

Resource Packet
COVID-19 FQHC Employment Issues/Human Resource Guidance

Health centers are serving on the frontline, providing critical health care services in communities dealing with the coronavirus and COVID-19. This packet contains guidance on emerging and immediate **human resource/employment questions** relevant to federally qualified health centers (FQHCs) across the country.

The enclosed guidance is current as of the issuance date and may require revisions as circumstances evolve in our rapidly changing operating environment.

Enclosed:

1. Frequently Asked Questions (see attached FAQs, starts page 2) regarding **Emergency Paid Sick Leave and Emergency Family Leave** (as currently interpreted from the “Families First Coronavirus Response Act”)

2. High level overview (see attached MEMO, starts page 15) from Feldesman, Tucker, Leifer, Lidell, expert legal consultants, regarding:
 - a. What are an employer’s considerations in a situation in which an employee who is not symptomatic and has not been exposed to COVID-19 is asking to self-quarantine?
 - b. What are an employer’s options regarding layoffs vs. furloughs?
 - c. May an employer use its normal leave policy for self-quarantine measures?
 - d. What is the background and initial interpretation regarding the paid leave provisions in the recently enacted Families First Coronavirus Response Act?

Health centers are responsible for determining appropriate, tailored operations suitable for their organization, staff, patients and community. Health centers should refer to applicable State, Local, and Organizational regulations in consultation with local general counsel.

Additional Human Resources Guidance can be found at:

The Society for Human Resource Management (SHRM) Coronavirus website

<https://www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx>

Additional COVID-19 information and resources can be found at:

HRSA COVID-19 Frequently Asked Questions (FAQ) – <https://bphc.hrsa.gov/emergency-response/coronavirus-frequently-asked-questions.html>

NACHC’s Coronavirus webpage - information, event postings and resources for health centers
<http://www.nachc.org/coronavirus/> or email preparedness@nachc.org

For inquiries about this document, contact trainings@nachc.org



**Emergency Paid Sick Leave and Emergency Family Leave
in response to COVID-19
*as established in the “Families First Coronavirus Response Act”***

**Overview
Summary Chart
Q&As**

Current as of 3/25/2020

Important: *The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, and goes into effect on April 1, 2020. At this time, we are waiting for the Department of Labor to issue regulations fleshing out many details related to the law; in addition, Congress is currently debating potential changes to the FFCRA. These FAQs reflect the information available on March 25, 2020 and will be updated as new information becomes*

Please contact Colleen Meiman at cmeiman@nachc.org with questions.



**Emergency Paid Sick Leave and Emergency Family Medical Leave
in response to COVID-19
*as established in the “Families First Coronavirus Response Act”***

OVERVIEW

Current as of 3/25/2020

- The Families First Coronavirus Response Act (FFCRA), signed into law on March 18, created two new types of paid leave for workers impacted by COVID-19: Emergency Paid Sick Leave and Emergency Family and Medical Leave.
- In general, all employers with fewer than 500 employees are required to make these types of leave available to their employees.
- While **employers are required pay their employees for these types of leave, they are eligible for reimbursement up to the maximum amount allowable for each employee.** Reimbursement will be made **in the form of refundable tax credits on the employer share of Social Security payroll taxes.**
 - NACHC is currently researching the time lag between when a health center would need to pay an employee for mandatory leave, and when they would receive the financial benefit of the refundable tax credits.
- There are caps on both:
 - How many days of each type of leave an employee can take, and
 - How much an employee can be paid per day.

Specifically:

- Emergency Paid Sick Leave: Employees can take up to 10 days of Emergency Paid Sick Leave. If they are sick or under quarantine themselves, the maximum daily payment is \$511; if they are caring for a family member, the maximum daily payment is \$200.
- Emergency Family Leave: Employees can take up to 12 weeks of Emergency Family Leave – but only if they are caring for a child whose school or childcare is closed, and they are unable to telework. The first two weeks are unpaid, and the maximum daily payment is \$200 for the remaining 10 weeks.

Mandatory Paid Leave Under Families First Coronavirus Response Act
Current as of 3/25/2020

		Emergency Paid Sick Leave	Emergency Family Medical Leave	
Which EMPLOYERS must offer this leave		All employers with fewer than 500 employees		
Which EMPLOYEES are eligible:		Employees who are <i>sick or under quarantine themselves</i>	Employees who are <i>caring for a family member or child</i> who is sick, quarantined, or whose school/ childcare is closed	Employees who have a <i>child under 18</i> whose school or childcare is closed AND who are unable to telework.
	Minimum tenure to be eligible	No minimum	No minimum	30 days
MAXIMUM days and dollar amounts (that employers must provide and the Federal government will reimburse)				
	Maximum number of days	10 days (for a full-time FTE)	10 days (for a full-time FTE)	12 weeks
	Maximum amount per day	The lesser of \$511 or the employee's regular daily rate	The lesser of \$200 or two-thirds of the employee's daily rate	The first 10 days may be unpaid (or employee may choose to use other types of leave.) For the remaining 50 days, maximum is the lesser of \$200 or two-thirds of the employee's daily rate
	Maximum Total Amount	\$5,110	\$2,000	\$10,000
Potential EXCEPTIONS				
	Employers	US Dept. of Labor may exempt some employers with less than 50 FTE		
	Health care employees	Employers can choose to deny emergency sick leave to health care employees (but not other employees).	Both employers and the US Dept of Labor can choose to deny this FML to health care employees.	
How employers get REIMBURSED		Employers receive a refundable tax credit equal to 100% of the eligible leave costs described above. The tax credit is applied against an employer's total portion of Social Security taxes for the period, and is refundable.		



