DOL Guidance on Health Care Provider Definitions

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 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, the 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.

This definition includes any individual employed by an entity that contracts with the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19. To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the FFCRA.

Interpretation from Littler Mendelson PC:
Reference to “any similar institution, employer, or entity” combined with longstanding DOL classification of individuals providing personal care service in the home as health care workers support the conclusion that home health agencies, personal care services companies, private duty nursing employers, and hospices are all within DOL’s exemption of a “home health care provider.”

For example, the Department of Labor has long maintained within a health care worker category 31-1011 Home Health Aides: Provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient’s home or in a care facility. Monitor or report changes in health status. May also provide personal care such as bathing, dressing, and grooming of patients.

Further support is found in the reference to a “retirement facility” distinct from a “nursing facility.” At most, a retirement facility provides personal care.
Note also that the exemption goes beyond direct service employees and “includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.”

While this is an encouraging development for our industry, this result is not set in stone and still subject to challenge. The regulations related to the FFCRA are with the Office of Management and Budget as of today and they may be issued as soon as tomorrow. The regulations will likely clarify the FFCRA more and could modify our current understanding. Likewise, efforts are already underway to eliminate the current exemptions to the FFCRA.