

MEMORANDUM

TO: Kari Thurlow

FROM: Penelope J. Phillips
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DATE: April 6, 2020

RE: FAQs from LeadingAge MN Members regarding FFCRA

The “Families First Coronavirus Response Act” or “FFCRA” (H.R. 6201) creates two new types of paid leave: (1) Public Health Emergency Leave (“E-FMLA”) and (2) Emergency Paid Sick Leave (“E-PSL”). The law took effect on April 1, 2020, and the leave is available until December 31, 2020.

1. Is my organization covered by the FFCRA?

The FFCRA applies to all **private** employers with “**fewer** than 500 employees.” 29 C.F.R. § 826.40(a). In terms of counting employees, the FFCRA requires you to include all full-time employees, part-time employees, temporary employees, and any employees on leave. You also need to count any employees who are “jointly employed” by your organization (e.g., via temporary staffing services) and any employees who are employed by a related organization (as long as it meets the “integrated employer test”). If your employee-count varies above and below 500, it is possible to be covered at one point and then not covered at another.

Public employers are covered by the FFCRA if they employ **one or more** employees. See 29 C.F.R. § 826.40(a). As the DOL explained in its Final Rule: “All covered public agencies must comply with both the [E-PSL and the E-FMLA requirements] regardless of the number of employees they employ” Final Rule, 85 Fed. Reg. 19326, 19336 (April 6, 2020). As outlined below, however, both public employers and private employers can exclude “health care providers” and “emergency responders.”

2. What if my organization has fewer than 50 employees?

Your organization is still covered, unless it can meet one of the potential exemptions. Specifically, an employer with 1-49 employees can claim the exemption from providing E-FMLA or E-PSL **only if** it meets (and can document) one of the following:

- (i) Providing the requested leave would result in the business’s “expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity”;
- (ii) The employee’s absence would entail a “substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or
- (iii) “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting [E-FMLA or E-PSL], and these labor or services are needed for the small business to operate at a minimal capacity.”

29 C.F.R. § 826.40(b)(1).

If the employees are represented by a union and the union learns of the employer making the claim that it is not covered, it is possible that the Union could request information relating to the employer’s decision and/or documentation.

3. Who is exempt as a “health care provider” under the FFCRA?

The DOL’s regulations define “health care provider” to include “***anyone employed at any . . . nursing facility, retirement facility, nursing home, home health care provider, . . . or any similar institution, Employer, or entity.***” 29 C.F.R. § 826.30(c)(1)(i). The definition also includes contractors who work at the location. *Id.* § 826.30(c)(1)(ii).

The DOL’s definition is “location-based,” which means that the employees need to be “employed at” one of the defined facilities. *Id.* Employees employed at a separate (unattached) corporate office or administrative office would likely ***not*** be covered by the exemption.

As noted above, while the exclusion likely doesn’t include corporate office employees that are employed at a separate facility, it certainly includes “anyone” employed at any of your nursing facilities, retirement facilities, or nursing homes.

4. Assuming the employer’s employees are “health care providers” under the FFCRA, can the employer choose to exempt employees from the expanded FMLA benefits and not the emergency sick leave?

The exemption is “discretionary,” so employers have the ability to apply it as needed. As the DOL regulations explain: “An Employer whose Employee is a health care provider or an emergency responder ***may exclude*** such Employee from the [E-PSL] requirements and/or the [E-FMLA] requirements.” 29 C.F.R. § 826.30(c). Nevertheless, the DOL encourages employers to be “judicious when using this definition to exempt health care

providers and emergency responders from the provisions of the FFCRA.” Final Rule, 85 Fed. Reg. 19326, 19334 (April 6, 2020).

The DOL regulations permit employers to carve out employees who will **not** be exempt (and therefore eligible for E-FMLA and E-PSL) and the employer can still receive the tax credits. *Id.* (“Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider . . . from taking paid leave [for E-PSL or E-FMLA], such leave . . . should be treated in the same manner for purposes of the tax credit created by the FFCRA.”).