**Emergency Paid Sick Leave and Emergency Family Leave
in response to COVID-19
as established in the “Families First Coronavirus Response Act”**

FAQs

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EMPLOYERS TO WHOM FFCRA APPLIES

1. Which employers are required to provide Emergency Leave, as established under FFCRA, to eligible employees?

FFCRA applies to all private employers with fewer than 500 employees, and all public employers, with some potential exceptions for employers with less than 50 employees. (See following question.) FFCRA contains no requirements for employers with more than 500 employees.

2. Our health center/PCA/HCCN has less than 50 FTE. Could we be exempted from the FFCRA requirements?

Employers with less than 50 employees will be eligible to apply for an exception for most, but not all, FFCRA Emergency Leave requirements. The statute states that “when the imposition of such requirements would jeopardize the viability of the business as a going concern”, the Secretary of Labor may exempt these employers from the requirements to provide:

- Emergency Family Medical Leave
- Emergency Paid Sick Leave for individuals who are not sick or quarantined themselves, but whose child’s school or childcare is closed due to COVID-19 precautions.

However, DOL may not exempt any employers – regardless of size -- from the requirement to pay Emergency Paid Sick Leave for employees who are sick or quarantined themselves.

The Department of Labor (DOL) has stated that it will outline the criteria and process for applying for this exemption in the forthcoming regulation.

3. How should we count our staff to determine if we fall above the 500-employee or below the 50-employee threshold?

The [Department of Labor FAQs](#), published on March 25, provide guidance on how to count employees for purposes of FFCRA eligibility. (See FAQ #2.)

4. We have read that health care providers may be exempted from certain FFCRA requirements and protections. Do those exemptions apply to organizations, or to individual employees?

The potential exemptions for “health care providers” apply to individual employees, not organizations¹. Specifically, a health care organization with less than 500 employees may choose to deny FFCRA Emergency Leave to its clinicians; however, it may not deny Emergency Leave to its non-clinical staff.

¹ For example, Section 5102(a), which discusses Emergency Paid Sick Leave, reads: “an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.”

EFFECTIVE DATE & RETROACTIVITY

5. When do FFCRA requirements to provide Emergency Leave go into effect?

On March 25, the [Department of Labor announced](#) that the new requirements would become effective on April 1, 2020. FFCRA will apply to leave taken between April 1, 2020, and December 31, 2020.

6. Can employees receive Emergency Leave under FFCRA for leave taken prior to April 1, 2020?

No. On March 25, the [Department of Labor announced](#) that the Emergency Leave provisions do not apply retroactively.

TYPES OF EMERGENCY LEAVE UNDER FFCRA

7. What types of emergency leave are created under FFCRA?

FFCRA created the following types of emergency leave in response to the COVID-19 pandemic:

- Emergency Paid Sick Leave: Employees can take up to 10 days of Emergency Paid Sick Leave. Within EPSL, there are two categories:
 - ***For employees who are sick or quarantined themselves.*** For these individuals, the maximum daily payment is \$511.
 - ***For employees who are healthy but caring for a family member.*** For these individuals, the maximum daily payment is \$200.
- Emergency Family Leave: Employees can take up to 12 weeks of Emergency Family Leave – but only if they are caring for a child under age 18 whose school or childcare is closed, and they are unable to telework. The Federal government pays nothing (through the employer) for the first two weeks; for the remaining 10 weeks, the maximum payment is \$200 per day. (Total \$10,000.)

Details on both leave types are provided below.

PAYMENT FOR FFCRA EMERGENCY LEAVE

8. Who pays eligible employees directly for their Emergency Leave?

FFCRA requires employers to pay their eligible employees for the Emergency Leave they take, up to the maximum amount allowed under the law. However, employers will be

reimbursed for these expenses in the form of refundable tax credits on the Social Security payroll taxes.

9. Who ultimately “foots the bill” for Emergency Leave mandated under FFCRA?

Ultimately, the Federal government will pay the full cost of both Emergency Paid Sick Leave and Emergency Family Medical Leave. While employers are required to pay employees “upfront” for their Emergency Leave, once they calculate the amount of spent on FFCRA-mandated Emergency Leave, they can offset the company's FICA taxes when they submit their payroll taxes.

