

DATE **APRIL 20, 2020**

TO: **MICHEON BALMER, DIRECTOR, POOL MANAGEMENT**

FROM: **RICARDO J. NAVARRO, SPECIAL LEGAL COUNSEL**

RE: **LEGAL OPINION REGARDING APPLICABILITY OF FFCRA TO
PUBLIC EMPLOYERS WITH FEWER THAN 50 EMPLOYEES AND
APPLICABILITY OF EXEMPTION CRITERIA**

Dear Ms. Balmer:

You had asked for a legal opinion regarding whether districts organized under Texas law that have fewer than 50 employees were covered by the provisions of the FFCRA (Families First Coronavirus Relief Act).

The short answer to the question is that 1) yes, public entities such as districts fall within the coverage of FFCRA as currently written; however 2) there are certain exemption provisions that allow certain smaller districts to be exempted if they meet certain criteria set out in Department of Labor (DOL) regulations promulgated under FFCRA.

This legal opinion addresses this question by a review of the FFCRA itself, as well as the applicable Department of Labor (DOL) regulations recently adopted, codified at 29 CFR Part 826. There is a lot of secondary commentary about the FFCRA and the Regs, some of it boiled down into the form of FAQs on the DOL website itself, but this legal opinion relies on the primary sources.

Discussion & Explanation

The FFCRA has lots of pieces to it, but the portions of interest here are the provisions that modify the Family Medical Leave Act (FMLA), known as the Emergency FMLA, or EFMLA, as well as the portion entitled the Emergency Paid Sick Leave Act (EPSLA). The entire Act is called the FFCRA. It is important to note that this is a temporary measure, effective April 1, 2020, but set to expire on December 31, 2020.

The EFMLA provisions of the FFCRA redefines the Employer threshold to be “fewer than 500 employees” which would now cover districts with fewer than 50 employees, However, the EFMLA gives the DOL authority to issue regulations to exempt small businesses with fewer than 50 employees when imposition of EFMLA requirements would jeopardize the viability of the business as a going concern. See FFCRA, Sec. 3102.

In addition, under FFCRA, Section 5110, which relates to the Emergency Paid Sick Leave Act (EPSLA) provisions of the FFCRA, an employer is further defined as a public agency or other entity that is not a private entity or individual that employs *one or more* employees. Therefore, the general rule is that districts with one or more employees are covered by the FFCRA.

The FFCRA and the DOL Regulations also provide for exclusions from coverage under certain hardship conditions. One exclusion has to do with employers with less than 50 employees. Under DOL Regulations codified at 29 CFR §826.40 – Employer Coverage, the following language appears:

(b) Exemption from requirement to provide leave under the EPSLA Section 5102(a)(5) and the EFMLEA for Employers with fewer than 50 Employees.

(1) An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if **an authorized officer of the business has determined** that:

- (i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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;
- (ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; **or**
- (iii) 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 leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

29 CFR §826.40 (b) (emphasis added).

The leave request obligations are those summarized in the DOL mandated posting notices, a copy of which is attached to this legal opinion memorandum. It is the fiscal and operational burdens generated by the temporary measures under the FFCRA that must be considered in applying the foregoing criteria.

Attached to this Legal Memorandum is an FFCRA Employee Notice of Rights summarizing the benefits to be offered if the FFCRA applies. See Exhibit “A”.

Caveats

There remains enough ambiguity in the language of the Regulations to question whether public employers are entitled to the exemption. In our considered opinion, they are. The hardship conditions of a small public entity would be no different than those of any other small business or non-profit entity. And unlike small private businesses, the tax credit provisions of the FFCRA do not apply, so there is no mitigation of hardship. See FFCRA, Section 7001(e)(4)(excluding local government).

Therefore, it is our considered judgment that the exemption provisions apply to smaller units of local government so long as there is a finding that the regulatory criteria pertaining to fiscal and operational hardship is determined by the employer to be satisfied.

Implementation

As shown above, the FFCRA has no specific direction other than to give the Secretary of Labor authority to adopt criteria under which imposition of the FFCRA requirements would “jeopardize the viability of the business as a going concern. See FFCRA, Section 3102.

The DOL Regs in turn, provide that “[a] small business under this section is entitled to this exemption if an authorized officer of the business has determined that the exemption criteria is satisfied.

Based on this language, it is our legal opinion that the appropriate protocol for evaluating the exemption criteria, and for documenting it, turn initially on a finding by the executive or administrative management of the public entity which should be memorialized in a memorandum to the governing board, along with backup documentation.

The memorandum and finding should then be presented to the governing board for action under a duly and properly posted agenda item. If the findings are ratified by the governing board, the executive memorandum and the minutes pertaining thereto should be filed with the secretary or clerk of the governing board. This should be legally sufficient to demonstrate entitlement to the exemption.

-END-

[DISTRICT LETTERHEAD]

DATED: _____, 2020
TO: BOARD OF DIRECTORS
FROM: _____, GENERAL MANAGER
RE DETERMINATION OF EXEMPTION UNDER THE FFCRA AND REQUEST FOR BOARD CONFIRMATION

To the Governing Board:

Please be advised that we recently reached out to the Texas Water Conservation Association Risk Management Fund (TWCARMF) to get legal advice about whether the District is covered under the new law known as the Families First Coronavirus Response Act (the FFCRA).

In our opinion, the FFCRA does apply to local government entities with one employee or more, but entities with less than 50 employees who meet certain hardship criteria can be exempted under certain criteria set out in the Department of Labor Regulations (DOL Regs). See 29 CFR §826.40 (b). That criteria provides as follows – emphasis added:

(b) Exemption from requirement to provide leave under the EPSLA Section 5102(a)(5) and the EFMLEA for Employers with fewer than 50 Employees.

(1) An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if **an authorized officer of the business has determined** that:

- (i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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;
- (ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; **or**
- (iii) 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 leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity

In going over these criteria, executive management has determined that the District qualifies for the FFCRA exemption for the following reasons:

[lay out reasons here referencing the criteria; plug something into the draft and let's review and discuss]

Conclusion

Therefore, in addressing any sick leave requests, we will continue to follow our existing personnel policy manual as before. We do request that you review and confirm this determination so that it is clear that it applies to the District as a public employer.

Be advised as well that we are in the process, however, of preparing a continuity of operations plan to deal with short-staffing situations that are likely to occur and we may include in that package some temporary sick leave benefits beyond what we currently have, although not at the level called for by the FFCRA.

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