

Paying Staff Who Are on Leave Due to COVID-19

If a staff member tests positive for COVID-19 or must self-quarantine or otherwise needs leave for a COVID-19-related reason, do I need to pay staff members while they are out?

Yes, directly through the Families First Coronavirus Relief Act (FFCRA) amendments to the Family and Medical Leave Act (FMLA), if leave has not yet been exhausted and no exemption applies. Under the FFCRA, every employer with 500 or fewer employees must pay up to 80 hours (or prorated equivalent for part-time workers) of time off at full pay (up to \$511 per day and \$5,110 in the aggregate) if the employee is unable to work from home and one of the following scenarios applies:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a qualified healthcare provider to self-quarantine due to concerns related to COVID-19; or
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

This paid leave requirement applies **regardless of whether the employer was previously covered by the FMLA or the employee has met the FMLA's service requirements to be eligible** (which normally applies only to businesses of 50 or more employees and only after an extended period of service).

This paid leave requirement is **subject to several important exceptions.**

- First, the paid leave under the above three scenarios is subject to work availability according to the U.S. Department of Labor's (DOL) recently revised temporary rules regarding leave under the FFCRA (rev. Sept. 16, 2020). If work is not available during the time period of the intended leave, the employee would be entitled to unemployment compensation rather than paid COVID leave.
- Second, **certain health care providers are exempt from the paid leave requirement at the practice owner's discretion.** Under the DOL's September 16, 2020 revised temporary rules, dentists, hygienists and dental assistants are likely to be considered as "healthcare providers" who could be exempted from the paid leave requirement. Office staff who do not perform or assist directly in providing healthcare services are entitled to paid leave while dental professional staff are not. Once again, if no work is available to be performed, the employee must be furloughed in order to receive compensation from state unemployment coffers.

What if a staff member requests leave for another COVID-related reason? Do I have to pay for that?

Maybe. In addition to the three scenarios set forth above, under the FFCRA, if the employee is unable to work for any of the following reasons, the employee is entitled to up to 80 hours of pay at 2/3 the normal rate of pay, up to \$200 per day and \$2,000 in the aggregate):

- The employee is caring for an individual who is subject to a government or medical quarantine or isolation order related to COVID-19; or

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- The employee is caring for their child if the school or place of care of the child has been closed, or the childcare provider of the child is unavailable, due to COVID-19 precautions.

With respect to the above reason only, small employers may be exempted from the paid and additional unpaid) leave requirement if doing so would jeopardize the viability of the small business as a going concern. Specifically, the practice must be able to certify and demonstrate that:

- the provision of leave for that reason would cause practice business expenses to exceed revenues and cause the small business to cease operating at a minimal capacity;
- the absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Once again, if there is no work for the employee to perform, they must be furloughed to receive pay during their leave period through state unemployment compensation programs.

Moreover, under the Extended Family and Medical Leave Emergency Act (EFMLEA) amendment to the FMLA, if an employee has worked for the employer for 30 days or more, the employee is also entitled to up to ten weeks of additional paid, job-protected leave to care for a child if the school or place of care of the child has been closed, or the childcare provider of the child is unavailable, due to COVID-19 precautions. Paid leave in this scenario is **at 2/3 the employee's normal rate (up to \$200 per day and \$12,000 in the aggregate)**. As with the initial up to 80 hours of paid leave, the partially-paid leave requirement is subject to a small business exemption for COVID-related childcare leave.

Finally, if the employer is large enough to be covered by the FMLA leave generally (i.e., has 50 or more employees) the employer may also be required to extend additional unpaid leave to employees who are suffering from a COVID-19-related illness or are required to care for a sick family member, as long as the circumstances would otherwise qualify the employee for leave and the individual's leave-allotment has not been exhausted.

With respect to all of the above discussion under the recent FMLA amendments, note that if paid leave could have been but is not provided (whether as a result of an exemption or voluntary exclusion of health care providers by the employer), the employer is also not entitled to the offsetting tax credit for having provided COVID-related leave.

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A staff member has an elementary school child in a “hybrid” learning situation this fall (partly remote and partly in person). Can they take intermittent paid leave for the time period when their child is learning remotely?

*For partial day absences, **the employer must consent to the arrangement.** If, however, classes are remote for full days at a time, **no employer consent is required.** This intermittent leave rule also applies to leaves involving parental leave due to closings/unavailability of day care (and not leave to care for a sick family member unless FMLA also applies to the practice generally).*

What if an employee claims they contracted COVID-19 through work-related contact? Must I pay the employee while they are out on leave in this circumstance?

Perhaps indirectly *through workers' compensation, if it can be shown that the staff member more likely than not contracted the virus at work.* In that case, the employee would be entitled lost time payments through state workers' compensation funds as well as possible recovery of certain medical expenses. This could result in a higher premium rate to the practice for WC insurance coverage.

What if the employee doesn't qualify for workers' compensation (e.g., because the virus was clearly contracted elsewhere than the workplace) and has already exhausted available paid FFCRA leave (or it is unavailable because of the childcare exemption mentioned above)? Do I have to pay leave benefits in that circumstance??

Perhaps, indirectly through unemployment compensation. If feasible, the practice could lay-off the staff member during the quarantine or isolation period in question and bring back the employee once the situation has resolved. It may also be possible for an employee to receive unemployment benefits while on any unpaid FFCRA leave.

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