

# Update on Families First

*Provided to us by Jeffrey Worley, Esq.:*

Providers of health and human services with fewer than 500 employees have asked the question: Is my organization or are my employees exempt from the paid time off and expanded FMLA under the Families First Coronavirus Response Act (the "Act")? Specifically, are my employees considered health care providers for purposes of the Act and therefore excluded? Providers are then asking: If we are not exempted from the Act how are we-as a nonprofit-going to pay for it?

The Secretary of Labor has not provided clarification as to who is a health care provider for purposes of the Act. Therefore, we must rely solely on the language of the Act. Below is the guidance that we are providing as to who is a health care provider until further guidance is given from the Secretary of Labor.

The Act incorporates by reference the definition of health care provider from the FMLA's regulations. The FMLA's regulations provide that the following are health care providers: Doctors of medicine or osteopathy; podiatrists, dentists, clinical psychologists, optometrists and chiropractors when practicing within the scope of their practice; nurse practitioners, nurse-midwives, clinical social workers and physician assistants when practicing within the scope of their practice.

Thus, for many providers of health and human services the only employees who will be excluded from coverage under the Act are doctors (including psychiatrists), clinical psychologists and clinical social workers. To be clear, nurses, nursing assistants, pharmacists, other direct care providers, are not included in the definition of health care provider and are not excluded from the coverage under the Act.

Since many employees will not be excluded as health care providers and will thus be eligible for paid leave and expanded FMLA, many providers are rightfully concerned as to how this paid time off is paid for. This question is of particular importance to non-profits. Employers are to be compensated for all eligible paid leave provided to its employees through tax credits. Put simply-employers will be able to recoup the cost of the leave paid to its employees by not depositing payroll taxes to the IRS. These payroll taxes include withheld federal income taxes, as well as both the employee and employer share of Social Security and Medicare taxes with respect to all employees. If the amount of payroll taxes is not enough to cover the cost of the paid leave, employers can file a request for an accelerated payment for the additional amount from the IRS. See the IRS link below.

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus?>

As I see it, this means that most employers will not suffer a significant financial burden by providing the paid leave. I note, as it is proposed, the tax credits will be available immediately through the non-payment of payroll taxes. Therefore, employers should be able to immediately offset the paid leave. Providers must still contend with those employees' entitlement for leave and their staffing and coverage concerns.

Providers should be communicating with their legal counsel to get specific recommendations for their specific situations.

**Jeffrey J. Worley, Esq. | Gibbel Kraybill & Hess LLP**  
**2933 Lititz Pike | P.O. Box 5349 | Lancaster, PA 17606**  
**P: 717.291.1700 | F: 717.291.5547 | Email: [jworley@gkh.com](mailto:jworley@gkh.com)**