

March 23, 2020

VIA ELECTRONIC MAIL

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Families First Coronavirus Response Act
Definition of “Health Care Provider”**

Dear Mr. Secretary:

At the request of the U.S. Department of Labor (“DOL”) via its nationwide Town Hall of March 20, 2020, we write to provide input as DOL prepares to issue regulations and/or interpretive guidance regarding the “Families First Coronavirus Response Act” (“FFCRA”).

Specifically, we are writing to request that, pursuant to the explicit authority granted to DOL in the Emergency Family and Medical Leave Expansion Act (“EFMLA”), Division C of the FFCRA, and the Emergency Paid Sick Leave Act (“EPSLA”), Division E of the FFCRA, that DOL issue regulations defining “health care provider” for purposes of exclusion from the definition of “eligible employee” for purposes of the EFMLA and EPSLA, to include:

An employee of any home care provider who is providing home care services, including vital preventive care, much-needed companionship and assistance with daily activities, and essential activities of daily living, hospice services, and/or skilled medical services, to a vulnerable population including seniors, disabled adults, and medically frail children; and

An employee of a senior living community including independent living, assisted living, memory care, and continuing care retirement communities, who is providing long term services and support and care essential to activities of daily living and/or skilled medical services to a vulnerable population including seniors and disabled adults.

The reasons for this request, and support for exclusion of these employees (collectively, “home health and senior living providers”) from the definition of “eligible employee,” is set forth below.

STATEMENT OF INTEREST

The **Home Care Association of America (HCAOA)** is the home care industry's leading trade association, and currently represents nearly 3,000 companies that employ more than 500,000 caregivers across the United States. The HCAOA member provide a broad range of services that supports seniors, the disabled and the medically-frail's wellbeing and enables them to age in place. The HCAOA protects industry interests, promotes industry values by setting the standard of high-quality care, tackles barriers to growth and represents the industry's voice in Washington DC and state governments across the country. HCAOA is a champion and advocate for its members, for caregivers, and for seniors, the disabled and the medically-frail across America. Among its purposes, the HCAOA seeks to support care in the home, which is the least risk setting to our aging population and to foster economic growth.

The **National Association for Home Care & Hospice (NAHC)** is the largest and most respected professional association representing the interests of chronically ill, disabled, and dying Americans of all ages and the caregivers who provide them with in-home health and hospice services. NAHC is a trade association that represents the nation's 33,000 home care and hospice organizations.

Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults. Argentum member companies operate senior living communities offering assisted living, independent living, continuing care, and memory care services. Along with its state partners, Argentum's membership represents approximately 75 percent of the professionally managed communities in the senior living industry.

The **American Seniors Housing Association** represents over 550 companies/6,000 communities involved in the operation, development, investment, and financing of the entire spectrum of seniors housing, independent living, assisted living, memory care and continuing care retirement communities (CCRCs).

The **International Franchise Association (IFA)** is the world's oldest and largest organization representing franchising worldwide. IFA promotes the economic impact of the more than 733,000 franchise establishments, which support nearly 7.6 million jobs and \$674.3 billion of economic output for the U.S. economy. IFA members include franchise companies in over 300 different business sectors, including franchises in the home health and senior living health care delivery, as well as those companies that support the industry in marketing, law and business development.

ANALYSIS

Statutory Requirements

The EPSLA generally provides eligible employees who are employed by a private-sector employer with fewer than 500 employees with up to eighty hours (for full time employees) of paid sick leave when: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual subject or advised to quarantine or self-isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Subject to statutory caps, this sick leave is generally paid by the employer at the employee's regular rate when taken for the reasons specified in sections (1), (2), or (3); or at a reduced rate for reasons (4), (5), or (6).

The EFMLA generally provides eligible employees who are employed by a private-sector employer with fewer than 500 employees with up to twelve weeks of emergency FMLA leave, where leave is taken for a "qualifying need related to a public health emergency." The statute defines "qualifying need related to a public health emergency" as an employee being unable to work or telework due to a need for leave to care for a minor son or daughter, if the child's school or place of care has been closed, or their child care provider is unavailable, due to a public health emergency.

The first segment (for full-time workers, ten days) of EFMLA leave may be unpaid (although as a practical matter, paid leave is likely to be provided by way of the EPSLA); the remaining ten weeks of EFMLA leave is paid at two-thirds of the employee's regular rate, again subject to certain statutory caps.

Exemption of Certain Health Care Providers

Section 3102 of the EFMLA expressly provides the Secretary of Labor with the authority, for good cause shown to exempt "certain health care providers" from the definition of "eligible employee" for purposes of the statute's expanded FMLA benefits. Section 5111 of the EPSLA grants the same authority to the Secretary for purposes of that statute's emergency paid sick leave benefits.

Both the EFMLA and EPLSA adopt as a baseline definition of "health care provider" the definition set forth in the Family and Medical Act. Section 101(6) of the FMLA, 29 U.S.C. § 2611(6), defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any

other person determined by the Secretary of Labor to be capable of providing health care services.”

Regulations implementing the FMLA define “any other person ... capable of providing health care services as: (i) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; (ii) nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; (iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner; (iv) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and (v) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law. *See* 29 CFR 825.102.

The Need to Exclude Home Health and Senior Living Employees from the Definition of “Eligible Employee” Under the EFMLA and EPSLA

We note at the outset that the definition of “health care provider” and other persons “capable of providing health care services” are included in the FMLA for a very specific statutory purpose: namely, to identify those individuals who are authorized under the statute to certify the need for an employee to take FMLA leave related to a serious health condition (or that of a family member). *See* 29 U.S.C. §§ 2613, 2614. They have never been construed to determine whether a given worker is a “health care provider” for the purposes of determining whether an individual is providing necessary health care to patient populations.