EMERGENCY PAID SICK LEAVE

10. We have heard that there are two types of Emergency Paid Sick Leave under FFCRA.

What are they?

There are different rules for FFCRA Emergency Paid Sick Leave depending on why the employee is unable to work. FFCRA divides employees taking this Emergency Paid Sick Leave into two categories:

- Employees who take Emergency Paid Sick Leave because they:
 - are subject to a state, local or federal quarantine, or
 - have been advised by a health care provider to self-quarantine; or
 - are experiencing symptoms of COVID-19 and seeking a medical diagnosis

- Employees who taking paid Emergency Paid Sick Leave to:
 - care for an individual subject to a federal, state or local quarantine or isolation;
 - care for a child whose school/place of care is closed or whose care provider is unavailable; or
 - deal with a "substantially similar condition" (to be defined by the Department of Labor.)

For ease of reference, these FAQs refer to the first group as “sick or quarantined employees” and second group as “employees with family responsibilities.”

11. How many days of Emergency Paid Sick Leave can a full-time employee receive?

All eligible employees can receive up to ten days of Emergency Paid Sick Leave, regardless of whether they fall in the “sick or quarantined” category or the “family responsibilities” category.

12. How much does an employee receive per day of Emergency Paid Sick Leave?

It depends on which category the employee is in. Specifically:

- “Sick or quarantined” employees receive the lesser of \$511 or their regular daily rate.
- “Family responsibilities” employees receive the lesser of \$200 or two-thirds of their daily rate.

Since employees are eligible for a maximum of ten days of Emergency Paid Sick Leave, the maximum payment is \$5,110 for “sick or quarantined” employees (\$511 x 10), and \$2,000 for “family responsibilities” employees (\$200 x 10.)

13. How should we calculate the “daily rate” for hourly employees?

For hourly employees, their daily rate should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave.

14. How should we calculate the “daily rate” for part-time employees?

For a part-time employee, the daily rate should reflect the number of hours that the employee works on average in a two-week period.

15. Can an employee receive take 10 days of Emergency Paid Sick Leave for “family responsibilities”, and later take an additional 10 days if they become sick or quarantined themselves?

No. Each employee is entitled to no more than 10 days of Emergency Paid Sick Leave, regardless of the circumstances. For more information, see #9 in the [Department of Labor FAQs](#), published on March 25.

16. Can an employer require an employee to take earned sick leave before taking FFCRA Emergency Paid Sick Leave?

No. FFCRA explicitly prohibits an employer from requiring an employee to use the paid leave provided as a benefit by the employer before using Emergency Paid Sick Leave provided under FFCRA.

17. If an employee took regular paid sick leave for COVID-related reasons prior to April 1, 2020, can the employer deny him Emergency Paid Sick Leave?

No. For more information, see #11 in the [Department of Labor FAQs](#), published on March 25.

18. How long must an employee have worked for us to be eligible for Emergency Paid Sick Leave?

There is no minimum tenure for employees to be eligible for Emergency Paid Sick Leave. For more information, see #14 in the [Department of Labor FAQs](#), published on March 25.

EMERGENCY FAMILY LEAVE

19. FFCRA expanded the Family and Medical Leave Act of 1993. Is the new FFCRA leave structured similarly to FMLA leave?

There are key differences between traditional FMLA and FFCRA’s “Emergency Family Leave”. These include, but are not limited to:

- Which employers must offer it: While the Family and Medical Leave Act of 1993 applies to employers with 50 or more FTE, the FFCRA requirement to provide EFML applies to all employers with 500 FTE or fewer. However, as discussed in the FAQ below, the Department of Labor may choose to exempt employers with less than 50 FTEs.
- Federal government reimburses employers up to capped amount. There is no Federal reimbursement for traditional FMLA leave.
- Applies only to family leave for a minor -- not medical leave for an employee or family member. Employees are eligible for emergency “Family and Medical Leave” only when they:
 - Have a child under age 18 whose school or childcare is closed due to COVID -19
AND
 - Are unable to telework.

Because this type of FFCRA leave does not cover medical issues (of either the employee or a family member), it may be helpful to think of it simply as “Emergency Family Leave”, without referencing “medical leave.”

20. Did FFCRA expand family leave, medical leave, or both?

FFCRA expanded *only family leave* -- and only for employees who:

- have a child under age 18 whose school or childcare is closed due to COVID -19
AND
- are unable to telework.

So unlike FMLA, this leave is not available for employees:

- To care for a child or other family member over age 18
- For medical reasons of the employee or a family member.

Because this type of FFCRA leave does not cover medical issues (of either the employee or a family member), it may be helpful to think of it simply as “Emergency Family Leave”, without referencing “medical leave.”

21. What’s the difference between “medical leave” and “paid sick days”?

“Medical leave” is a term used in the FMLA to refer to extended (unpaid) leave to deal with a personal health issue, or a health issue of a family member. FMLA grants 12 weeks of medical leave to qualifying individuals. “Paid sick days” generally refers to a shorter period of time, during which an employee is paid.