The DOL regulations also suggest that employers do not need to provide **both** E-PSL and E-FMLA to “health care providers.” Specifically, the regulations use the term “**and/or**” to describe the exemption: “An Employer . . . may exclude such Employee from the [E-PSL] requirements **and/or** the [E-FMLA] requirements.” This suggests that you can choose to provide “health care providers” with E-PSL but not E-FMLA because, for example, you cannot accommodate several nurses taking 12 weeks of E-FMLA in order to care for their small children whose school or daycare is closed.

5. How should employers communicate to employees if they decide to exempt their employees from the FFCRA?

You should communicate with your employees about your intention to provide or assert the “health care provider” exemption under the FFCRA. As part of this communication, you should include information regarding any applicable policies or practices requiring use of sick leave, vacation, or PTO. You should also communicate your expectations regarding documentation to support the need to be gone from work.

If you have a union contract, you should communicate your decision to the Union and offer to discuss the matter (but not concede that bargaining is required). If the Union demands to bargain over the issue, you should agree to meet with the Union while also confirming that you do not believe such bargaining to be required. At the end of the day, in the absence of expressed contract language to the contrary, you are under no obligation to change your decision regarding the exemption, but you should entertain any proposals from the Union.

6. How should an employer handle situations where the employee has wanted to take a leave of absence because of a general fear of catching COVID-19?

If an employee refuses to come to work due to COVID-19, the first thing you should do is try and explain what protective steps you are taking to safeguard employees and assure the employee you as an organization are taking all CDC recommended steps to keep employees from COVID-19 exposure.

Ultimately, you could order an employee to come to work even if they are afraid. However, what you do if they refuse to come to work is more complicated. Depending on the circumstances, an employer may have the ability to terminate or otherwise discipline

an employee for a refusal to work, but I would exercise extreme caution in this approach. An employee has the right to refuse work if the employee ***reasonably believes that he or she is in imminent danger***. If an employee has this belief, an employer may not terminate or otherwise discipline an employee for refusing to come to work without raising a potential issue under MOSHA's anti-retaliation guidelines and potentially the Minnesota Whistleblower Statute. It is also possible that this conduct could be considered to be "protected and concerted" activity under Section 7 of the NLRA or that the employee is protesting "abnormally dangerous conditions" under Section 502 of the NLRA.

If you intend to allow employees not to return to work out of COVID-19 fear, employers should consider first allowing an employee to work from home, to utilize his/her sick time or PTO as provided in the CBA or the employer's policy, and review whether any other leave-of-absence provisions of the applicable employer's policies (or CBA) apply that an employee could draw from.

7. If an employee brings in a doctor's note that they are immunosuppressed and unable to work, must the employer honor this request?

The answer depends on individual circumstances. In each case, we recommend analyzing the legal issues in the following order: (1) Is the employee eligible for E-PSL? (2) Is the employee eligible for regular FMLA? and (3) Is the employee eligible for leave under the ADA or Minnesota Human Rights Act (MHRA)?

E-PSL

The employee is eligible for E-PSL only if the employee's health care provider has recommended that the employee "self-quarantine" (not simply avoid work) and the employee cannot perform their work remotely. 29 C.F.R. § 826.20(a)(3) ("An Employee may take Paid Sick Leave . . . only if: (i) A health care provider advises the Employee to self-quarantine based on a belief that— . . . (C) The Employee is particularly vulnerable to COVID-19; **and** (ii) Following the advice of a health care provider to self-quarantine prevents the Employee from being able to work, either at the Employee's normal workplace or by Telework.").

FMLA

Remember, unlike E-FMLA, in order to be eligible for traditional forms of FMLA, the employee must have been employed for at least one year and worked at least 1,250 hours in the past year. The employee must also work at a jobsite with at least 50 employees in a 75-mile radius.

The FMLA defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The key is "incapacity," which the regulations define as the "inability to work . .

. or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” 29 C.F.R. § 825.113(b).

An employee suffering from a severe case of COVID-19 may have a “serious health condition.” However, avoiding infection alone is not a “serious health condition” under the FMLA. As the DOL explained in guidance relating to an influenza pandemic:

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. ***Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.*** Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

<https://www.dol.gov/agencies/whd/fmla/pandemic>.

The COVID-19 situation is different. An employee that is immunosuppressed as a result of cancer or another chronic condition, such as multiple sclerosis, may be advised by a health care provider to avoid leaving their house during a pandemic. The DOL regulations appear to recognize “prophylactic” FMLA leave if it is advised by a health care provider to avoid exacerbating an otherwise dormant serious health condition:

Absences attributable to incapacity [for chronic conditions] qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report . . . because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level.

29 C.F.R. § 825.115(f); see also *Santiago v. Department of Transp.*, 50 F. Supp. 3d 136 (D. Conn. Sept. 25, 2014). That said, you should apply your normal FMLA process, including requiring the employee’s health care provider to complete the FMLA certification. See 29 C.F.R. § 825.306.

Remember, too, that mental health conditions may also constitute a “serious health condition.” Certain mental health conditions such as depression or anxiety could be exacerbated during this difficult time. Be sure to recognize that an employee’s request for leave for work due to depression, anxiety, and similar conditions may constitute a request

for FMLA leave, and provide the appropriate paperwork and designate the leave as FMLA leave in appropriate circumstances.

ADA and MHRA

If the employee is not eligible for leave under the E-PSL or the FMLA, you should also analyze whether the employee is a “qualified individual” under the ADA or Minnesota Human Rights Act. The underlying medical condition (e.g., cancer) could constitute a disability, so the question would be whether the individual can perform his or her job with a reasonable accommodation. If so, you may be obligated to accommodate an employee’s need for leave (or an alternative accommodation), unless doing so would be an undue hardship. Remember, the ADA and MHRA would cover employers and employees not protected by the FMLA.

Other

Even if the time off is not protected, you may choose to provide the time off as unprotected leave and allow the employee to use any accrued time off or take unpaid leave.

8. If leave is granted, what sort of documentation is needed? Is there any template communication to the employee receiving leave?

For E-PSL or E-FMLA, the employer should document the following: (1) the employee’s name; (2) the date(s) for which leave is requested; (3) the COVID–19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID–19 qualifying reason. Final Rule, 85 Fed. Reg. 19326, 19339 (April 6, 2020). If the employee is requesting E-PSL because of a medical recommendation to self-quarantine, then the employee should also provide “name of the health care provider who advised him or her to self-quarantine for COVID–19 related reasons.” Id.

For leave under the FMLA or ADA, the employer should follow its normal processes. For example, the employee (and his or her medical provider) should complete the FMLA certification form. For employees who need leave under the ADA, the employer may require an employee to provide documentation that is sufficient to substantiate that the employee has an ADA disability and needs the reasonable accommodation requested.

9. What should I do if I have an employee that claims “at risk status” but does not have a specific doctor’s note?

If the employee cannot support the need to be gone from work with some type of health care provider recommendation, then the employee should not be eligible for **any** type of leave. A possible exception can be made for pregnant employees.

10. Is a pregnant employee covered by the FFCRA who is in their last trimester and decides not to work because their doctor said she is “leaving it up to her patients” if they want to work or not because of the unknown effects of covid-19 in pregnancy?

Similar to the immunosuppressed employee described above, a pregnant employee may be eligible for E-PSL, FMLA, and leave under the ADA and MHRA. In addition, Minnesota law requires employers to “provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests, with the advice of her licensed health care provider or certified doula, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer’s business.” Minn. Stat. § 181.9414, subd. 1.

E-PSL

To be eligible for E-PSL, the employee must be advised by a health care provider to self-quarantine. In this example, the health care provider stated that she is “leaving it up to her patients” about whether her patients want to work. This may be insufficient. Thus, we recommend requesting a clearer statement from the employee’s medical provider regarding the provider’s recommendation to self-quarantine. The regulations explain that “the advice to self-quarantine must be based on the health care provider’s belief that the employee . . . is particularly vulnerable to COVID–19.” Final Rule, 85 Fed. Reg. 19326, 19329 (April 6, 2020). However, it is ultimately a judgment call and accepting the provider’s “suggestion” may be sufficient for purposes of E-PSL documentation.

