

# The Small Business Exemption to the FFCRA: Employers to Self-Certify

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April 3, 2020

Although otherwise applicable to all U.S. private employers with fewer than 500 employees, both the new [Emergency Paid Sick Leave \(E-PSL\)](#) and the [Expanded Family and Medical Leave \(E-FMLA\)](#) included an exemption for businesses with fewer than 50 employees, which has been referred to in the preliminary guidance as the “Small Business Exemption” (for our purposes, “SBE”).<sup>1</sup> The new rules make it clear that, for better or worse, there is no formal approval process to guarantee the exemption. Instead, an authorized officer of the employer need only make (and document) a determination that one or more of the following applies:

1. Providing the otherwise mandated E-PSL or E-FMLA would result in the business’s “expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity” (i.e. the business truly can’t afford it);
2. The absence of the employee or employees requesting E-PSL or E-FMLA would pose a substantial risk to the employer’s financial health or operational capacity, due to the employee’s, or employees’, specialized skills, knowledge of the business, or responsibilities (i.e. the business can’t function without the unique capabilities of this employee or group of employees); or
3. If the employee or employees requesting E-PSL or E-FMLA are out, the business would not have sufficient staff who are able, willing, and qualified, and available at the time and place needed, to provide the required coverage, and the work is necessary for the employer to operate at a minimal capacity (i.e., if this person or group is out the business would not be operational).

As you can see, other than the first item, these criteria are determinations that will presumably need to be made at the time of the leave request(s), so employers that wish to rely on the SBE should anticipate incorporating that decision into their approval process accordingly. Employers are also obligated to document and retain records of any SBE determination, as well as an explanation of the facts and circumstances that support the criteria relied on to deny any requested leave, along with the other required documentation for the required four-year period.

One additional note: Triggering the SBE doesn’t appear to excuse an employer’s obligation to comply with the posting requirements. So even if a business expects to rely on the exemption, it should [still comply with the notice requirements](#). For more information about ongoing developments related to COVID-19, visit [Miller Nash Graham & Dunn’s resource library](#).

<sup>1</sup> IMPORTANT NOTE: This exemption is only available for E-PSL and/or E-FMLA needed for Reason #5 on the DOL’s poster: i.e. when an employee is unable to work or telework because they are needed to care for their child who is home due to the closure of their school, daycare, or regular place of care.

*Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.*



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