FFCRA provided for 10 days of Emergency Paid Sick Leave, but no extended “medical leave” in the FMLA sense.

22. How many days of Emergency Family Leave are allowed under FFCRA?

FFCRA allows for 12 weeks of Emergency Family Leave.

23. Will employees be paid while on Emergency Family Leave? If so, how much can they receive?

The Federal will provide no payment for the first 10 days of an employee's Emergency Family Leave. (However, as discussed below, the employee may choose to use other forms of paid leave during this time.) For the remaining 50 days, the maximum amount that the employee may receive is the lesser of \$200 or two-thirds of the employee's daily rate.

24. If an employee is eligible for Emergency Family Leave, must they go without pay for the first ten days? Or can they use other forms of leave to receive payment for those days?

As noted above, the FFCRA does not provide for payment for employees for their first ten days of EFML. However, employees have the option to use any other leave for which they are eligible – including paid sick leave under FFCRA, or paid vacation leave, personal leave, or sick leave that they have accrued with their employer – for any or all of those first ten days.

25. Can an employer require an employee to take their earned leave before taking FFCRA Emergency Family Leave?

Unlike with Emergency Paid Sick Leave, FFCRA does not explicitly prohibit employers from requiring employees to use their earned leave prior to using FFCRA Emergency Family Leave.

26. How long must an employee have worked for us to be eligible for Emergency Family Leave?

An employee must have worked for the employer for at least 30 days to be eligible for Emergency Family Leave. (This is another difference from traditional FMLA, which requires a minimum 12-month tenure.)

27. Our health center/ PCA/ HCCN has less than 50 employees, so we are exempt from the Family Medical Leave Act of 1993. Are we required to provide Emergency Family Medical Leave under FFCRA?

At present, yes. While the Family and Medical Leave Act of 1993 applied to employers with 50 or more FTE, the FFCRA requirement to provide EFML applies to all employers with 500 FTE or fewer.

However, it is important to note that when the U.S. Department of Labor publishes FFCRA regulations (expected not later than April 2, 2020), it may choose to exempt employers with less than 50 employees from the requirement to offer EFML “when the imposition of such requirements would jeopardize the viability of the business as a going concern”:

MISCELLANEOUS

28. How do we determine the “regular rate of pay” for employees, including those who work part-time or overtime, etc.?

See questions #5, #6, and #8 in the [Department of Labor FAQs](#), published on March 25.

29. What type of documentation are employees required to submit to demonstrate that they are eligible for Emergency Leave?

This information has not yet been specified. It will likely be outlined in the regulations that the Department of Labor is expected to publish not later than April 2, 2020.

30. Does FFCRA contain anti-discrimination protections for employees?

Yes. Employers are prohibited from discharging, disciplining, or discriminating against employees who take FFCRA Emergency Leave, or who file a complaint or proceeding related to the benefits and protections provided by the Act. Employers who violate these requirements shall be subject to civil penalties under the FLSA.

31. We have read that FFCRA could allow the Federal government to force health care providers to work, even when they are sick. Is this true?

No. Unfortunately, there has been some confusion in the press (such as [this article](#)) leading to unfounded fears that the Federal government could force health care providers to work while they are sick. Here are the two ways in which the law treats individual health care providers differently from other employees:

- Emergency Paid Sick Leave (EPSL):
 - Employers with less than 500 employees are given the option – but are not required – to deny Emergency Paid Sick Leave to their health care employees.
 - The US Secretary of Labor is not authorized to deny Emergency Paid Sick Leave to health care employees.
- Emergency Family Leave:
 - Both the US Secretary of Labor² and employers with less than 500 employees have the option to deny Emergency Family Leave to health providers and emergency responders.
 - Note that Emergency Family Leave is not for when the employee is sick; rather, it is available only when an employee has a child under age 18 at home whose school or childcare is closed due to COVID-19 and is unable to telework. So, while healthcare workers could be denied emergency FMLA that other workers can receive, ***these provisions would never force health care workers to go to work while sick or exposed.***

Finally, note that the two types of Emergency Leave created under FFCRA only apply to employers with under 500 employees. So these provisions will have no direct impact on large hospitals and health systems, whose staffs are above 500 persons.

² Section 110(a)(3) of FFCRA reads in reference to Emergency Family Leave: “(3) REGULATORY AUTHORITIES.— The Secretary of Labor shall have the authority to issue regulations for good cause to...

