



## Compliance Support

by Cushion Employer Services  
Corp

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### The Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (the "Act") was passed by Congress on March 28, 2020. The Act amends the federal Family and Medical Leave Act (FMLA) to allow employees to take leave for certain child care purposes related to COVID-19. It requires employers to partially compensate employees after the first 10 days of leave.

#### Covered Employers

The expanded FMLA requirements apply to private employers with **fewer than 500 employees**, and to all government employers. Thus, small employers that are not subject to the FMLA's regular leave provisions are subject to the new FMLA

leave rules that allow employees to take leave for specified child care purposes related to COVID-19.

The law allows for future regulations to exempt businesses with fewer than 50 employees if the leave would jeopardize the viability of the business. The law states that employers with fewer than 50 employees will **not** be subject to civil damages in an employee action brought under the FMLA for violation of the new provisions.

### **Covered Employees**

All employees who have worked for their current employer for **30 calendar days** are eligible for the new FMLA leave; however, employers are permitted to deny leave to employees who are **health care providers** or **emergency responders**.

### **Using Leave**

Eligible employees of covered employers may take up to **12 weeks** of FMLA leave if they are unable to work (or telework) because they must care for a son or daughter under 18 years of age. The need for leave must be caused by the closing of the child's elementary or high school or place of care, or the unavailability of the child's child care provider, due to a declared COVID-19 public health emergency.

"Child care provider" means a provider who receives compensation for providing child care services on a regular

basis.

Where the need for leave is foreseeable, employees should provide their employers with **as much notice of leave as is practicable**.

### **Compensation**

Employers are **not** required to pay employees for **the first 10 days** of the new FMLA leave, but employees may substitute any accrued vacation leave, personal leave, or medical or sick leave for this unpaid leave. Thereafter, the employer must compensate FMLA leave taken under the new provision at a rate of at least **two-thirds** of the employee's regular rate of pay, based on the number of hours the employee would otherwise normally be scheduled to work, up to a **maximum** of **\$200** per day, or **\$10,000** total.

Special calculation rules apply for employees with variable schedules.

Special rules apply to multi-employer collective bargaining agreements.

### **Job Protection**

While FMLA leave is usually job-protected, meaning employees who take leave must be restored to their position (or an equivalent) when they return to work, the new law provides a

**limited exception** to this requirement. Employers with **fewer than 25 employees** are not subject to the job restoration requirement, if:

- The employee took FMLA leave under the new COVID-19 expansion of the law;
- The employee's position no longer exists due to economic conditions or changes in operating conditions of the employer that affect employment and are caused by a public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If these efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available. The contact period is for one year, beginning on the earlier of:
  - The date on which the employee's need for leave ends
  - Twelve weeks after the employee's leave begins

### **Tax Credit**

Employers are entitled to a credit against the tax imposed by section 3111(a) or 3221(a) of the IRS Code for each calendar quarter of an amount equal to 100% of qualified family leave wages paid. Tax credits are also available for self-employed people.

# DOL Guidance on COVID-19 and the FMLA

**Special Update: On March 18, 2020, Congress passed sweeping legislation that included an expansion of FMLA leave for certain child care purposes necessitated by COVID-19. Some information in the DOL guidance below may therefore be outdated. A summary of the FMLA expansion appears earlier on this page.**

The U.S. Department of Labor has issued [questions and answers](#) on the federal Family and Medical Leave Act (FMLA) and COVID-19 (the disease caused by the new coronavirus) and other health emergencies. The Q&As explain that under the FMLA, covered employers must provide eligible employees with job-protected, unpaid leave for specified family and medical reasons, which may include the flu where complications arise. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as before they took leave.

The Q&As state, among other things, that the FMLA provides leave for an employee's serious health condition or to care for a family member's serious health condition, but does not provide leave for avoiding the workplace out of a fear of contracting a disease. The Q&As also provide information on the application of the Americans with Disabilities Act (ADA) to employee leave.

The Q&As recommend that employers encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home. They also encourage employers to consider flexible leave policies for their employees in these circumstances. The DOL Q&As are reprinted below.

## **COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers**

If you or your employees are out with the flu or are caring for ill family members, check with the Department of Labor (DOL) for information on whether such leave is covered under the [Family and Medical Leave Act \(FMLA\)](#). Under the FMLA, [covered](#) employers must provide employees job-protected, unpaid leave for specified [family and medical reasons](#), which may include the flu where complications arise. Employees on FMLA leave are entitled to the [continuation of group health insurance coverage](#) under the same terms as existed before they took FMLA leave.

### ***Which employees are eligible to take FMLA leave?***

Employees are eligible to take FMLA leave if they work for a covered employer and:

- Have worked for their employer for at least 12 months;

- Have at least 1,250 hours of service over the previous 12 months; and
- Work at a location where at least 50 employees are employed by the employer within 75 miles.

Special hours of service requirements apply to airline flight crew employees and to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). (See the U.S. Department of Labor [Wage and Hour Division](#) or call 1-866-487-9243 for additional information on FMLA.)

***Must an employer grant leave to an employee who is sick or who is caring for a family member who is sick?***

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons. This may include the flu where complications arise that create a "serious health condition" as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the

employee had been continuously employed during the leave period.

Workers who are ill with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

***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.

***What legal responsibility do employers have to allow parents or caregivers time off from work to care for the sick or children who have been dismissed from school?***

Covered employers must abide by the FMLA as well as any applicable [state FMLA laws](#). An employee who is sick, or whose

family members are sick, may be entitled to leave under the FMLA. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons, which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA.

