus Response Act: Questions and Answers, U.S. DEPARTMENT OF LABOR Wage and Hour Division, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> (last visited Mar 31, 2020).

⁸ Paid Leave under the Families First Coronavirus Response Act, 29 CFR Part 826 (April 1, 2020).

of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency. Accordingly, the Department is adopting a definition of “health care provider” that is broader than the diagnosing medical professionals under § 825.102 for the limited purpose of identifying employees whom an employer may exclude under sections 3105 and 5102(a) of the FFCRA. The definition of health care provider under § 825.102 continues to apply for other purposes of the FFCRA, such as, for instance, identifying health care providers who may advise an employee to self-quarantine for COVID-19 related reasons under section 5102(a)(2).⁹

On page 65 of the discussion, the DOL reiterates that the exception is not necessarily meant to include all employees of the listed organizations, noting that:

“Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, their employers may have some employees who do not meet this definition, so these employers may still be impacted by the provisions of the FFCRA.”¹⁰

We read this guidance to mean that “health care provider” for the purposes of the exemption includes (1) all health care providers as defined under the DOL FMLA regulations, (2) individuals capable of providing health care services necessary to combat the COVID-19 public health emergency, and (3) other workers needed to keep hospitals and other health care facilities supplied and operational. Further, as the DOL did not provide guidance on how employers should determine which workers are needed to keep hospitals and other health care facilities supplied and operational, employers are to make such determinations using their best judgement.

Our current interpretation is that certain employees of behavioral health organizations that meet the above definition would be excepted as health care providers under this guidance. Specifically, employees of behavioral health organizations that offer any direct patient care, health care education, or organizations that directly contract with such organizations to provide these services would be excepted as health care providers. Employees of organizations that support other community programs would not be excepted. Examples of such

⁹ *Id.*

¹⁰ *Id.*

employees may include those engaged exclusively in jail diversion and prison re-entry initiatives.

Behavioral health organizations employing health care providers who fall under the exception should be aware that not all employees will meet the definition. As such, employers must carefully document their rationales for all leave decisions, continually monitor the DOL guidance for new requirements, and consult with an attorney with any questions regarding leave provisions under the FFCRA.

The DOL will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect (i.e., through April 30th), so long as the employer has acted reasonably and in good faith to comply with the Act.¹¹ Employers should document ongoing efforts to comply with guidance prior to the issuance of regulations by the DOL, which may be needed to establish good faith.

We hope that this memorandum responds to your questions. Please contact Adam Falcone (afalcone@feldesmantucker.com), Molly Evans (mevans@feldesmantucker.com), or Noori Ali (nali@feldesmantucker.com) if you need any additional information.

¹¹ FIELD ASSISTANCE BULLETIN No. 2020-1, U.S. Department of Labor, <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1> (last visited Apr 1, 2020).