“(A) to exclude certain health care providers and emergency responders from the definition of eligible employee”

32. Where can we get more information on Emergency Leave under FFCRA?

On March 25, the Department of Labor issued two Fact Sheets on FFCRA Emergency Leave:

- [Fact Sheet for Employees](#)
- [Fact Sheet for Employers](#)

MEMORANDUM

TO: Gina Capra
Vice President, Training and Technical Assistance
National Association of Community Health Centers (NACHC)

FROM: Marcie Zakheim, Partner
Molly Evans, Partner
Noori Ali, Associate

DATE: March 25, 2020

RE: COVID-19: FQHC Employment Issues

This memorandum responds to your request for information regarding employment considerations for employers during the 2019 novel coronavirus (“COVID-19”) pandemic. Specifically, you requested information on the following:

1. What are an employer’s considerations in a situation in which an employee who is not symptomatic and has not been exposed to COVID-19 is asking to self-quarantine?
2. What are an employer’s options regarding layoffs vs. furloughs?
3. May an employer use its normal leave policy for self-quarantine measures?

Additionally you requested information regarding the paid leave provisions in the recently enacted Families First Coronavirus Response Act. This memorandum summarizes the legal background by which the questions above can be assessed (including the new paid leave provisions in the Families First Coronavirus Response Act) as well as the specific questions posed.

I. EXECUTIVE SUMMARY

In short, employers must carefully review federal and state requirements as well as employment contracts and collective bargaining agreements prior to making determinations relating to employee leave policies. Decisions regarding employee leave are often fact-specific and depend on the unique circumstances of each employer and employee.

To ensure a safe work environment, employers should first take steps to keep the workplace clean and sanitized, and train staff on best practices for hygiene. Employers should also ensure that all employees who are sick, immunocompromised, or otherwise eligible for leave under federal and state law are accommodated. As the COVID-19 pandemic situation develops, employers should constantly reassess the need to move to remote telework or temporary halt operations to ensure employee safety.

If the need to halt operations altogether arises, employers should utilize existing leave policies to the extent that they are compliant with new emergency policies mandated under the Families First Coronavirus Response Act. Finally, when making difficult decisions regarding the need to furlough or layoff employees, employers should carefully consider all relevant factors including financial need, ability/ desire to recall employees at a later date, and impact on customer base.

A detailed review and analysis of federal and state labor and employment guidance for employers follows below.

II. LEGAL BACKGROUND

With the onset of the COVID-19 pandemic, employers must develop policies and procedures to adequately protect employees from harm while managing day-to-day operations. Major considerations for employers include ensuring a safe and hygienic workplace for able-bodied employees and leave policies for employees who are sick and/or have been exposed to individuals with COVID-19 or are otherwise unable to come to work. Prior to forming policies and procedures regarding COVID-19, employers should review relevant federal, state, and local laws as well as its employment contracts and union contracts to determine applicable requirements.

The Fair Labor Standards Act (“FLSA”)

The FLSA is the federal law that sets forth requirements for minimum wage and hours of work in the United States.³ Employers must consult the FLSA when making determinations regarding salaries and wages provided to employees during the COVID-19 pandemic.

The FLSA makes a distinction between exempt salaried employees and non-exempt hourly employees.⁴ As a general rule, the statute requires that exempt salaried employees must receive a set weekly salary for any work performed during a workweek.⁵ Conversely, employers are only required to pay non-exempt hourly employees for actual hours worked absent a company policy to the contrary.⁶

It is important to note that many states and local governments have enacted labor laws that may differ from the federal FLSA. Employers should contact an attorney if they have any questions or concerns regarding their obligations under these laws.

³ Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17a_overview.pdf (last visited Mar 19, 2020).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

The Family and Medical Leave Act (“FMLA”)

The FMLA provides that covered employees may take up to 12-weeks of unpaid leave, with guaranteed job reinstatement, due to a serious health condition or to care for a family member with a serious health condition.⁷ Covered employees include individuals who have worked for an employer for at least 12 months and completed at least 1,250 hours of work.⁸ The FMLA covers all employers who have employed 50+ workers for at least 20 weeks of the current or prior year.⁹ COVID-19 would likely qualify as a serious health condition under FMLA, allowing a covered employee working for a covered employer to take covered leave if they contract the condition or need to care for a family member who has contracted the condition. FMLA does not include leave to prevent contraction of COVID-19.¹⁰

It is important to note that many states and local governments have enacted medical leave acts that are more generous than the federal FMLA. Further, the recently enacted Families First Coronavirus Response Act included the Emergency Family and Medical Leave Expansion Act (“EMFLEA”), which altered some FMLA requirements. The EMFLEA requirements are described in greater detail below, in the section of this memo addressing the Families First Coronavirus Response Act. Employers should contact an attorney if they have any questions or concerns regarding their obligations under FMLA, EMFLEA or applicable state laws.