There is currently no federal law covering non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families. Remember that federal law mandates that any flexible leave policies must be administered in a manner that does not discriminate against employees because of race, color, sex, national origin, religion, age (40 and over), disability or veteran status.

***Is an employer required by law to provide paid sick leave to employees who are out of work because they have pandemic influenza, have been exposed to a family member with influenza or are caring for a family member with influenza?***

Federal law generally does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu or are caring for someone with the flu, although pursuant to [Executive Order 13706](#), some federal contractors may be required to provide such leave to employees under certain circumstances, such as if the employee or a family member is sick with the flu or seeking care related to the flu. Certain state or local laws may have different requirements, which should be independently considered by employers when determining their obligation to provide paid sick leave.

If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. Employers should encourage employees who are ill with pandemic influenza to stay home and should consider flexible leave policies for their employees.

***May employers send employees home if they show symptoms of pandemic influenza? Can the employees be required to take sick leave? Do they have to be paid? May employers prevent employees from coming to work?***

It is important to prepare a plan of action specific to your workplace, given that a pandemic influenza outbreak could affect many employees. This plan or policy could permit you to send employees home, but the plan and the employment decisions

must comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability or veteran status. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time.

Your company policies on sick leave and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have any questions.)

Remember when making these decisions to exclude employees from the workplace, you cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership or veteran status. However, you may exclude an employee with a disability from the workplace if you:

- Obtain objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and

- Determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

(See the U.S. Equal Employment Opportunity Commission's [Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act](#) for additional information.)

***May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam or remain symptom-free for a specified amount of time before returning to work?***

**Yes.** However, employers should consider that during a pandemic, health care resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the [Americans with Disabilities Act](#)\* (ADA), an employer would be allowed to require a doctor's note, a medical examination or a time period during which the employee has been symptom-free before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief-based on objective evidence-that the employee's present medical condition would:

- Impair their ability to perform **essential job functions** (i.e., fundamental job duties) with or without reasonable accommodation; or
- Pose a **direct threat** (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a [fitness-for-duty certification](#) to return to work. If state or local law, or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

***May employers change their paid sick leave policy if a number of employees are out and they cannot afford to pay them all?***

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national

origin, disability or veteran status. Be sure also to consult state and local laws.

In addition, you should consider that, if your workforce is represented by a labor union and the collective bargaining agreement covers sick leave policies, you may be limited in either the manner in which you change the policy or the manner of the changes themselves because the collective bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave. Your sick leave policy also has to follow the requirements of the FMLA (if your employees are covered by the Act), and it needs to be consistent with federal workplace anti-discrimination laws, such as the [Americans with Disabilities Act](#) (ADA). (See the U.S. Department of Labor, [Wage and Hour Division](#) or call 1-866-487-9243 for additional information on FMLA. See the [U.S. Equal Employment Opportunity Commission](#) or call 1-800-669-4000 if you have questions on ADA.)

***If an employer temporarily closes its place of business because of an influenza pandemic and chooses to lay off some but not all employees, are there any federal laws that would govern this decision?***

The federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national

origin or disability may apply. (See the [U.S. Equal Employment Opportunity Commission](#) (EEOC) or call 1-800-669-4000 if you have questions.) Other specific federal laws that prohibit discrimination on these or additional bases may also govern if an employer is a federal contractor or a recipient of federal financial assistance.

Additionally, the Worker Adjustment and Retraining Notification (WARN) Act helps ensure advance notice in cases of qualified plant closings and mass layoffs. For more information about the WARN Act, see <https://www.dol.gov/agencies/eta/layoffs/warn>.

You may also not discriminate against an employee because the employee has requested or used qualifying FMLA leave. (See the U.S. Department of Labor, [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have questions.)

In addition, you may not discriminate against an employee because he or she is a past or present member of the United States uniformed service. (See the U.S. Department of Labor, [Veterans' Employment and Training Service](#) for additional information or call 1-866-889-5627 if you have questions.)

***Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?***

It depends. If an employee is **covered and eligible** under the

FMLA and is needed to care for a spouse, daughter, son or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of job-protected, unpaid leave during any 12-month period. Some states may have similar [family leave laws](#). In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees. (See the U.S. Department of Labor, [Wage and Hour Division](#) for additional information or call 1-866-487-9243 if you have questions.)

In lieu of laying off employees in this situation, we would encourage you to consider other options, such as telecommuting, and to prepare a plan of action specific to your workplace.

***What types of policy options do employers have for preventing abuse of leave?***

Both the FMLA and the [Americans with Disabilities Act affect](#) the provision of leave.

Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave **when the need is foreseeable** and such notice is practicable. In addition, employers may require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or a

spouse, son, daughter or parent, including periodic recertification;

- Second or third medical opinions (at the employer's expense);
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
- Consistent with a uniformly applied policy or practice for similarly situated employees, a fitness-for-duty certification. (Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.) (See also: "May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?")

The FMLA also allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances. (See the U.S. Department of Labor [Wage and Hour Division](#) for additional information on the FMLA or call 1-866-487-9243 if you have questions.)

\*Under the [Americans with Disabilities Act](#), qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave or modifications to the employer sick leave policies as "reasonable accommodations." These are modifications or adjustments to jobs, work environments, or workplace policies

that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities. (See the U.S. Equal Employment Opportunity Commission's [Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#) for additional information.)

For further information about coronavirus, please visit the HHS's [Centers for Disease Control and Prevention](#).

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