



COUNTY ADVISORY BULLETIN

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COVID-19 EMPLOYMENT RELATED FAQs

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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 26, 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.

1. Can an Employer send an employee home if they are sick or appear to be sick?

Answer: Yes. Although normally, an Employer must be careful about discussing personal medical conditions with an employee, with the COVID-19 pandemic, Employers have more leeway to send an employee home if they are exhibiting COVID-19 symptoms. In these situations, the employee may be required to use sick leave or other paid leave.

2. Can a public Employer place an employee on administrative leave with pay for purposes relating to the COVID-19 pandemic?

Answer: Yes. Ohio Revised Code section 124.388 provides an appointing authority may, in its discretion, place an employee on administrative leave with pay in

circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. This means an employee who is not at work due to the COVID-19 pandemic may be placed on administrative leave with pay although there are circumstances when accrued leave should be used. Compensation for administrative leave with pay must be equal to the employee's base rate of pay. The length of administrative leave with pay is solely at the discretion of the appointing authority but cannot exceed the length of the situation for which the leave was granted.

Those Employers with collective bargaining agreements should follow the agreement. O.R.C. section 124.388 may not apply to employees governed by a collective bargaining agreement.

3. Can an Employer ask an employee if they are experiencing symptoms of COVID-19?

Answer: Yes. Employers generally are restricted from asking questions about an employee's disability or questions which are likely to elicit information about a disability. However, asking an employee about symptoms of Coronavirus is unlikely to elicit information about a disability. In addition, the EEOC has stated Employers can require employees to take their temperature in front of a supervisor before entering the workplace. This practice is consistent with the orders from the Ohio Department of Health.

4. What steps should an Employer take when taking employees' temperatures?

Answer: An Employer must ensure employees' temperatures are taken under sanitary conditions. The thermometer (forehead or ear) should be properly disinfected between uses. The temperature should be taken in a manner that maximizes employee confidentiality and privacy and complies with social distancing requirements. The current best practice is to send home any employee with a temperature of 100.4 or greater. If sent home, employees can be required to use applicable leave, including new federally mandated sick leave, regularly accrued sick leave, vacation leave and comp time (in that order).

5. Can an Employer deny vacation leave requests and/or revoke vacation leave already approved?

Answer: Yes. Under civil service law, an Employer is permitted to deny requests for vacation leave for operational reasons. In some emergency situations, Employers can revoke approval previously given for vacation leave although it is recommended this option be used carefully. It is likely that staffing needs during the COVID-19 pandemic would justify a decision to cancel vacation leave based on actual operational needs. For employees in a bargaining unit, Employers should consult the collective bargaining agreement. It is likely denying requests or revoking vacation leave already approved falls within management rights.

6. When does the Families First Coronavirus Response Act (FFCRA) go into effect?

Answer: The FFCRA becomes effective April 1, 2020. Employees are not entitled to benefits under the law prior to April 1. Initially, it appeared the Act would be implemented on April 2, 2020, because the law requires an effective date no later than 15 days after it was signed. The FFCRA expires on December 31, 2020. The leave benefits under the law are available to qualified employees any time between April 2, 2020, and December 31, 2020.

7. What type of documentation can an Employer require from employees who take leave under the FFCRA?

Answer: The Act does not modify the FMLA requirements relating to medical certification justifying leave under the FMLA. If the leave relates to the employee's health condition or the health condition of an individual who is quarantined and being cared for by an employee, the DOL is suggesting Employers be more lenient with requiring medical certification to avoid placing a burden on the healthcare system. An Employer still may require employees to certify the specific reason they are taking off under the Act. If an Employer later discovers an employee falsified the certification, discipline would be appropriate.

If an employee is taking leave to care for a child under 18 years old due to school or childcare unavailability, the Employer may require the employee to certify their presence is reasonably necessary. Keep in mind the school or childcare must be unavailable due to the COVID-19 pandemic. An employee is not entitled to take leave under the FFCRA simply because that person wants to stop paying for childcare that is otherwise available.

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

Answer: Generally, intermittent FMLA leave is available if it is medically necessary. While the DOL may provide more guidance, it is recommended that Employer's allow employees to take the sick leave and FMLA leave for COVID-19 medical reasons on an intermittent basis only if medically necessary. Sick leave and FMLA leave taken for school or childcare related reasons does not have to be granted on an intermittent basis although Employers can allow employees to take intermittent leave for these reasons. In some cases, it may be beneficial to the Employer and employee to allow intermittent leave for childcare purposes.

9. Are part-time employees entitled to sick leave under the FFCRA?

Answer: Yes. Part-time employees receive sick leave for two weeks equal to the number of hours they normally work in a two-week period.

10. How long does an Employer have to approve leave requested under the FFCRA?

Answer: Under the “regular” FMLA, Employers must approve a request within five (5) calendar days. The FFCRA requires an Employer to approve requests without unreasonable delay. This standard will depend on the circumstances. Employers should endeavor to approve requests as soon as possible.

