



The FFCRA and other laws affecting the return to work

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Many employers are beginning preparations for the return to full operations. Many employees, however, may be unable – or even unwilling – to re-enter the workplace. Those employees are likely to turn to COVID-inspired federal legislation, the Families First Coronavirus Response Act (FFCRA), to delay their return to work or to leave once they have returned.

The FFCRA was signed into law on March 18, 2020, and its provisions are effective from April 1, 2020, through December 31, 2020. All public school districts are subject to the requirements of the FFCRA, which provides employees with two types of additional paid leave: (1) Emergency Paid Sick Leave and (2) Expanded Emergency FMLA Leave. Employees may apply these leaves to hours they are scheduled to work when they satisfy the applicable leave requirements, which are discussed in greater detail below. Employees who have not used their FFCRA leave allocations by December 31, 2020, will lose them, as the leave does not carry over to calendar year 2021, and an employer is not required to pay employees for any unused FFCRA leave.

Emergency paid sick leave

All full-time and part-time employees, regardless of how long they have been employed by their current employer, are eligible to receive up to 80 hours (10 days) of Emergency Paid Sick Leave under the FFCRA. The amount of available leave is prorated for part-time employees.

This leave allocation is in addition to an employee's other accrued paid leaves, such as sick leave, personal days and compensatory time, and should be used before an employee's other leave entitlements when an FFCRA-qualifying reason exists. Emergency Paid Sick Leave can be used by an employee who is unable to work or telework for one or more of the following

reasons:

1. To comply with a governmental quarantine or isolation order related to the pandemic, including a shelter-in-place or stay-at-home order.
2. To comply with a health care provider's recommendation to self-isolate because the employee has been exposed to COVID-19 or when an employee's pre-existing health condition makes them particularly vulnerable to the virus.
3. To obtain a medical diagnosis when an employee is experiencing COVID-19 symptoms, such as fever, chills, shortness of breath, cough, sore throat, or a new loss of taste or smell.
4. To care for an individual who is subject to quarantine or has been advised to self-quarantine and is unable to care for themselves.
5. To care for their child when the child's school or childcare provider is closed due to the virus and the employee is needed to care for the child.
6. When the employee is experiencing any other substantially similar condition specified by the Department of Health and Human Services in consultation with the Department of the Treasury and the Department of Labor.

An employee who uses Emergency Paid Sick Leave for the first three reasons receives a full day's pay, up to \$511 per day, to an aggregate of \$5,110. An employee who uses Emergency Paid Sick Leave for the last three reasons receives two-thirds of their daily pay, to a maximum of \$200 per day and a total aggregate of \$2,000. Notably, any employee receiving two-thirds pay may choose to supplement their Emergency Paid Sick Leave pay with other available paid leave to receive a full day's pay, but their employer cannot require them to do so.

Expanded emergency FMLA leave

Expanded Emergency FMLA Leave is available to all full-time and part-time employees who have worked for their current employer for 30 days. This Expanded Emergency FMLA Leave provides an eligible employee up to ten weeks of paid leave, as it is intended to be used in conjunction with the two weeks of Emergency Paid Sick Leave for a total of 12 weeks' paid leave, and is available to an employee who is unable to work or telework because they are needed to care for their child whose school or childcare provider is closed due to the coronavirus. As with Emergency Paid Sick Leave, this Expanded Emergency FMLA Leave is prorated for part-time employees. An employee using this leave receives two-thirds pay to a maximum of \$200 per day and a total aggregate of \$10,000. However, unlike the FFCRA's Emergency Paid Sick Leave, an employer may require that an employee supplement Expanded Emergency FMLA Leave pay with other accrued paid leave if the employer's FMLA policies and any applicable collective bargaining agreement allow for supplementation.

Although the eligibility requirements for Expanded Emergency FMLA Leave are different than those for "regular" FMLA leave, this emergency leave is counted as part of an employee's total 12-week FMLA leave entitlement. When an employee has already used their Emergency Paid Sick Leave for another reason, 10 weeks of Expanded Emergency FMLA Leave would be paid, and the remaining portion of the employee's 12-week leave entitlement would be unpaid. Department of Labor guidance further provides that if an employee used some of their "regular" annual FMLA entitlement prior to April 1, 2020, their Expanded Emergency FMLA Leave 12-week entitlement would be reduced by that amount. Presumably, the passage of sufficient time could deem an employee eligible to use additional FMLA leaves.