The Occupational Safety and Health Act of 1970 (“OSHA”)

OSHA requires employers to maintain a safe workplace for employees, including allowing employees to exercise their legal right to refuse to work in a situation in which they would be exposed to a health hazard without experiencing retaliation or discrimination.¹¹ Under this statute, employers are required to conduct hazard assessments for potential harmful exposures, such as exposure to COVID-19, and develop actions plans to identify, prevent, and prepare for such exposures.¹² In addition, under OSHA, employees are entitled to refuse to attend work in limited circumstances if they objectively and reasonably believe that they are in imminent danger of seriously injury or death.¹³ However, prior to voicing refusal to attend work under this statute, the employee must (1) present their concern to their employer and seek a correction; and (2) if the employer refuses to take any corrective action, the employee must

⁷ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

⁸ COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/fmla/pandemic> (last visited Mar 19, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Occupational Safety and Health Administration, United States Department of Labor, <https://www.osha.gov/workers/> (last visited Mar 19, 2020).

¹² Guidance on Preparing Workplaces for an Influenza Pandemic, United States Department of Labor, https://www.osha.gov/Publications/influenza_pandemic.html (last visited Mar 19, 2020).

¹³ Occupational Safety and Health Administration, United States Department of Labor, <https://www.osha.gov/workers/> (last visited Mar 19, 2020).

report the condition to OSHA and ask OSHA to investigate.¹⁴ OSHA determinations regarding the risk of exposure to COVID-19 in the workplace will be largely fact and situation dependent.

Worker's Compensation

Virtually every state has developed worker's compensation programs.¹⁵ These programs provide remedies to workers who suffer an illness or injury at work, usually due to a unique professional hazard.¹⁶ For example, health care workers may experience an increased risk of contracting a communicable disease such as COVID-19.¹⁷ Due to the unprecedented nature of COVID-19, it is uncertain whether workers compensation benefits would apply to workers outside of a healthcare setting who contract COVID-19 while at work.¹⁸ Employers should be aware of this risk and consult an attorney with any questions or concerns regarding the applicable workers compensation statute in their state.

The Americans with Disabilities Act Amendments Act of 2008 ("ADAAA")

The ADAAA prohibits discrimination in the workplace based on disability.¹⁹ The ADAAA protects any individuals who have a disability or have a relationship or association with an individual with a disability.²⁰ This statute defines an individual with a disability as "a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment."²¹ The ADAAA does not specifically name all of the impairments that are covered."²² However, the Equal Employment Opportunity Commission ("EEOC") includes breathing among its major life activities in its ADA regulations.²³ As difficult breathing is a symptom of coronavirus, contraction of COVID-19 may implicate the ADAAA.

Worker Adjustment and Retraining Notification Act of 1988 ("WARN")

¹⁴ *Id.*

¹⁵ Workers' Compensation Won't Cover Many Coronavirus Claims, SHRM (2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/workers-compensation-coronavirus-claims.aspx> (last visited Mar 19, 2020).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ A Guide to Disability Rights Laws, U.S. Department of Justice, <https://www.ada.gov/cguide.htm> (last visited Mar 19, 2020).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ United States Department of Labor, The ADA Amendments Act of 2008 Frequently Asked Questions, <https://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm> (last visited Mar 19, 2020).

The federal WARN Act requires employers to provide advance 60-day notice of layoffs to employees under certain circumstances.²⁴ This statute does not apply to temporary layoffs of less than six months.²⁵ Additionally, the statute does not apply unless there are at least 50 employment losses at a single site of employment within a 90-day period.²⁶ An exception to the statute allows for shortened notice if terminations of employment result from unforeseeable circumstances that were not reasonably anticipated 60 days before terminations occurred.²⁷ It is unclear if this statute would apply in the event of mass layoffs due to COVID-19 due to the unprecedented nature of the pandemic.

It is important to note that many states and local governments have enacted WARN statutes that contain different requirements than the federal law. Employers should contact an attorney if they have any questions or concerns regarding their obligations under these laws./

The Families First Coronavirus Response Act (“FFCRA”)

This Act, passed on March 18, 2020, implements a public health emergency leave program under FMLA that applies to employers with fewer than 500 employees.²⁸

Under this emergency leave program, all covered employers must provide emergency leave to regular full-time or part-time employees who have been employed for at least thirty (30) calendar days, excepting employers who employ healthcare providers or emergency responders. Such employers may elect to exclude their healthcare providers and emergency responders from the public health emergency leave provisions of the bill but do not have to.²⁹ An eligible employee can take leave under the emergency leave program if he/she is unable to work (or telework) because the employee must care for a child under the age of 18 years old whose school or place of care has been closed, or because the child-care provider of such child is unavailable, due to a public health emergency. In this instance, public health emergency is defined as an emergency with respect to COVID-19 as declared by a federal, state, or local authority.

