

April 3, 2020 Update from Bob King

**From:** Legally Nanny <[info@legallynanny.com](mailto:info@legallynanny.com)>

**Date:** April 3, 2020 at 2:03:47 PM MST

**To:** "[info@legallynanny.com](mailto:info@legallynanny.com)" <[info@legallynanny.com](mailto:info@legallynanny.com)>

**Subject:** Home Care COVID-19 Legal Update

## **Families First Coronavirus Relief Act: What Home Care Agencies Need to Know Now**

Dear Friends,

We recently sent you an update about the federal Families First Coronavirus Relief Act (FFCRA). There have been a lot of developments since our initial email last week, and we wanted to clarify two important provisions for home care agencies.

The FFCRA went into effect on April 1, 2020. The law requires most employers with fewer than 500 employees to provide paid sick leave and extended FMLA leave for COVID-19-related issues.

However, there are two important exemptions that may apply to your home care agency:

1. FIRST and most importantly, based on clarifying information from the [Department of Labor posted online in its FAQs](#), it is our belief that caregivers employed by home care agencies may be considered **EXEMPT** from the two new leave provisions in the FFCRA.

In FAQ #56, the DOL states that "a health care provider is anyone employed at any doctor's office, hospital...nursing facility, retirement facility, nursing home, **home health care provider**...or any similar institution, Employer, or entity." Based on this definition, home care agencies could be considered similar entities to home health care providers and therefore not required to provide these benefits to caregivers. Please note, however, that there is some risk to claiming this exclusion because home care agencies are not specifically identified as exempt. Thus, there is no guarantee that the exemption will apply. Nevertheless, based on the similarities between home health care agencies and home care agencies, in our opinion, taking the exemption for your caregivers seems reasonable.

2. Additionally, if your agency has fewer than 50 employees you may have a second exemption. Specifically, if providing the required benefits "would jeopardize [your] business as a going concern," you may be exempt from providing extended FMLA leave, which applies to employees who need to care for a son or daughter under the age of 18 whose school or child care has been closed due to COVID-19. You also may be exempt from providing paid sick leave, but only if paid sick leave were used for the same purpose as the extended FMLA leave. Please see FAQs 58 and 59 for more information.

This summary represents our opinions, is meant purely for informational purposes and does not constitute legal advice. Agencies should consult with their legal counsel to determine whether to take the exemptions listed above.

As always, if you have specific questions, please [contact our firm](#) directly. Please understand, however, that we can only provide follow-up responses to clients of our firm, and we will need to bill for our time in providing such responses.

Remember, if you want these updates first and in real time, please connect with us on our social media sites below.

These are challenging times for home care, and we are with you. We look forward to continuing to educate and advocate on your behalf.

Sincerely,

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The following is a message sent to us from our friend Attorney Bob King of Legally Nanny (keynote speaker at our 2018 and 2019 conferences). Although Bob gave us permission to post this information, he has asked that we include the following:

1. This message is purely informational. It's not meant as legal advice. Bob is an attorney licensed to practice law in California but works with clients nationwide on federal legal issues such as this new law.
2. The law isn't effective until April 1, 2020, and the federal Department of Labor will issue clarifying regulations before that time. Thus, things may change in the coming days.
3. Bob will continue to publish updates on Legally Nanny's social media sites, so please connect with him using the Facebook, LinkedIn or Twitter links below for the latest news.

Dear Friends,

These are challenging times for home care agencies, and we want to provide you with the information you need as employers to navigate new legal requirements in light of COVID-19.

As you may be aware, President Trump signed a Coronavirus relief bill on Wednesday, March 18. (<https://www.congress.gov/bill/116th-congress/house-bill/6201/text>). The bill has two main components for employers relating to COVID-19, an extension of paid FMLA leave and a paid sick leave provision.

**\*\*Both of these provisions don't apply to employers with 500 or more employees. Further, employers with fewer than 50 employees may be exempt if "such requirements would jeopardize the viability of the business as a going concern."\*\***

**Extended FMLA Leave:** If an employee has worked for an employer for 30 or more calendar days, the employee can request leave of up to 12 weeks if the employee "is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." Put simply, this is leave for an employee to care for his or her own child because the child can't go to school due to COVID-19. The first 10 days of this leave may be unpaid, but an employee can use paid time off if available. However, the employer can't require the employee to use paid time off. After 10 days, the employer must pay the employee 2/3 of the employee's regular rate, up to a maximum of \$200 per day and \$10,000 in the aggregate.

**Paid Sick Leave:** Employers must provide a maximum of 80 hours of paid sick leave for full-time employees (less for part-time employees) at the employee's regular rate up to a maximum of \$511 per day if the leave is for the employee's own medical condition due to COVID-19, and up to a maximum of \$200 per day if the employee is caring for another person due to COVID-19.

The extended FMLA leave and paid sick leave benefits do not apply to "health care providers and emergency responders." Many people have asked us if this language exempts caregivers employed by home care agencies. Given that most home care agencies are non-medical (as distinct from home health agencies providing nursing services), it's our opinion that such caregivers are not exempt, meaning they are eligible for extended FMLA leave and paid sick leave.

Please understand this is just a summary with our opinions. It is meant purely for informational purposes and does not constitute legal advice. If you have specific questions, please contact our firm directly. Please understand however, that we can only provide follow up responses to clients of our firm, and we will need to bill for our time in providing such responses.

The federal Department of Labor will issue clarifying regulations on these matters shortly. When it does, we will post updates to our social media sites below, as we did today regarding this bill. We encourage you to connect with us on these social media sites to get the legal news affecting your agency.

We are your law firm for home care and nanny agencies and family employers, and we are with you in these difficult times supporting the good work you do.

Sincerely,

Bob King, Esq. • Legally Nanny® • 37 Trailwood • Irvine, CA 92620-1216 • 714-336-8864

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