

Home Health, Personal Care and Hospice Included in Exemption for Extended Sick and FMLA Leave

The US Department of Labor issued guidance yesterday, 03/28/2020, on standards and application of the extended sick and FMLA leave under the recent Covid-19 stimulus bills. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

The guidance addresses an important issue affecting home care and hospice companies. HHAU and others sought to have an exemption applicable to a “health care provider” to apply to the workforce in home care and hospice as they are essential to the care needs of the whole population during the pandemic. The exemption would affect health care workers who otherwise would qualify for sick leave and family leave when they cannot work due to school or child care services closings and unavailability.

The National Association for Homecare & Hospice explains, “The DOL guidance provides an exemption of employees of a “home health” company. While those of us involved in home care consider that term to be limiting rather than encompassing the broad array of companies providing health services in the home, further elements of the guidance make it clear that it encompasses the full range of home care and its employees.”

Specifically, the guidance states:

“Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?”

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, 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.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”

“NAHC’s view is that the reference to “any similar institution, employer, or entity” combined with longstanding DOL classification of individuals providing personal care service in the home as health care workers results in the conclusion that home health agencies, personal care services companies, private duty nursing employers, and hospices are all within DOL’s exemption of a “home health care provider. For example, the Department of Labor has long maintained within a health care worker category 31-1011 Home Health Aides:

‘Provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient's home or in a care facility. Monitor or report changes in health status. May also provide **personal care such as bathing, dressing, and grooming of patient.**’

Further support is found in the reference to a ‘retirement facility’ distinct from a ‘nursing facility.’ At most, a retirement facility provides personal care.

Finally, note also that the exemption goes beyond direct service employees and ‘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.

NAHC has confirmed the appropriateness of this interpretation through outside counsel.”

This is another big win for our industries. However, HHAU advises that homecare and hospice providers fully review all aspects of the extended leave standards as there will be instances when they still apply to your workforce.

For further information on this issue, see <https://report.nahc.org/nahc-files-comments-to-dept-of-labor-on-if-home-workers-eligible-for-leave/>

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