Documenting the need for leave

School districts can – and should – require some written documentation of the leave requested by an employee, such as a completed leave request form. Current Department of Labor regulations stipulate that an employee may give oral notice of their consultation with a health care provider in support of their need for leave, but the employee must provide the name of the health care provider. Other information can be required when an employee requests FFCRA leave for another qualifying reason. As always, employees are subject to discipline for falsifying their need for leave or presenting inaccurate information to their employer.

The FFCRA's right of restoration and prohibition of retaliation

As with other employment statutes, school district employees who use FFCRA leave are statutorily-protected from retaliation in relation to their use of that leave. They are also generally entitled to the same or an equivalent position upon their return from leave. Employees who believe their rights have been violated may pursue remedies through the Department of Labor or by filing a private action in court.

What the FFCRA does not do

Although the FFCRA gives employees greater ability to take care of themselves and their families during this pandemic, it does not entirely limit an employer's decision-making. For example, an employer may lay off or reduce an employee who has taken leave when the employer's actions are because of a legitimate, non-discriminatory and non-retaliatory business reason.

The FFCRA also doesn't allow an employee to avoid coming to work simply because they are afraid of COVID-19, and an employee who refuses to come to work without sufficient excuse is subject to discipline. Regardless, the Ohio Department of Health and Governor DeWine have asked employers to remain flexible when dealing with employees and that would include those employees who have concerns about the virus and their work environments.

Finally, FFCRA leave is not available to health care providers and emergency responders whose employers affirmatively exempt them from the statute's provisions. In school districts, this could include school nurses, therapists, mental health counselors and others.

Other statutes still apply

The FFCRA does not relieve public school districts from their other statutory obligations. While the FFCRA provides Expanded Emergency FMLA Leave to nearly all employees for one particular reason (*i.e.*, when an employee is needed to care for their child whose school or child care provider is closed due to the virus), eligible employees can still utilize "regular" FMLA leave for other qualifying reasons, to a maximum of 12 weeks in any 12-month period. Employees turning to traditional FMLA leave must satisfy its length of service and hours of work requirements and use the leave due to their own serious health condition; to care for a spouse, parent or child having a serious health condition; the birth, adoption or placement of a child; a qualifying military exigency; or to care for a covered servicemember. The usual FMLA certification process also applies here, which provides an employer additional confirmation of the employee's need for leave.

An employer's obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act also continue. While COVID-19 is not yet a legally-recognized disability, school districts must reasonably accommodate employees' pre-COVID disabilities that can create new or different circumstances for them during this pandemic, such as diabetes, asthma, or immunodeficiency disorders and anxiety, obsessive compulsive disorder or depression. In fulfilling their requirements under these statutes, employers should continue to do what they always have – identify the limitations that a disability imposes on the employee's performance of their essential job functions, engage in the interactive process to determine whether a reasonable accommodation exists and then provide it. Accommodations could include leave, alternate assignments, adjustments to non-essential job duties or work processes, working from home or implementing additional sanitary measures to protect employees from the spread of coronavirus. Employers should also be aware of the need to accommodate an employee's ability to telework when that is assigned, especially considering that an employee's home office needs may be different than their usual workplace needs.

Title VII and the Age Discrimination in Employment Act (ADEA), along with their state law counterparts, continue to prohibit discrimination based on an employee's sex, race, national origin and age, among others. Accordingly, an employer cannot discriminate by making employment decisions based on these factors, even when those decisions are guided by our current understandings of the COVID-19 virus.

Additionally, Ohio's teachers and regular nonteaching school employees retain their rights to statutory sick leave and unpaid leaves of absence, along with other negotiated leaves and benefits provided by their collective bargaining agreements.

Other considerations

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) on March 27, 2020. The CARES Act includes provisions for Pandemic Unemployment Assistance (PUA), funded entirely by the federal government and retroactive to January 27, 2020. These special benefits provide an economic safety net to employees who cannot work and are available to individuals who might otherwise be ineligible for state-based unemployment compensation benefits. Employees can receive them when they declare themselves unable to work for the same reasons they would have previously received FFCRA leave, including when they are subject to a quarantine order, when they are needed to care for their child whose school or daycare provider is closed, or when they have a particular vulnerability to COVID-19. The availability of these expanded unemployment benefits may further delay an employee's return to work or result in an employee's increased willingness to leave the workplace all together.

Although nothing is certain in these times, employers can reasonably expect the requests and demands made by their employees to look different than they previously did. School employees have gained additional rights as a result of COVID-19 that allow them to avoid returning to work, leaving many school districts grappling with the best way to meet the needs of the students and communities they serve.

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