Put another way, the definition of “health care provider” and those “capable of providing health care services” set forth in existing law and regulations was not intended to address the situation presented under the EFMLA and EPSLA, that is, whether an employee is delivering health care services in the context of a public health emergency, and/or whether such an employee should be excluded from eligibility for certain benefits during such a crisis.

Like nurse-practitioners, nurse-midwives, and physician assistants, home health and senior living providers are part of a continuum of care, and a vital part of our integrated health care delivery system. Given the critical public health services they are providing, there is a compelling need to exclude home health and senior living providers from the definition of “eligible employee” for purposes of the EFMLA and EPLSA.

Home health and senior living providers deliver services in the home often identical to those provided in post-acute care facilities, in a non-acute setting. In simpler terms, this means the delivery of these services in an isolated environment, consistent with guidance for “social distancing” and non-exposure to COVID-19 promulgated by health officials. Additionally, home health and senior living providers deliver emergency back-up staffing services to hospitals, rehabilitation facilities, and nursing homes. These health care workers are an integral component of post-hospitalization or other acute care, and help to prevent readmission to the acute health care system, an outcome particularly desirable where, as now, there is great concern that our acute health care delivery system may be overloaded by those exposed to or who have contracted COVID-19.

Home health and senior living providers work to ensure that seniors and medically frail individuals—those most at risk in the face of COVID-19— stay out of hospitals and other acute-care facilities, and ensure that those facilities are able to maintain adequate staffing levels, and are not unnecessarily over-taxed where quality care can be provided in a non-acute setting. Moreover, in many instances, they provide continuity of care to patients in post-acute setting, on either a short-term or long-term basis.

We are gravely concerned, based on prior experience, that absent an exemption from the requirements of the EFMLA and EPSLA, we will lack an available workforce able to deliver much needed home health and residential care. The home health and senior living industries faced such a shortage during the economic downturn of 2008, when broad-based extensions of benefits to displaced workers resulted in a lack of available workers to deliver critical care.

When seniors and other medically-frail individuals are unable to obtain home or residential care, they are, of necessity, required to obtain this care in hospitals or other acute care facilities. The increased cost of obtaining care in these settings is likely then to be borne by patients, further exacerbating the cost of care, and increasing the burden on our already over-taxed health care system.

For these reasons, we request that DOL use the regulatory authority it is provided by way of statute to exempt from the definition of “eligible employee” for purposes of the EFMLA and EPSLA the following:

An employee of any home care provider who is providing home care services, including vital preventive care, much-needed companionship and assistance with daily activities, and essential activities of daily living, hospice services, and/or skilled medical services, to a vulnerable population including seniors, individuals with disabilities, and medically frail children; and

An employee of a senior living community including independent living, assisted living, memory care, and continuing care retirement communities, who is providing long term services and support and care essential to

activities of daily living and/or skilled medical services to a vulnerable population including seniors and disabled adults.

By doing so, DOL will ensure that these workers will continue to provide much-needed health and medical care during this unprecedented national health emergency. For purposes of determining whether home health or senior living providers are “health care providers” under these statutes, these health care workers are no differently situated than nurse practitioners, clinical social workers, nurse-midwives, and the range of other health care professionals delivering care in an integrated health care system.

The Exclusion of Home Health Care and Senior Living Providers Is Consistent with Public Health and Safety Precautions Taken by State and Local Governments

Finally, we note that the exclusion of home health and senior living providers from the definition of “eligible employee” under the EPSLA and EFMLA is entirely consistent with actions taken by state and local governments responding to the COVID-19 pandemic by way of mandated business closures. As confirmed with the National Governors’ Association, every single Governor deemed home care workers as essential.

In the State of New York, the governor has directed 100% of the workforce to stay at home, subject to exemptions for “essential” businesses or entities. The state has specifically exempted as “essential” home health care worker and home health care aides, as well as nursing homes, residential health care facilities, and congregate care facilities. His directive includes employees of senior living communities. Similarly, in the State of California, the governor has ordered those workers who are not “Essential Critical Infrastructure Workers” to remain at home, and has expressly designated home health care workers, workers in long term care facilities, and hospice care workers, as essential public health care workers not subject to this restriction. California has likewise designated workers who provide support to vulnerable populations, including residential care facilities for the elderly, to ensure their health and well-being, including family care providers, as critical health care infrastructure personnel. Illinois has likewise excluded home-based care and services for adults, children, people with disabilities, substance use disorders, and/or mental illness, as well as other home health care workers, from its “shelter in place” order. Other states have likewise recognized the need to recognize home health and senior living providers as critical to health care delivery, and essential health care providers: while mandating broad closures of non-essential facilities, New Jersey has expressly provided that long term care facilities are essential to continue operating, as has neighboring Pennsylvania.

The recognition by states and localities of the essential nature of all aspects of public health delivery—including residential and in-home care—recognize that home health and residential care providers are “health care providers” within an integrated health care delivery system. These facts further support DOL’s designation of home health and senior living as exempt from the definition of “eligible employee” under the EPSLA and EFMLA.

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For all of the foregoing reasons, we respectfully submit that DOL should designate home health and senior living workers, as defined above, as exempt from the definition of “eligible employee” for purposes of the emergency leave allowances of the EFMLA and EPSLA.

We thank you for your consideration of these comments and welcome the opportunity to share additional information with you or your staff directly should you so desire.

Respectfully submitted,

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counsel for

HOME CARE ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF HOME CARE AND HOSPICE
ARGENTUM
AMERICAN SENIORS HOUSING ASSOCIATION
INTERNATIONAL FRANCHISE ASSOCIATION

cc: The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor