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Applying the New FFCRA “Health Care Provider” Exclusion

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The U.S. Department of Labor has amended its rules for excluding health care providers from qualifying for Families First Coronavirus Relief Act (FFCRA) leave. Employees whose services are integral to patient health can be excluded from FFCRA leave under the “health care provider” exclusion. The new definition of excludable “health care providers” must be applied on an employee-by-employee basis. We are providing you a decision-making guide to identify which employees in the health-related fields can be excluded under the updated regulation.

1. Does the employee have diagnostic capabilities? There are two main categories of excludable health care providers in the revised FFCRA regulations:

- A. Medical professionals who are licensed to diagnose serious medical conditions (these are the doctors, nurse practitioners, and other practitioners who have diagnostic capabilities); and
- B. Any other person who is employed to provide *diagnostic services, preventive services, treatment services, or other services* that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

The first category captures all the obvious “health care providers.” For the trickier cases that may fall into the second category, continue on.

2. Is the employee’s position listed among the jobs that *cannot* be a “health care provider?” First eliminate those that *cannot* be “health care providers.” The new regulations provide a list of positions that may *not* be excluded from FFCRA, even if the jobs somehow affect the provision of health care services:

- IT professionals,
- Building maintenance staff,
- Human resources personnel,
- Cooks,
- Food services workers,
- Records managers,
- Consultants, and
- Billers.

Once you determine who does not qualify as a “health care provider,” run your remaining positions through the following tests.

3. Does the employee’s job duties include one of the listed *examples* of qualifying health care services? The new definition lists three types of patient care *service categories*, as well as a catch-all category, that will classify an employee as a health care provider. Under each service category are *examples* of qualifying services. The key to the analysis will be focusing on the employee’s duties. Employees who deliver any of following listed services are health care providers:

- *Diagnostic services* include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.
- *Preventive services* include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.
- *Treatment services* include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.
- *Other Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care*, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

4. Does the employee support patient care under the direction or supervision of a “health care provider?” For employees who you think may be providing qualifying services, but that are not specifically listed in the examples above, identify whether the employee is either working at the direction of or being supervised by someone who is clearly a health care provider. In other words, if a certified nurse oversees a team to ensure the team’s work supports patient health, the employees working under the nurse could be excluded from FFCRA leave.

5. Would the absence of the employee’s services negatively impact patient health? Finally, if an employee is not being supervised by a health care provider, evaluate whether the absence of the service they are providing would negatively impact patient health. The guidelines provide this distinction as an example:

“For example, bathing, dressing, or hand feeding a patient who cannot do that herself is integrated into the patient’s care. In another example, an individual whose role is to transport tissue or blood samples from a patient to the laboratory for analysis for the purpose of facilitating a diagnosis would be providing health care services because timely and secure transportation of the samples is integrated with and necessary to provide care to that patient.

...

[But] a person employed to provide general transportation services that does not, for example, specialize in the transport of human tissue or blood samples is not a health care provider. FFCRA leave is currently available through December 31, 2020.

For help with determining FFCRA eligibility or other leave-related questions, contact Charlotte Hodde at 503-276-2102 or chodde@barran.com.