



National Compliance Update

USI EMPLOYEE BENEFITS

March 17, 2020

Coronavirus and the Family and Medical Leave Act

As the number of confirmed cases of the coronavirus disease 2019 (“COVID-19”) continue to rise, employers will likely see an increase in employee requests to take job-protected leave under the Family and Medical Leave Act (“FMLA”). The Department of Labor has issued guidance on frequently asked questions (“FAQs”) that employers may face in response to various COVID-19 scenarios as it relates to FMLA.

The following is a high-level summary of the guidance issued and is intended provide employers with information to assist in determining whether an employee is eligible to take FMLA for an absence related to COVID-19.

Q1. [Is an employee who has become infected with COVID-19 entitled to job-protected leave under FMLA?](#)

It depends. The FMLA requires that an employer permit an “eligible employee” to take up to 12 weeks of unpaid, job-protected leave due to the employee’s own “serious health condition” or to care for an immediate family member who has a “serious health condition.”

A “serious health condition” is an illness, impairment, or physical or mental condition that involves (1) inpatient care in a hospital, hospice, or residential medical care facility or (2) continuing treatment by a health care provider. By analogy, this may include the flu where complications arise that create a serious medical condition, as defined under the FMLA.

An “eligible employee” is defined as one who (a) has worked for a covered employer for at least 12 months (not necessarily consecutively), (b) has been employed for at least 1,250 hours during the 12-month period immediately preceding the start of the leave, and (3) works at a location where at least 50 employees are employed by the employer within 75 miles.

An employee on FMLA leave is eligible to continue health benefits on the same terms and conditions as if the employee had continued to work.

Generally, sickness due to a virus, without complications that trigger a serious health condition, does not qualify as FMLA leave. DOL guidance notes that employees who are ill with COVID-19 or have a family member with the virus are urged to stay home to minimize the spread of the disease. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees if an employee is not otherwise eligible for FMLA.

[Q2. If an employee requests time off work to avoid exposure to COVID-19, will the time off qualify for job-protected leave under the FMLA?](#)

No. Leave taken by an employee to avoid exposure would not qualify as protected leave under FMLA. FMLA provides protection to eligible employees who are incapacitated by a serious health condition or who are caring for an immediate family member incapacitated by a serious health condition.

[Q3. Is an employee entitled to job-protected leave under the FMLA to care for healthy children who have been dismissed from school?](#)

No. Federal laws do not require that employers provide job-protected leave to employees who take time off work to care for healthy children who have been dismissed from school or daycare.

Nevertheless, the DOL is encouraging employers to “review their leave policies to consider providing increasing flexibility to their employees and their families” “given the potential for significant illness under some pandemic influenza scenarios.”

[Q4. Is an employer required to provide paid sick leave to employees who are absent from work because they are sick with COVID-19, have been exposed to someone with COVID-19, or are caring for a family member who is sick with COVID-19?](#)

It depends. FMLA leave is unpaid leave. An employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer wouldn't normally provide paid leave.

However, when leave qualifies under the FMLA, an employee may elect, or an employer may require the employee, to substitute accrued paid vacation leave, personal leave, or family leave for any part of the unpaid FMLA leave.

Employers should also evaluate whether employees with COVID-19 qualify for paid leave. Arizona, California, Connecticut, Washington D.C., Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington have different forms of paid leave laws (sick, family, and/or medical). In addition, paid leave may be available under a city law, employer policies, collective bargaining agreements, etc.

[Q5. May an employer require an employee who is out sick with COVID-19 to provide medical certification before they are permitted to return to work?](#)

Yes. During a pandemic health crisis, the American with Disabilities Act (“ADA”), permits employers to require an employee who is out sick 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. Specifically, the ADA provides “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.”

As a reminder, employers are allowed to contact the employee’s health care provider directly for the purposes of authenticating and clarifying the medical certification when it relates to a qualified leave under FMLA. Such contact must be made using a healthcare provider, a human resource professional, a leave administrator or some other management official of the employer. However, “under no circumstances” may an employee’s “direct supervisor” contact the healthcare provider. It is the employee’s responsibility either to provide a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization – such as that required by HIPAA – in order for the health care provider to release information to the employer.

Employers are required to notify employees in advance if the employer will require a fitness for duty certification to return to work. If state or local law or terms of a collective bargaining agreement govern an employee’s return to work, those provisions should be applied.

The DOL, however, cautions employers to keep in mind that health care providers may be overwhelmed, making it difficult for employees to schedule appointments with medical professionals to obtain the certification that the employee is well and no longer contagious.

[Q6: How does FMLA affect full-time employee status under the Affordable Care Act?](#)

Under the look back measurement method, there is an averaging method. The applicable large employer determines the average hours of service per week for the employee during the measurement period excluding special unpaid leave period and uses that average as the average for the entire measurement period. Alternatively, the employer may choose to treat employees as credited with hours of service for special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not special unpaid leave.

There are no special rules under the monthly measurement method.

[Q7: Will the federal government expand FMLA to provide additional protections related to COVID-19?](#)

The House of Representatives introduced and passed legislation that, if enacted as written, would extend FMLA protections in limited circumstances related to COVID-19. H.R. 6201, “Families First Coronavirus Response Act” would extend up to 12-week of FMLA leave to employees of employers with fewer than 500 employees, who have been on the job for at least 30 days, for any of the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of COVID-19;
- To care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of COVID-19; and
- To care for a child of an employee if the child’s school or place of care has been closed, or the child-care provider is unavailable, due to a COVID-19.

Notably, the Act creates a paid leave component, requiring employers to provide a paid leave benefit after 14 days.

As of publication of this article, the legislation has only been passed in the House. It is not law. Further developments are expected. USI is monitoring this legislation and will provide further updates.

EMPLOYER ACTION

- Employers should ensure that they comply with applicable state and federal laws, including FMLA.
- If more generous than applicable law, employers can change their paid leave policies. However, note that this will not affect benefit continuation.

RESOURCES

- For the FAQs, visit: <https://www.dol.gov/agencies/whd/fmla/pandemic>
- For more information on the DOL guidance for preparing your workplace for COVID-19:
 - OSHA Guidance on Preparing Workplaces for COVID-19, <https://www.osha.gov/Publications/OSHA3990.pdf>
 - Wage Hour and Division Guidance on COVID-19 and FMLA Questions and Answers, <https://www.dol.gov/agencies/whd/fmla/pandemic>

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