Emergency leave consists of mandatory 10-day unpaid leave (with an employee option to use any existing paid vacation leave, personal leave, or medical or sick leave for unpaid leave), followed by paid leave at an amount not less than two-thirds of an employee’s regular rate of pay based on the number of hours the employee was scheduled to work, up to \$200 per day or \$10,000 in the aggregate.³⁰ For hourly employees, the employee’s paid leave rate should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave.³¹

The Act also directs covered employers to provide 80 hours of paid sick leave to employees who are unable to work for certain COVID-19-related reasons regardless of the employee’s tenure,

²⁴ WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT, United States Department of Labor, https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf (last visited Mar 19, 2020).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ The Families First Coronavirus Response Act (2020).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

excepting employers who employ healthcare providers or emergency responders. Such employers may elect to exclude their healthcare providers and emergency responders from the public health emergency leave provisions of the bill but do not have to.³² Part-time employees will receive paid leave equal to the number of hours that the employee works on average in a two-week period.³³

Further, employers are prohibited from discharging, disciplining, or discriminating against employees who take paid sick leave or file a complaint or proceeding related to the benefits and protections provided by the Act.³⁴ Employers who violate these requirements shall be subject to civil penalties under the FLSA.³⁵ The Act also directs the Secretary of Labor to promulgate emergency temporary standards under OSHA to protect healthcare workers.³⁶ Employers should carefully monitor the Department of Labor regulations for these requirements and consult with an attorney with any questions regarding the new standards.

III. ANALYSIS

a. Employer Options Regarding Employee Requests to Voluntary Self-Quarantine

An employer is under no obligation under federal law to grant a request from an employee who has not contracted COVID-19 or been exposed to an individual who has contract COVID-19 unless (1) the employee reasonably believes that coming to work would put them in serious and immediate danger under OSHA; (2) the individual has a condition that is protected under the ADAAA that could be exacerbated by COVID-19; or (3) the employee meets requirements for leave under FFCRA. Employers should note that employees who have contracted COVID-19 or have been exposed to an individual who has contracted COVID-19 should remain at home for the safety and protection of other employees.³⁷

Voluntary Self-Quarantine Situations Protected by OSHA

A situation that would warrant an otherwise healthy employee to avoid coming to work due to COVID-19 risks could arise if the outbreak worsens or if there are confirmed COVID-19 cases in the area surrounding the workplace. If a situation arises in which an employee voices a reasonable OSHA-protected concern that coming into work would put them in danger of contracted COVID-19, employers should take steps to mitigate the dangers to ensure workplace safety and avoid penalties under OSHA. If it becomes untenable to maintain a safe workplace, employees should be placed on telework or leave.

³² *Id.*

³³ *Id.*

³⁴ The Families First Coronavirus Response Act (2020).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Guidance on Preparing Workplaces for COVID-19, United States Department of Labor, <https://www.osha.gov/Publications/OSHA3990.pdf> (last visited Mar 19, 2020).

To prepare for this type of situation, employers should develop communicable illness policies and procedures as part of their business continuity plan.³⁸ Employers should take care when drafting such policies and procedures and ensure that federal and state law as well as employment contract requirements are incorporated.³⁹ Policies and procedures should include information concerning how disclosures should be made to an employer in the event of exposure to a communicable disease, when employees are expected to be at work and when employees must stay home, whether sick leave is paid or unpaid, what leave benefits are available to employees, and when applicable federal laws such as FMLA and ADA will apply.⁴⁰

Employers should take measures to create a safe work environment by providing hand sanitizer and masks where necessary, training employees on measures to prevent the spread of communicable disease, create an open line of communication to address employee's concerns, and encourage good hygiene practices such as washing hands frequently, coughing and sneezing into one's elbow, and ensuring that all common areas are clean and sanitized.⁴¹ Further, employers should send employees who are exhibiting symptoms of COVID-19 home and take reasonable precautions to ensure safety for employees by increasing opportunities for employees to work remotely or take sick leave, particularly those who are high-risk individuals and individuals with disabilities.⁴²

It is important to note that, because COVID-19 is an unprecedented global pandemic, there is a lot of unknown regarding the incubation period and contagiousness of the disease. Therefore, it is best for employers to be prudent and follow CDC workplace guidelines to ensure employee safety to limit potential liability from OSHA and other laws.⁴³

Voluntary Self Quarantine Protected by ADA

An employee who has an ADA-protected condition that could be exacerbated by COVID-19 may be eligible to voluntarily self-quarantine if there is no other accommodation available.⁴⁴ Conditions that could warrant such accommodation include physical conditions such as diabetes,

³⁸ Managing Through Flu and Other Epidemics in the Workplace, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingfluandepidemics.aspx> (last visited Mar 19, 2020).

³⁹ *Id.* (Employers should not that additional consideration apply to employers operating in a unionized work environment. Employers in unionized work environments should carefully review collective bargaining agreements to determine if provisions have been made regarding emergency leave for unionized employees.)

⁴⁰ Corona virus: Preparedness Plan, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx?erid=1524> (last visited Mar 19, 2020).

⁴¹ 3 Ways to Keep Your Workplace Clean During Coronavirus Scare, SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/keep-your-workplace-clean-during-coronavirus-scare.aspx> (last visited Mar 19, 2020).

⁴² *Id.*

⁴³ CDC Official Asks Employers to Do All They Can to Slow Coronavirus, SHRM, <https://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/CDC-Official-Asks-Employers-to-Do-All-They-Can-to-Slow-Coronavirus.aspx> (last visited Mar 19, 2020).