11. Can employees taking leave at two-thirds pay supplement their FFCRA leave by using other accrued leave?

Answer: The FFCRA does not require Employers to allow employees to take the equivalent of one-third of their accrued leave to attain full pay when taking the two-thirds form of leave. The Act does not address this issue. In some cases, this issue may be governed by a collective bargaining agreement. Please note that Employers allowing such a practice can limit employees to using leave applicable under Ohio law or a collective bargaining agreement. For example, normally an employee taking off work because of a lack of childcare would not be entitled to use sick leave. An employee seeking to supplement the two-thirds pay for school/childcare reasons can be required to use vacation leave, personal leave or comp time instead of sick leave. A similar scenario could apply for employees caring for a quarantined individual other than a family member.

12. If both spouses work for the County, can they take simultaneous leave due to the unavailability of school or childcare?

Answer: No. Leave for this purpose is only available when it is reasonably necessary for the employee to be present with the child. If one parent is at home, the other does not have to be present and can be required to work.

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. At this point, there is no indication that this is an additional 12 weeks of leave. 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 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 possible the Department of Labor will provide guidance on this issue.

14. Who are health care workers under the FFCRA?

Answer: The law does not define health care worker. 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 workers and exempt from the leave provisions under the FFCRA.

15. Who are emergency responders under the FFCRA?

Answer: Again, this group of employees are 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. 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.

16. Do employees accrue leave while on paid FFCRA leave?

Answer: Employees who accrue sick leave and vacation leave based on bi-weekly pay periods should continue accruing this leave while on FFCRA paid leave. Employees off under the FFCRA at two-thirds pay may only be entitled to two-thirds of accrued leave during those bi-weekly pay periods.

17. Does the FFCRA prohibit Employers from requiring employees to work from home?

Answer: No. An employee is entitled to leave under the FFCRA if they are unable to work due to one of the six reasons. The Department of Labor indicates this inability to work includes telework if the Employer makes it available. An employee who is offered telework and has the ability to perform this work may be denied leave under the FFCRA. These situations are fact specific and must be considered on a case by case basis.

18. How will the Department of Labor enforce the FFCRA?

Answer: On March 24, 2020, the Department of Labor issued a field assistance bulletin setting a temporary non-enforcement period for the FFCRA from March 18, 2020 until April 17, 2020. During this period, Employers who violate the FFCRA will not be liable for those violations if they act in good faith and do not willfully ignore the requirements of the law. Good faith will be determined by 1) The Employer must remedy any violation, including making employees whole as soon as practicable; 2) Violations of the Act were not willful; and 3) DOL receives a written commitment from the Employer of intent to comply with the Act.

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 \$531 per day for the first 80 hours of sick leave if at full pay with a total cap of \$5,310 for the 10 days. The two-thirds pay cap is \$200 per day. The \$200 per day cap applies to the additional 10 weeks of FMLA leave with a total cap of \$10,000.

20. How does HIPAA apply to COVID-19 information?

Answer: The confidentiality concerning personal medical information under HIPAA applies to most aspects of employees who contract COVID-19. Disclosure can be made for purposes of treatment, when notification is required by law, to an appropriate public health authority and certain disclosure relating to law enforcement and corrections facilities. In general, an Employer cannot share a positive COVID-19 test with other employees.

21. Can the Employer force older or “at-risk” employees to stay at home?

Answer: No. Employers can reach out to these employees and offer accommodations but these employees cannot be required to stay home simply based on their age or health condition unless they have symptoms of COVID-19. These employees can be placed on administrative leave with pay or other leave based on the same criteria applied to other employees.

22. Can the Employer require a doctor’s note to return to work, to confirm they were not absent due to COVID-19?

Answer: Yes. The EEOC has issued guidance specifically stating that employers are permitted to obtain verification from a doctor during a pandemic. However, employers should carefully consider whether this is necessary, as it will put additional strain on the healthcare system.

23. Is an Employee eligible for Unemployment Compensation if they are unpaid/underpaid due to COVID-19?

Answer: Yes. The usual seven day period for unemployment has been waived as has the requirement for recipients to be seeking employment as a condition of receiving benefits.

24. Could an employee who contracts COVID-19 be entitled to workers’ compensation benefits?

Answer: Probably not. With the prevalence of COVID-19, it is very unlikely an employee could prove the disease was contracted at work.

25. How should an Employer treat pension contributions when an employee is taking leave under the FFCRA?

Answer: Unless PERS indicates otherwise, pension contributions should be paid on the employee's earnings. If an employee is receiving two-thirds pay under the FFCRA, pension benefits should be based on the lesser amount.

26. How will COVID-19 and the FFCRA impact health insurance?

Answer: First, employees on FFCRA paid sick leave or FMLA leave, even at two-thirds pay will be entitled to continue receiving health insurance on the same basis as if they are working. Similarly, employees on unpaid FMLA leave are permitted to continue receiving health insurance on the same basis as if they are working.

Second, employees who are on a leave without pay status, other than for FMLA purposes, may not be entitled to receive health insurance. Employers should check with their insurer or third part administrator concerning these issues.

Third, all fully insured and self-insured group health plans, as well as individual health insurance policies, must provide coverage for COVID-19 diagnosis and testing without cost sharing or prior authorization when performed during:

1. health care provider office visit;
2. telehealth visit;
3. urgent care center visit; or
4. emergency room visit.

The Act does not require plans to cover the actual treatment of COVID-19 without cost sharing.

Fourth, while the Act does include telehealth visits/telemedicine services, it has not been interpreted to require telehealth coverage to employees. Plans are not required to cover other care or services received during a visit that are unrelated to COVID-19 at 100% without cost sharing.