

Resolution for the Public Sector on “Emergency Responder” and “Health Care Provider” Exemption from FFCRA

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Posted By: Kyle J. Gulya

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With the April 1 effective date of the Families First Coronavirus Response Act (“FFCRA”) fast approaching, many public sector employers across the state are discussing how to apply the FFCRA’s exemptions from the new extended leave and paid sick leave entitlements for employees considered an “emergency responder” or “health care provider.” Information concerning the FFCRA and its application to public employers in Wisconsin can be found [here](#).

The FFCRA explicitly defines a “health care provider” by referencing the definition of the term in the Family and Medical Leave Act (“FMLA”). While this definitional framework is troubling because of the narrow definition in the FMLA (designed to identify those professionals capable of certifying a serious health condition), there is little room for interpretation or exception absent future Congressional action or Department of Labor (“DOL”) guidance.

The term “emergency responder” is not defined in the FFCRA. While we expect that the DOL may issue guidance on the definition, Wisconsin public employers cannot wait for the guidance and must begin making decisions now relative to the personnel of their specific organization who they deem critical to the ongoing operation of essential governmental functions when faced with an emergency. Given the breadth of Emergency Order #12 and the latitude given Wisconsin local governments to determine what is an essential government function necessary to provide and support the health, safety and welfare of the public, we believe that local governments have an opportunity to define the term “emergency responder” based upon their own good faith and reasonable view of the particular positions, departments and personnel that will be necessary to serve the public during an emergency.

A local government desiring to define the term "emergency responder" is encouraged to do so through the resolution process before its governing body. If that process is not feasible, the local government can proceed under its emergency powers declaration or otherwise rely upon previously delegated authority to an executive or administrator. No matter the process, it is important that the local government memorialize the definition and create a record of the employee designations resulting from the definition, as well as the designations resulting from application of the definition of "health care provider." Local governments are strongly encouraged to work closely with their corporation counsel, city/village/town attorney or outside counsel to carefully craft the materials necessary to effectuate the FFCRA exemptions because each local government's process and designations will be different.

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