⁴⁴ PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, U.S. Equal Employment Opportunity Commission (2009), https://www.eeoc.gov/facts/pandemic_flu.html.

heart disease, lung disease, or conditions that have caused an individual to become immunocompromised.⁴⁵ Certain mental health conditions such as anxiety may also apply. However, before providing leave in such circumstances, employers should consider remote work options.⁴⁶

Voluntary Self Quarantine Protected by FFCRA

FFCRA allows healthy employees who have not been exposed to COVID-19 to self-quarantine if:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is caring for his or her son or daughter if the school or place of care has been closed or the childcare provider is unavailable due to COVID-19 precaution; or
4. The employee is experiencing “any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”⁴⁷

Prior to making a determination regarding an employee’s eligibility to self-quarantine, covered employers should review these requirements carefully. Employers should contact an attorney if they have any questions or concerns regarding their obligations under this law.

b. Employer Options Regarding Employee Layoffs and Furloughs

Due to COVID-19, many employers are faced with the different choice to layoff or furlough certain employees. A layoff is defined as a temporary removal from payroll, usually due to a lack of work available for the employee to complete.⁴⁸ Employees who are laid off are eligible for unemployment and often continue to receive certain benefits from employers, such as healthcare premiums.⁴⁹ A furlough does not involve a complete separation from payroll.⁵⁰ Instead, furloughed employees are required to work fewer hours or take time off from work.⁵¹ For this reason, a decision to furlough employees requires additional analysis based on whether employees are compensated on an exempt/ salaried or a non-exempt/ hourly basis.

Salaried Employees

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The Families First Coronavirus Response Act (2020).

⁴⁸ What is the difference between a furlough, a layoff and a reduction in force?, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/furloughlayoffreductioninforce.aspx> (last visited Mar 19, 2020).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

If an employer chooses to furlough a salaried employee, the employee must be paid a consistent salary for every week that the employee works regardless of how many hours that the employee spends working.⁵² Therefore, the employer will have to determine how it will make changes to its pay practices. For example, the employer could mandate that all employees do not work or receive pay for the period of furlough.

Hourly Employees

Employers can choose to furlough non-exempt hourly employees by altering their schedules to work fewer hours with little risk of liability.⁵³ An employer is only required to compensate an hourly employee for hours actually worked.⁵⁴ Therefore, if an employer mandates that hourly employees must stay at home, they are not required to pay them for the entire time that they are at home.⁵⁵ This may present a difficult situation for small businesses who do not have the money to pay hourly employees due to decreased business, but who may face public backlash for not paying quarantined or sick employees.⁵⁶ For this reason, many employers who can afford to pay leave for hourly employees who quarantine due to COVID-19 are choosing to do so.⁵⁷

However, if an employer mandates that an employee must stay home without pay, that employee may seek unemployment compensation.⁵⁸ Further, certain furloughed hourly employees may have rights to compensation under state law and employee benefit programs such short-term disability.⁵⁹

Employees who choose to lay off or furlough employees should be cognizant of federal and state WARN Act requirements as well as discrimination and disability laws.⁶⁰ A short-term layoff or furlough is unlikely to implicate the federal WARN act but could implicate state WARN acts.⁶¹

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Temporary Furloughs, SHRM, <https://www.shrm.org/hr-today/news/hr-magazine/pages/1009lega12.aspx> (last visited Mar 19, 2020).

⁵³ Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, United States Department of Labor, <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs> (last visited Mar 19, 2020).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Hourly Workers Lose Pay Due to Coronavirus, SHRM, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/hourly-workers-could-see-pay-losses-due-to-coronavirus.aspx> (last visited Mar 19, 2020).

⁵⁷ *Id.*

⁵⁸ States May Expand Jobless Benefits During Pandemic, SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-may-expand-jobless-benefits-during-pandemic.aspx> (last visited Mar 19, 2020).

⁵⁹ *Id.*

⁶⁰ Employers Advised to Ponder Worst-Case Scenarios, SHRM, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/employers-ponder-worst-case-scenarios.aspx> (last visited Mar 19, 2020).

⁶¹ *Id.*

c. Utilization of Employer Leave Policies

Employers should ensure that internal sick leave policies are flexible and consistent with public health guidance, particularly the FFCRA, which prohibits an employer from requiring an employee to use other paid leave provided as a benefit by the employer before using the paid sick time provided under FFCRA.⁶² Employers should also take measures to ensure that employees are aware of and understand these policies.⁶³

IV. Conclusion

We hope that this memorandum responds to your questions. Please contact Marcie Zakheim (MZakheim@feldesmantucker.com), Molly Evans (mevans@feldesmantucker.com), or Noori Ali (nali@feldesmantucker.com) if you need any additional information.

⁶² The Families First Coronavirus Response Act (2020).

⁶³ Interim Guidance for Businesses and Employers, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited Mar 19, 2020).