

US COVID-19: COVID-RELATED LEAVE – WHEN DOES THE FMLA APPLY?

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COVID-19 has led to significant employee absences from the workplace. While the federal Family and Medical Leave Act (FMLA) may well apply to certain such absences, employers must avoid the temptation to count all COVID-related leave against employees' FMLA entitlement without considering the specific circumstances. Over-designating absences as FMLA leave when the FMLA does not actually apply can create just as many legal issues as failing to designate covered absences under the FMLA.

For example, an FMLA interference claim may result if an employee is denied additional FMLA leave after the employee's FMLA entitlement is exhausted due to absences that did not truly count as FMLA leave. Conversely, by offering FMLA protections when the FMLA does not apply, employers may be establishing a right to reinstatement or other benefits when no such right should exist. At a minimum, improperly designating absences as FMLA leave can create confusion and administrative nightmares.

Accordingly, COVID-related absences must be evaluated carefully and designated as FMLA leave only in appropriate circumstances. As a general overview – but with the caveat that this post is not intended to provide legal advice concerning specific situations – below are examples of COVID-related situations in which the FMLA typically will, and typically will not, apply (assuming employer coverage and employee eligibility). Employers with specific questions about FMLA coverage for an employee's absence should consult with legal counsel.

Leave Likely To Be FMLA-Protected

Employee has symptomatic COVID-19 that renders employee unable to work for more than three consecutive workdays.

Employee is hospitalized due to COVID-19 complications.

Employee needs a week off to care for Employee's spouse who is incapacitated by

Leave Not Likely To Be FMLA-Protected

Employee has asymptomatic COVID-19, or only mildly symptomatic COVID-19, but is able to work from home.

Employee wants time off to visit an aunt who is hospitalized due to COVID-19 complications.

Employee needs a week off to provide childcare for Employee's young children

significant COVID-19 symptoms.

because Employee's spouse, who usually cares for the children, has COVID-19.^[1]

Employee needs time off due to debilitating, chronic anxiety that has been exacerbated by the pandemic.

Employee does not want to come to work due to generalized fear of COVID-19 exposure.

Employee needs multiple days off from work due to having a severe reaction to the COVID-19 vaccine.

Employee needs time off to obtain a COVID-19 vaccine.

Employee is sent home from work due to having mild COVID-19 symptoms, and is not permitted to return to the workplace under the employer's COVID protocols without a negative COVID-19 test, the results of which take three workdays for the employee to receive.

Employee, who must work onsite, has been exposed to COVID-19 and, pursuant to employer's COVID protocols, is not permitted in the workplace during the 10-day quarantine period.

Employee's FMLA entitlement is exhausted as a result of using 12 weeks of FFCRA childcare leave during 2020 (within the applicable 12-month leave period as defined by Employer's FMLA policy).

In those COVID-related situations where the FMLA may apply, employers should follow the normal FMLA procedures relating to providing notice of eligibility and rights & responsibilities, requesting an FMLA medical certification, designating the leave under the FMLA when appropriate, and tracking the FMLA leave usage.

In both situations – i.e., regardless of whether the FMLA may or may not apply – employers must be careful to consider employees' leave rights and options under applicable state law and their existing leave policies.

^[1] Leave for this reason may have been considered FMLA leave during a portion of 2020 as a result of the Emergency FMLA provisions of the Families First Coronavirus Response Act (FFCRA) relating to childcare. However, mandatory leave entitlements under the FFCRA expired at the end of 2020.

Notably, employers who voluntarily continue to provide FFCRA benefits through March 31, 2021 are still entitled to receive a federal tax credit for such leave.

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