COVID – DOL NEW GUIDANCE (FFCEA, FLSA, FMLA) JULY 2020 - HIGHLIGHTS FAQ

On July 20, 2020, the U.S. Dept. of Labor announced additional guidance to provide information to workers and employers about how the requirements and protections of the Families First Coronavirus Response Act (FFCRA), Fair Labor Standards Act (FLSA), and Family and Medical Leave Act (FMLA) impact the workplace as America continues to reopen. Below are some key FAQ on hot button issues. You can find DOL's complete FAQs at the links above.

Forced Leave and Return to Work Rights after Leave

- **May employers send employees home if they show symptoms of COVID-19? Can the employees be required to take sick leave? May employers prevent employees from coming to work?**

It is important to prepare a plan of action specific to your workplace, given that a pandemic outbreak could affect many employees. This plan or policy could permit you to send employees home, but the **plan and the employment decisions must comply with the laws prohibiting discrimination** in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. It would also be prudent to notify employees about decisions made under this plan or policy at the earliest feasible time.

However, you may exclude an employee with a disability from the workplace under the **Americans with Disabilities Act** if you:

- ✓ obtain objective evidence that the employee poses a **direct threat** (i.e. significant risk of substantial harm); and
- ✓ determine that there is **no available reasonable accommodation** (that would not pose an undue hardship) to eliminate the direct threat.

Your company policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as **FMLA-protected leave**, the statute allows the **employee to elect or the employer to require the substitution of paid** sick and paid vacation/personal leave in some circumstances.

- **Do I have a right to return to work if I am taking FFCRA sick leave or family leave?**

Generally, yes. DOL clarifies that the Acts require employers to provide the same (or a nearly equivalent) job to an employee who returns to work following leave.

In most instances, you are entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave. Thus, your employer is prohibited from firing, disciplining, or otherwise discriminating against you because you take paid sick leave or expanded family and medical leave. Nor can your employer fire, discipline, or

otherwise discriminate against you because you filed any type of complaint or proceeding relating to these Acts, or have or intend to testify in any such proceeding.

However, you are **not protected from employment actions, such as layoffs, that would have affected you regardless of whether you took leave**. This means your employer can lay you off for legitimate business reasons, such as the closure of your worksite. Your employer must be able to demonstrate that you would have been laid off even if you had not taken leave.

Your employer may also **refuse to return you to work** in your same position if you are a **highly compensated "key" employee** as defined under the FMLA, or if your employer has **fewer than 25 employees**, and you took FFCRA family leave because school or place of care was closed, or child care provider was unavailable, and all four of the following hardship conditions exist:

- ✓ your position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
- ✓ your employer made reasonable efforts to restore you to the same or an equivalent position;
- ✓ your employer makes reasonable efforts to contact you if an equivalent position becomes available; and
- ✓ your employer continues to make reasonable efforts to contact you for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

- **May an employer require an employee who is out sick with COVID-19 to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?**

Yes. During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would

- ✓ impair his ability to perform **essential job functions** (i.e., fundamental job duties) with or without reasonable accommodation, or,
- ✓ pose a **direct threat** (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it **may be difficult for employees** to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

- **Can employer require <u>quarantine after leave</u> to care for someone? My employee used two weeks of paid sick leave under the FFCRA to care for his parent who was advised by a health care provider to self-quarantine because of symptoms of COVID-19. I am concerned about his returning to work too soon and potentially**

exposing my other staff to COVID-19. May I require him to telework or take leave until he has tested negative for COVID-19?

It depends. In general, an employee **returning from paid sick leave under FFCRA has a right to be restored** to the same or an equivalent position, although exceptions apply. However, due to the public health emergency and your employee's potential exposure to an individual with COVID-19, you **may temporarily reinstate him to an equivalent position requiring less interaction with co-workers or require that he telework**.

In addition, the employee must comply with job requirements that are unrelated to having been out on paid sick leave. For instance, a company may require any employee who knows he has **interacted with a COVID-infected person to telework or take leave until he has personally tested negative for COVID-19 infection**, regardless of whether he has taken any kind of leave. Such a policy would apply equally to an employee returning from paid sick leave. However, you may **not require the employee to telework or be tested for COVID-19 simply because the employee took leave** under the FFCRA. (Lori Goldstein note: If an employer **forces quarantine** without medical diagnosis/advice, unless you provide work from home, you **may have to pay for the forced leave.)**

FFCRA and Self-Quarantine

- **When am I eligible for paid sick leave to self-quarantine?**

  You are eligible for paid sick leave **if a health care provider directs** or advises you to stay home or otherwise quarantine yourself because the health care provider believes that you may have COVID-19 or are particularly vulnerable to COVID-19, and quarantining yourself based upon that advice prevents you from working (or teleworking).

- **I am an employee. I become ill with COVID-19 symptoms, decide to quarantine myself for two weeks, and then return to work. I do not seek a medical diagnosis or the advice of a health care provider. Can I get paid for those two weeks under the FFCRA?**

  Generally, **no**. If you become ill with COVID-19 symptoms, you may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises you to self-quarantine. If you test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, you may continue to take paid sick leave. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may **not take paid sick leave under the FFCRA if you become ill with an illness not related to COVID-19**. (Lori Goldstein notes: But FFCRA is **available to care for someone advised to quarantine as high-risk.)**

Family Leave and School Uncertainty

- **Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?**

You may take FFCRA sick or family leave for your child **only when you need to, and actually are, caring for your child** if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a **co-parent, co-guardian**, or your usual child care provider is available to provide the care your child needs.

- **My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?**

Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true **even if some or all instruction is being provided online** or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

An employer may **not require employer-provided paid leave to run concurrently** with—that is, cover the same hours as—FFCRA paid sick leave. In contrast, an employer **may require that any paid leave** available to an employee under the employer's policies to allow an employee to **care for his or her child or children** because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run **concurrently** with FFCRA **family leave.**

In this situation, the employer must pay the employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan—including vacation and/or personal leave (typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the FFCRA statute ($200 per day or $10,000 in total). If the employee exhausts available paid leave under the employer's plan, but has more FFCRA leave available, the employee will receive any remaining FFCRA leave in the amounts and subject to the daily and aggregate limits. Additionally, provided both an **employer and employee agree**, and subject to federal or state law, **paid leave provided by an employer may supplement 2/3 pay** under the FFCRA so that the employee may receive the **full amount** of the employee's normal compensation.

Finally, an **employee may elect—but may not be required by the employer—to take FFCRA paid sick leave** or paid leave under the employer's plan for the first two weeks of FFCRA family leave. If, however, an employee has used some or all FFCRA paid sick leave, any remaining portion of that employee's first two weeks of FFCRA family leave may be unpaid. During this period of unpaid leave, the **employee may choose—but the employer may not require the employee—to use paid leave** under the employer's policies that would be available to the

employee to take in order to care for the employee's child or children because their school or place of care is closed or the child care provider is unavailable due to a COVID-19 related reason concurrently with the unpaid leave.

FFCRA Family Leave After Reopening

- **I have an employee who used four weeks of expanded family and medical leave before she was furloughed. Now I am re-opening my business. When my employee comes back to work, if she still needs to care for her child because her child care provider is unavailable for COVID-related reasons, how much expanded family and medical leave does she have available?**

Under the FFCRA, your employee is entitled to up to 12 weeks of expanded family and medical leave. She used four weeks of that leave before she was furloughed, and the weeks that she was furloughed do not count as time on leave. When she returns from furlough, she will be eligible for eight additional weeks of leave if she has a qualifying reason to take it.

Because the reason your employee needs leave may have changed during the furlough, you should treat a post-furlough request for expanded family and medical leave as a new leave request and have her give you the appropriate documentation related to the reason, she currently needs leave. For example, before the furlough, she may have needed leave because her child's school was closed, but she might need it now because her child's summer camp is closed due to COVID-19-related reasons.

FFCRA Exemption For Small Businesses With < 50 Employees

- **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational

capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FFCRA and Domestic Services Workers

- **I hire workers to perform certain domestic tasks, such as landscaping, cleaning, and child care, at my home. Do I have to provide my domestic service workers paid sick leave or expanded family and medical leave?**

It **depends on the relationship** you have with the domestic service workers you hire. Under the FFCRA, you are required to provide paid sick leave or expanded family and medical leave if you are an employer under the Fair Labor Standards Act (FLSA), regardless of whether you are an employer for federal tax purposes. If the domestic service workers are **economically dependent on you for the opportunity to work, then you are likely their employer** under the FLSA and generally must provide paid sick leave and expanded family and medical leave to eligible workers. An example of a domestic service worker who may be economically dependent on you is a nanny who cares for your children as a full-time job, follows your precise directions while working, and has no other clients.

If, on the other hand, the domestic service workers are not economically dependent on you and instead are essentially in business for themselves, you are their customer rather than their employer for FLSA purposes. Accordingly, you are not required to provide such domestic service workers with paid sick leave or expanded family and medical leave. An example of a domestic service worker who is not economically dependent on you is a handyman who works for you sporadically on a project-by-project basis, controls the manner in which he or she performs work, uses his or her own equipment, sets his or her own hours and fees, and has several customers. Likewise, a day care provider who works out of his or her house and has several clients is not economically dependent upon you.

Of course, you are not required to provide paid sick leave or expanded family and medical leave for workers who are employed by a third-party service provider with which you have contracted to provide you with specific domestic services.

FMLA During COVID

- **Can an employee stay home under FMLA leave to avoid getting COVID-19?**

No. The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 where complications arise, or who are needed to care for

covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA. Employers should encourage employees who are ill with COVID-19 or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

- **Does FMLA apply to parents or caregivers to care for sick children or children whose school is closed?**

Covered employers must abide by the FMLA as well as any applicable state FMLA laws. An employee who is sick, or whose **family members are sick, may be entitled to leave under the FMLA**. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA.

Other than FFCRA, there is currently **no federal law covering non-government employees who take off from work to care for healthy children**, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

- **Do I qualify for leave for a COVID-19 related reason even if I have already used some or all of my leave under the Family and Medical Leave Act (FMLA)?**

If you are an eligible employee, you are entitled to FFCRA paid sick leave regardless of how much leave you have taken under the FMLA.

However, **if your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period** that your employer uses for FMLA leave. You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

- **May I take leave under the Family and Medical Leave Act over the next 12 months if I used some or all of my expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act?**

It depends. You may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the Emergency Family and Medical Leave Expansion Act. If you take some, but not all 12, workweeks of your expanded family and medical leave by December 31, 2020, you may take the remaining portion of FMLA leave for a serious medical condition, as long as

the total time taken does not exceed 12 workweeks in the 12-month period. Please note that expanded family and medical leave is available only until December 31, 2020; after that, you may only take FMLA leave.

- **Will a telemedicine visit count as an in-person visit to establish a serious health condition under the FMLA?**

Yes. Until December 31, 2020, the WHD will consider telemedicine visits to be in-person visits, and will consider **electronic signatures** to be signatures, for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider; be performed by video conference; and be permitted and accepted by state licensing authorities. This approach serves the public's interest because health care facilities and clinicians around the nation are under advisories to prioritize urgent and emergency visits and procedures and to preserve staff personal protective equipment and patient-care supplies.

- **I was out on FMLA leave unrelated to COVID-19. While I was out, my company implemented a new policy requiring everyone to take a COVID-19 test before they come to the office. Under the FMLA, can my employer require me to get a COVID-19 test under this policy?**

The **FMLA does not prohibit the employer's testing** requirement. When your FMLA leave is over, your employer must reinstate you to the same job or an equivalent position. However, you are **not protected from actions that would have affected you if you were not on FMLA leave**. For example, if a shift has been eliminated, or overtime has been decreased, you would not be entitled to return to work that shift or the original overtime hours. (Lori Goldstein note: Similarly, your position can be eliminated and/or your employment terminated through a reduction in force that would have affected you if not on FMLA leave.) That principle also applies here, where your employer's requirement for testing isn't related to your having been out on FMLA leave but instead, all employees, regardless of whether they have taken any kind of leave, are required to be tested for COVID-19 before coming to the office. Other laws may impose restrictions on the circumstances when your employer can require COVID-19 testing, and what types of tests are permitted.

Pay Questions

- **If individuals volunteer to a private, not-for-profit organization, are they entitled to compensation?**

Individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Where employers are requested to furnish their services, including their employees, in emergency circumstances under Federal, state or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

- **Can a salaried executive, administrative, or professional employee who is <u>exempt</u> from FLSA minimum wage and overtime requirements <u>perform other nonexempt duties during the COVID-19</u> public health emergency and continue to be treated as exempt?**

Yes, during the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption. WHD's regulations permit an employee who otherwise qualifies for a Section 13(a)(1) exemption to perform nonexempt duties during emergencies that "threaten the safety of employees, a cessation of operations or serious damage to the employer's property" and which are beyond the employer's control and could not reasonably be anticipated. COVID-19 is a rare event affecting the public welfare of the entire nation that an employer could not reasonably anticipate and is consistent with the FLSA's regulatory criteria for emergencies. Employees who are temporarily required to perform nonexempt duties due to COVID-19 may do so without losing the FLSA exemption, as long as they continue to be paid on a salary basis of least $684 per week.

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