

COVID-19  
UPDATED EMPLOYMENT RELATED FAQS

Prepared by Marc A. Fishel  
Fishel Downey Albrecht Riepenhoff, LLP  
March 30, 2020

The following questions and answers represent the most significant issues relating to employment presented by the COVID-19 pandemic for public employers, including the Families First Coronavirus Response Act. These questions and answers are based on available information on March 30, 2020 and include guidance provided by the Department of Labor on March 29, 2020. It is likely there will be more questions and some of the answers could change as we get more information from the State and Federal government. The Department of Labor is expected to issue regulations concerning the FFCRA by March 30-31.

This document is designed to provide general guidance to counties. The answers to these questions depend on specific factual scenarios. Counties are advised to consult with legal counsel as these issues arise.

The first section of this document contains new questions and answers. The second section contains updated answers to the FAQs dated March 26, 2020 with specific reference to those questions by numbering used in the March 26, 2020 FAQ document.

**NEW FAQs**

**1. How do I determine the number of hours worked by part-time employees?**

Answer: Part-time employees are entitled to the number of hours they normally are scheduled to work. If that number cannot be determined, employers should use the average hours worked in the previous six months. If the employee has not been employed for six months, the Dept. of Labor states the number of hours should be agreed upon by the employer and the employee.

**2. Can an employee take 80 hours of sick leave because they are quarantined and take another 80 hours for as different reason under the FFCRA?**

Answer: No. The total number of emergency sick leave hours under the FFCRA is capped at 80 hours. Depending on the employee's circumstances, either traditional FMLA or expanded FMLA may be available after using the 80 hours of sick leave.

**3. Is all FMLA leave required to be paid?**

Answer: No. The FFCRA only requires extended FMLA leave taken due to the unavailability of school or childcare is paid. Pay for this FMLA leave is at two-thirds the employee's regular rate. Traditional FMLA leave is without pay unless employees are permitted/required to use accrued but unused sick leave, vacation leave, etc. concurrent with FMLA leave.

**4. Are the emergency sick leave provisions of the FFCRA retroactive?**

Answer: No. Any leave granted or taken for COVID-19 related reasons prior to April 1, 2020 cannot be deducted from the emergency sick leave provided by the FFCRA.

**5. Can I require medical documentation from an employee who is not working due to an underlying health condition making them more vulnerable to COVID-19?**

Answer: Yes. An employer may require an employee to provide sufficient evidence of such a health condition under these circumstances.

**6. Can I prohibit employees over 65 years old or those I know have an underlying health condition from working during the COVID-19 pandemic?**

Answer: No. Employees in these categories cannot be forced to stay home but can be sent home if they exhibit symptoms of COVID-19.

**7. Can an employee take leave due to unavailability of school after the date school normally would end for the year?**

Answer: No. Leave under the FFCRA for this reason is only available if an employee is unable to work or telework due to the unavailability of school or childcare for COVID-19 related reasons. Of course, the absence of childcare could result in leave continuing even after the date school is scheduled to end.

**8. Can an employer layoff or furlough an employee while they are taking emergency sick leave, extended FMLA leave under the FFCRA or traditional FMLA?**

Answer: Yes. If there is a lack of work or lack of funds justifying a layoff or furlough, the employee may be laid off even if they are on leave.

**9. Who is a child for purposes of the FFCRA?**

Answer: Under the FFCRA, a child is the employee's own child, which includes biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. Keep in mind, the employee's presence also must be reasonably necessary.

**10. What is a full-time employee under the FFCRA?**

Answer: A full-time employee is someone who works 40 hours per week. Counties may have employees who work less than 40 hours per week who they consider full-time. For purposes of the FFCRA, an employee working less than 40 hours per week should be considered a part-time employee.

**11. Can health care providers and emergency responders be given leave under the FFCRA?**

Answer: Yes. While the law does not require employers to provide emergency sick leave or extended FMLA leave, employers may provide such benefits. Some employers are considering offering these employees 80 hours of emergency sick leave if they become sick or quarantined due to COVID-19 reason but not for other purposes. Again, this is not required by the FFCRA.

