

Summary of Family and Medical Leave Act FAQs Regarding COVID-19 and Other Public Health Emergencies

As discussed in our *Act Now* Advisory entitled “[Department of Labor Issues OSHA, Wage/Hour, and FMLA Guidance Addressing COVID-19](#),” the U.S. Department of Labor’s Wage and Hour Division published questions and answers (“FAQs”) providing information on [common issues](#) that employers and employees face when responding to the 2019 novel coronavirus (“COVID-19”), including job-protected leave under the Family and Medical Leave Act (“FMLA”). Below is a detailed review of the [FMLA FAQs](#).

Please be aware that the following guidance may be subject to change as a result of federal legislation to amend the FMLA (“Bill”), as detailed in our recent [Advisory](#). The most significant changes contemplated by the Bill would apply to private employers with fewer than 500 employees to provide expanded FMLA benefits and paid leave in specific emergency circumstances.

FMLA Applicability

The FMLA is applicable to covered employees who:

- have worked for their employer for at least 12 months,
- have at least 1,250 hours of service over the previous 12 months, and
- work at a location where at least 50 employees are employed by the employer within 75 miles.

Reasons for FMLA Leave

The FMLA protects eligible employees who are incapacitated by a serious health condition, which may include the flu or COVID-19, or who need to care for a family member who is incapacitated by a serious health condition. The FMLA does not apply to leave taken by an employee for the purpose of avoiding exposure to the flu or COVID-19, and, thus, such absences are not protected by the FMLA.

Granting Leave for Parents and Caregivers

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. In addition, employers should also consider applicable state and local laws, which may require that employers provide an amount of leave for such purposes.

Paid Leave

Although proposals for federal paid leave have been raised, federal law generally does not require employers to provide **paid leave** to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu, or are caring for someone with the flu. Certain state or local laws, such as the New York Paid Sick Leave law, may have different requirements, which should be independently considered by employers when determining their obligation to provide paid sick leave.

Employers are allowed to require, or employees to elect, the substitution of paid sick and paid vacation/personal leave in some circumstances. As noted earlier, employers should consider the applicability of state and local laws.

Sending Employees Home from Work

Employers can implement a plan or policy to send employees home if they exhibit symptoms of pandemic influenza or COVID-19, and require them to remain symptom-free for a specified period before returning to work.

Requiring Doctor's Notes or Medical Examinations

Under the Americans with Disabilities Act ("ADA"), an employer is permitted to require a doctor's note or medical examination before it allows an employee to return to work during a pandemic health crisis. In addition, for those employees who are on FMLA leave, an employer can require a [fitness-for-duty certification](#) in order to return to work, provided that the employee was notified of such requirement at the time leave was granted. Employers, however, should consider that during a pandemic, health care resources may be overwhelmed, making it difficult for employees to get appointments to verify that they are no longer contagious or to provide a fitness for duty. The [Centers for Disease Control and Prevention](#), for example, has also recommended that employers not require a doctor's note.

If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions will be applied.

Preventing Abuse of Leave

Both the FMLA and the ADA affect the provision of leave.

Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave **when the need is foreseeable** and such notice is practicable. In addition, employers may require employees to provide:

- medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic re-certification;
- second or third medical opinions (at the employer's expense);
- periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
- consistent with a uniformly applied policy or practice for similarly situated employees, a fitness-for-duty certification.

Employers should anticipate difficulties and remain flexible in implementing any of the aforementioned requirements given the current state of affairs.

- Under the ADA, qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer's sick leave policies as "reasonable accommodations." This may include modifications to jobs, work environments, or policies that enable employees with disabilities to perform the essential functions of their jobs and have equal opportunities.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

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