

COVID-19: FMLA REMINDERS AND RECOMMENDATIONS

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As employers navigate the implications of COVID-19 and the workplace, one of the subjects to keep in mind is the federal Family and Medical Leave Act (FMLA). **Employers should be aware that currently pending legislation would temporarily amend the FMLA to, among other things, change the scope of the employers covered by the FMLA (with respect to the new provisions), expand eligibility in certain respects, and provide certain paid leave obligations in light of the novel coronavirus (COVID-19).** If that legislation becomes law, employers are encouraged to consult legal counsel to assess what, if any, new obligations they may have.

In the meantime, this post is intended to provide employers with reminders and recommendations for complying with the current version of the FMLA. In addition to reviewing this post, employers should review the FMLA guidance issued recently by the U.S. Department of Labor (DOL): <https://www.dol.gov/agencies/whd/fmla/pandemic>.

Eligibility: Resist the urge to make FMLA available for everyone regardless of eligibility status.

- While making FMLA leave available to all may seem generous, the DOL has emphasized that it is not permissible to count leave against an employee's 12-week FMLA entitlement if the employee is not yet eligible for leave (i.e., has not worked for the employer for 12 months, has not worked 1,250 hours in the 12 months before the leave is to begin, or does not work at a location with 50 employees in a 75 mile radius).
- Rather than providing "FMLA leave" to an employee who is not yet eligible, employers may provide leave under other employer policies.

Deadlines: Ensure compliance with employer notice requirements, absent extenuating circumstances.

- Even as employers' Human Resources/Benefits Departments are undoubtedly stretched thin, the various deadlines to comply with employer notice requirements remain in effect unless it can be shown that "extenuating circumstances" apply. Thus, efforts should be made to comply with applicable deadlines, including:

- The Notice of Eligibility and Rights & Responsibilities: must be provided to an employee within 5 business days after receiving notice that the employee may need FMLA leave;
- The Designation Notice must be provided to an employee within 5 business days after receiving sufficient information to know whether leave will be designated as FMLA leave.

Situations Which Qualify for FMLA Leave: Resist the urge to count all leave associated with coronavirus concerns against an employee's FMLA entitlement; on the other hand, remember that a number of situations may qualify for FMLA leave.

- As with eligibility, it is important to count an absence against an employee's FMLA entitlement only if the absence is due to an FMLA-qualifying reason. Otherwise, an employer may be found to have interfered with an employee's overall FMLA entitlement (e.g., if the employee needs leave for an FMLA-qualifying reason later in the applicable 12-month period but is found to have already used some or all of the employee's leave entitlement).
- Employees who are working from home are not on leave; thus, time working remotely should not be counted against an employee's FMLA entitlement.
- Leave due to a desire to avoid *potential infection* with coronavirus does not qualify for FMLA leave. Thus, leave due to an employee being directed to not come to work for social distancing purposes should not be counted against an employee's FMLA entitlement. Employers may wish to consider application of other leave policies (paid and unpaid) and offer employment protections for those on leave for this reason.
- Leave due to the need to *provide childcare for otherwise healthy children* whose schools have closed does not qualify for FMLA leave. Employers should consider whether state versions of FMLA or other state leave laws require protected leave in such circumstances.
- Leave due to an employee being diagnosed with COVID-19, or being needed at home to care for an individual with COVID-19, *may* qualify for FMLA leave, if the person is incapacitated (unable to work, attend school, or perform other daily activities) for three or more full calendar days due to a serious health condition (essentially, a condition that requires either in-patient care or continuing treatment). Note that leave due to the "flu" ordinarily does not qualify, unless complications arise.
- Even if an employee's or family member's illness does not qualify for FMLA leave, the federal government is encouraging employers to urge workers who are ill or potentially ill with COVID-19 to stay home in order to minimize the spread of the pandemic, and otherwise support community mitigation strategies such as by offering flexible leave policies for their employees.

- Generally, continuing treatment involves either one *in-person* visit plus continuing care (e.g., antibiotics or special equipment), or two *in-person* visits (unless extenuating circumstances apply, such as the health care provider being unable to schedule a second appointment due to availability). However, for various reasons (e.g., strains on the health care system, a desire to avoid spreading infection, a lack of availability of tests), medical evaluations may be done via tele-medicine, such as via phone call or e-visits. It is likely that, under present circumstances, employers should permit such evaluations to count as “in-person visits.”
- Remember that FMLA leave is available for mental health conditions as well as physical health conditions. There is concern that certain mental health conditions such as depression 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.

Medical Certifications and Fitness-For-Duty Certifications: Consider whether to relax requirements relating to submission of these certifications.

- Employers are permitted to require employees to submit appropriate medical certification supporting the need for FMLA leave. However, employers are not *required* to obtain such certification. Given the current strains on the health care system, employers may choose to consider and grant a request for FMLA leave in appropriate circumstances even if the employee is unable to submit a medical certification, or unable to submit the certification within the usual 15-day timeframe.
- Similarly, employers are permitted to require employees to submit appropriate fitness-for-duty certifications following FMLA leave, but employers may choose to relax this requirement when appropriate. That said, with respect to employees who have been diagnosed with COVID-19 or have been caring for or directly exposed to someone diagnosed with COVID-19, it is important to follow all government instructions with respect to quarantine, etc.

Layoffs: If an employer finds it necessary to lay off workers due to economic considerations, employees who have requested or taken FMLA leave are not entitled to greater job protection than other employees. However, employees should not be selected for layoff based on having requested or taken FMLA leave.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers deal with coronavirus related issues. If you or your organization would like more information on such issues or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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Christy E. Phanthavong

Chicago

[christy.phanthavong@bclplaw.co](mailto:christy.phanthavong@bclplaw.com)

[m](#)

[+1 312 602 5185](tel:+13126025185)

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