



## **Bent Ericksen & Associates**

Employment Compliance & Human Resources

### **HR ALERT FROM BENT ERICKSEN & ASSOCIATES**

**IMPORTANT UPDATE: Dental offices are now exempt from having to comply with the Families First Coronavirus Response Act (FFCRA).** Even so, we advise caution with this exemption and urge you to read this alert carefully.

The possibility of an exemption for dental offices, with fewer than 500 employees, as “healthcare providers” from having to comply with the FFCRA has been written about and discussed at length.

Typically, for most federal HR compliance issues that single out “healthcare providers,” the definition does not include dentists. For the FFCRA, we sought guidance from attorneys, attended webinars, and read the legislation in depth. Through it all, it appeared the exemption was intended for medical personnel actually on the front lines fighting COVID-19.

Not one source listed dentists, dental practices, or dental employees as part of the exemption. No one was stating, unequivocally, that the above definition included them. The guidance from the Department of Labor (DOL) was either nonexistent or too vague to draw a confident conclusion.

Recently, we've been getting some mixed messages from various governmental sources about the definition of “healthcare providers” as applied to the FFCRA. This prompted us to dig further and we were provided with new information that indicated that the DOL is now stating dental practices are exempt under the definition of a healthcare provider.

To verify this we contacted over 10 different regional Wage & Hour Divisions of the Department of Labor (DOL) throughout the United States and specifically asked about the dental office exemption.

**The consensus now from the DOL is that the healthcare provider definition for FFCRA is broader, and does include dental offices.** From the information we gathered, this broader definition also applies to other healthcare providers such as optometrists and chiropractors.



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### **What Now?**

While this information indicates that dental practices can decide to be exempt, it doesn't mean they have to take that step. In light of this though, a decision to be exempt or not, one way or the other, does need to be made.

It is each practice's choice. One that should be given serious consideration and one that would apply equally and fairly for all employees.

This decision cannot be made by us. It can only be made by each individual employer. Here are some practical steps we recommend:

1. Call the Wage & Hour Division of the Department of Labor at: (866) 487-9243
2. When prompted, press 1 for Wage & Hour Division
3. When prompted, press 0 to speak with a representative
4. Enter your zip code (this automatically routes you to the regional office for your state)
5. Press 1 if entered correctly
6. Press 2 to speak with representative
7. Once a representative on the line, tell the person how many employees you have and your type of practice
8. Ask whether you are exempt from the FFCRA
9. To cover yourself, and assuming the answer you get is "yes", document the individual's name that you spoke to as well as the date and time. If you can get the person to put their confirmation of exemption in writing, via email, do that too.

A few additional considerations:

- The FFCRA became effective April 1, 2020 and is currently set to expire December 31, 2020.
- Among its provisions, the FFCRA provides 1) Up to two weeks of Emergency Paid Sick Leave (EPSL), and 2) Expanded Family and Medical Leave Act (EFMLA). Both are provided based on six (6) specific qualifying reasons related to COVID-19.
- **These paid leave benefits are funded by the federal government. They run through your payroll and are then credited back via payroll tax credits.**
- Claiming exemption does not cause COVID-19 related problems and challenges to go away. Each practice will inevitably still have employees experiencing issues related to COVID-19, whether sickness, quarantine orders, childcare issues or no school.
  - When these issues arise, time off will still be needed/necessary – the exemption does not eliminate this problem.
  - When time off is needed due to COVID-19, what will be done instead of providing FFCRA leave? Will employees be forced to go without pay? Will employees be able to use their normal PTO/Vacation/Sick Leave? Will employees file for unemployment insurance (which may increase your tax rating)? Will those employees be terminated?



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- Employers should ask: “what kind of work environment do I want to have?” Claiming FFCRA exemption could send the wrong message to employees and create conflict, turnover, and unnecessary hassles.
- **IMPORTANT NOTE:** There is some flexibility with the exemption. Employers can consider claiming exemption from only part of the regulation. Nothing requires a practice to be exempt from all FFCRA provisions. If up to 80 hours of EPSL is reasonable but up to 12 weeks of EFMLA is not, you can be exempt from EFMLA but not EPSL.
  - Note: we strongly discourage claiming exemption for one employee vs another. Two employees in similar circumstances and claiming similar amounts of leave should be treated the same. Avoid claiming exemption with low-performers, for example, or employees that you are trying to force out of the practice. Doing this can increase the chances of morale issues and discrimination claims.
- There is no guarantee that there won't be legal challenges if the exemption is claimed. Mad employees who believe they've been treated unfairly may cause a battle that may never have needed to be fought.

**Individual state laws or requirements supersede FFCRA exemption.** Already some states, notably Colorado and New York, have enacted leave laws or requirements regarding COVID-19 leave or sick pay, which take precedence over the FFCRA. Be sure to adhere to those rules, as applicable.

### **Updating Your Policies & Communicating with Staff**

Depending on your FFCRA exemption decision, if you currently have a FFCRA policy in your manual/handbook, that policy should be modified or removed.

Employees should be informed of any FFCRA change. We recommend this be done in writing. For more information about COVID and the FFCRA, please visit our COVID FAQ Page and review our FFCRA How-To Guide. Please visit our Resource Library at [www.bentericksen.com](http://www.bentericksen.com)

Sincerely,

The Support Team at Bent Ericksen & Associates