



Memorandum

TO: The Honorable Mayor and City Council

FROM: Richard Doyle

**SUBJECT: DOL Temporary Rule
Regarding Small Business
Exemption**

DATE: April 5, 2020

On April 1, 2020 the Council held a Special Meeting to consider an urgency ordinance to provide sick leave benefits to certain employees in the City of San Jose. On that same day, the Department of Labor's Wage and Hour Division posted a temporary rule issuing regulations relating to paid leave under the Families First Coronavirus Response Act ("FFCRA" or the "Act"). Our Office provided a brief summary of the temporary rule at the Special Meeting. It is anticipated that the temporary rule will be published and final on April 6, 2020. We will provide a verbal update on the status of these regulations at the City Council meeting on April 7, 2020.

The FFCRA covers private employers with fewer than 500 employees and certain public employers. The Act requires employers to provide each employee paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because of the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2) above.
5. *The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.*

6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Pursuant to the temporary rule, small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, the reason set forth in subparagraph 5 above, if the leave payments would jeopardize the viability of their business as a going concern.

As set forth in the temporary rule, “the Department [of Labor] believes it is necessary to set forth objective criteria for when a small business with fewer than 50 employees can deny an employee paid sick leave to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons. To that end, ... a small employer is exempt from the requirement to provide such leave when: (1) such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. For reasons (1), (2), and (3) in this paragraph, the employer may deny paid sick leave only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.”

As explained in the temporary rule, “[i]n exercising its authority to exempt certain employers with fewer than 50 employees, the Department [of Labor] balanced two potentially competing objectives of the FFCRA. On the one hand, the leave afforded by the FFCRA was designed to be widely available to employees to assist them navigating the social and economic impacts of COVID-19 as well as public and private efforts to contain and slow the spread of the virus. On the other hand, the Department recognizes that the FFCRA leave entitlements have little value if they cause an employer to go out of business and, in so doing, deny employees not only leave but also jobs. The Department attempted to extend the leave benefits as broadly as practicable, but not in circumstances that would significantly increase the likelihood that small businesses would be forced to close. The Department rejected alternative arrangements that excessively favored either the extension of leave or exclusion of small businesses or which imposed compliance requirements that were overly burdensome, particularly in economic conditions resulting from COVID-19.”

HONORABLE MAYOR AND CITY COUNCIL

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At the Special Meeting, the Council directed the City Attorney to include small businesses covered by the limited waiver under the temporary rule in the City's Sick Leave Benefit Ordinance.

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