FMLA

The FMLA is a more difficult question. The DOL’s regulations provide that “[a] expectant mother may take FMLA leave before the birth of the child . . . if her condition makes her unable to work.” 29 C.F.R. § 825.120(a)(4). The regulations also provide that “[t]he expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.” *Id.*; see also Whitaker v. Bosch Braking Sys. Div. of Robert Bosch Corp., 180 F.Supp.2d 922, 931 (W.D. Mich. 2001) (concluding that plaintiff’s pregnancy qualified as a “serious health condition” although her doctor described her pregnancy as “normal” and she was able to perform her job that required her to stand on her feet all day, but as a “purely prophylactic” precaution, the doctor recommended that she be limited to working a regular schedule without overtime because she risked hypertension and premature delivery if she did not limit her hours and rest more). Thus, the employee may be eligible for FMLA, but only if her medical provider certifies that “her condition makes her unable to work.” You should follow your customary FMLA certification process and provide the leave if required.

ADA and MHRA

Although not required, you could request additional information from the medical provider to substantiate the employee's need for leave or whether another accommodation is possible.

Other

Even if the time off is not protected, you may choose to provide the time off as unprotected leave and allow the employee to use any accrued time off or take unpaid leave.

11. Are there any special considerations if the employee doesn't want to come to work because a member of his or her household is "at risk"?

In general, an employee's desire to not work in order to protect an "at risk" member of his or her household is not going to be eligible for E-PSL, FMLA, or leave under the ADA or MHRA. Nevertheless, the employer should consider whether the employee's risk of exposure can be minimized.

If the risk cannot be minimized and the employee cannot be exposed at work due to the family member's medical condition, then the employee can be offered unprotected leave and allowed to use any accrued time off or take unpaid leave.

12. What documentation is needed to receive tax credits under the FFCRA? Are there any special considerations for nonprofits?

According to the IRS, in order to receive the tax credits, request for such leave from the employee requires for all employers (not just for profit employers):

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

The IRS guidance also states that:

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Questions 44, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility.

The FFCRA allows employers to receive a credit in the full amount of the qualified E-PSL and E-FMLA paid to employees *plus* "qualified health plan expenses." The IRS provides that the credit is allowed against the employment taxes. There are a variety of mechanisms the IRS has implemented in which to get reimbursed.

First, the employer may receive reimbursement by reporting the total leave wages on your federal employment tax returns at the end of each quarter by filling out **IRS Form 941 – Employer's Quarterly Federal Tax Return**.

The IRS also allows an employer to withhold the federal employment taxes (including federal income taxes withheld by employees, employees' share of social security and Medicare taxes, and the employer's share of social security and Medicare taxes) equal to the amount of qualified leave wages paid plus the allocable qualified health plan expenses and the amount of the employer's share of Medicare tax imposed on the wages (rather than depositing them with the IRS). Although, it is important to note that the employer must still account for the reduction in deposits on **IRS Form 941**. The IRS provides the following example:

An Eligible Employer paid \$5,000 in qualified sick leave wages and qualified family leave wages (and allocable health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) and is otherwise required to deposit \$8,000 in federal employment taxes, including taxes withheld from all of its employees, for wage payments made during the same quarter as the \$5,000 in qualified leave wages. The Eligible Employer may keep up to \$5,000 of the \$8,000 of taxes the Eligible Employer was going to deposit, and it will not owe a penalty for keeping the \$5,000. The Eligible Employer is then only required to deposit the remaining \$3,000 on its required deposit date. The Eligible Employer will later account for the \$5,000 it retained when it files Form 941, Employer's Quarterly Federal Tax Return, for the quarter.

In the event that the withheld employment taxes are insufficient to cover the leave benefits an employer provided, an employer may then file a request with the IRS for advance payment by completing **IRS Form 7200**.

Please let us know if you have any questions.