**12. Is an employee entitled to leave under the FFCRA if a developmentally disabled adult child's day care program or provider is closed?**

Answer: No. The law does not provide leave for this purpose.

UPDATED FAQs FROM MARCH 26, 2020

**8. Can FMLA leave available under the FFCRA be taken on an intermittent basis?**

Answer: Generally, under traditional FMLA leave intermittent leave is available if it is medically necessary. According to DOL guidance, intermittent leave is only available pursuant to the FFCRA if the Employer wants to allow it. In general, Employers should be careful about authorizing intermittent leave although some exceptions may be warranted. Each situation should be considered based on the specific facts. In some cases, it may be beneficial to the Employer and employee to allow intermittent leave when an employee is absent due to unavailability of school or childcare due to the COVID-19 pandemic. For example, employees who need to be home with a child under 18 years old may be able to work for specific periods but less than a full day either in the office or teleworking. In these situations, intermittent leave may be feasible for the Employer and the employee. If such intermittent leave is permitted, Employers should make sure there is a specific schedule when the employee will work and a requirement to call in if they are unable to work the assigned hours.

**13. Is the FMLA leave provided by the FFCRA in addition to the 12 weeks of FMLA available for other statutory reasons (Serious health condition of employee or immediate family member, birth, adoption or foster placement or certain qualifying military exigencies)?**

Answer: No. The guidance issued by the DOL on March 29, 2020 makes it clear that the expanded FMLA under the FFCRA is not in addition to traditional FMLA. This means any leave taken in the applicable 12 month period for other FMLA reasons can be deducted from the 12 week allotment provided for by the FFCRA with one proviso; an employee who has used all 12 weeks of FMLA leave prior to April 1, 2020 should still be allowed the first two weeks of emergency sick leave under the FFCRA. Similarly, an employee who uses all or some of the FMLA provided by the FFCRA should have that leave deducted from their entitlement to FMLA leave during the remainder of the 12 month period.

It is important for Employers to make this point clear in its FFCRA policies. Employees should be put on notice that they **may** be entitled to up to an additional 12 weeks of leave for COVID-19

related reasons. In addition, the policy should state that any FMLA leave taken for COVID-19 purposes will be deducted from an employee's FMLA allotment during the applicable 12 month period.

#### **14. Who are health care providers under the FFCRA?**

Answer: The law does not define health care provider. It is important to keep in mind the purpose for this exemption. A policy decision was made by Congress that these types of employees are crucial for the response to COVID-19. At a minimum, employees providing direct care in a County nursing home would be considered health care providers and exempt from the leave provisions under the FFCRA. In its March 29, 2020 guidance, the states a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, 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 any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.

#### **15. Who are emergency responders under the FFCRA?**

Answer: Again, this group of employees is not defined. Clearly, this category includes sworn law enforcement officers, dispatchers, firefighters and EMT/paramedics. Realistically, the group should include corrections officers. The list likely encompasses probation officers as well. The DOL guidelines issued on March 29, 2020 provide an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The DOL recommends Employers be careful using this definition to avoid inadvertently including too many employees and exacerbating the spread of the virus.

Employers need to consider other possible, but less traditional emergency responders, for purposes of the Act. For example, it is possible that case workers within children's services could be considered emergency responders as well as caseworkers processing emergency or ongoing benefits in a County DJFS.

**19. Will public employers receive a tax credit for payments made for sick leave and FMLA leave under the FCCRA?**

Answer: No. Although the tax credits do not apply, the caps in the Act are applicable. Employees are entitled to no more than \$511 per day for the first 80 hours of sick leave if at full pay with a total cap of \$5,110 for the 10 days. The two-thirds pay cap is \$200 per day with a maximum payment of \$2,000 for the first two weeks. The \$200 per day cap applies to the additional 10 weeks of FMLA leave with a total cap of \$10,000.

Please note- this is a clarification from the previous list of FAQs and there was a typographical error in the prior version. There are no substantive changes.