

# UPDATE CORONAVIRUS (COVID-19)



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## Department of Labor Updates Definition of Health Care Provider Under Families First Act

Dear Members,

We are pleased to share a very helpful advocacy success on the federal level which will help prevent staffing shortages in assisted living in Massachusetts. We are appreciative of Argentum's success in advocating to the Department of Labor that senior living staff be exempted from expanded leave requirements. Argentum's letter explaining their interpretation of the Department of Labor definition and providing clarification of other aspects of these issues is below.

**To:** Argentum Owner/Operator Member CEOs

**Cc:** Argentum Board of Directors; Argentum State Partners

**From:** James Balda, Argentum President & CEO

**Re:** Department of Labor Updates Definition of Health Care Provider Under Families First Act

On March 28, the Department of Labor released [updated questions and answers](#) regarding the Families First Coronavirus Response Act, signed into law March 18, 2020. The guidance provides an exemption for all senior living workers from expanded leave requirements, as requested by Argentum. The Families First Coronavirus Response Act expands leave for employers with fewer than 500 employees, effective from April 1, 2020 through December 31, 2020. Leave is available for a number of COVID-19 related reasons, including employees caring for a child whose school or place of care was closed for reasons related to COVID-19. Certain workers are exempt from these provisions.

Argentum submitted [formal comments](#) to the DOL on March 23, requesting that all senior living workers be included as health care workers and exempt from this leave. With over 93% of all public and private schools closed nationwide, absent an exemption from the requirement of the Emergency Family Medical Leave Act (EFMLA) and Emergency Paid Sick Leave Act (EPSLA), senior living would lack the available workforce needed to deliver care to our nation's seniors.

The guidance clarifies the definition of "Health Care Provider" for the purpose of employees who may be exempted from the expanded leave provisions to include "anyone employed at any ... retirement facility ... or any similar institution." The guidance specifically states:

**56. Who is a "health care provider" who may be excluded by their**

## employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is **anyone employed** at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, **retirement facility**, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, **or any similar institution**, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

The original DOL definition was very limited and did not include numerous health care providers that are essential to preventing and containing the spread of COVID-19.

The Q&A also includes more information on determining the number of employees for the purpose of complying with the law's provisions:

**2. As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?**

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

**Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.** Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). **If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.**

Argentum continues to recognize and work to resolve the childcare issue for our workers. We continue to collaborate with our state partners to urge state and local governments and municipalities to provide this needed service for essential employees, including senior living workers, who want to continue caring for frail seniors and have peace of mind that their children are safe.

**James R. Balda**  
President & CEO

**ARGENTUM** | *Expanding Senior Living*  
1650 King Street, 6<sup>th</sup> Floor  
Alexandria, VA 22314  
D: 703.562.1190 | C: 703.209.2601  
[jbalda@argentum.org](mailto:jbalda@argentum.org) | [www.argentum.org](http://www.argentum.org)

*Mass-ALA will continue to keep you informed on Novel Coronavirus (COVID-19). Stay tuned for more updates.*

*\*The information provided in this COVID 19 update is solely for general informational purposes to assist in understanding the evolving guidance regarding the current COVID 19 public health threat. It is not intended to be a primary public health or medical resource, but is provided as a clearinghouse for or compilation of various guidance issued by official and related sources.*

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