



## Employment Law Note

November 2020

### COVID-19 Related Leaves of Absence and Other Accommodations



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As the coronavirus pandemic continues to wreak havoc on workplaces, employers large and small are faced with the challenge of navigating various federal, state, and local laws when responding to employees' requests for COVID-19 related leaves and other accommodations. Laws that potentially apply to requests for such leave are summarized below.

**The Family and Medical Leave Act (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. This may include employees who are incapacitated by a serious health condition, as may be the case with COVID-19 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 to avoid exposure to COVID-19 is not protected under the FMLA.

**The Families First Coronavirus Response Act (FFCRA).** In March 2020, Congress expanded the permissible use of leave under the FMLA to allow employees at companies of fewer than 500 people to receive emergency FMLA leave because of a qualifying need related to a public health emergency, including a need to care for a child under age 18 if the child's school or place of care has closed, or the child's care provider is unavailable. This legislation, also known as the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), was enacted under what is commonly known as the FFCRA.

Under the EPSLA, employers with fewer than 500 employees and some public employers must pay sick leave of up to 80 hours to employees who need to take leave for certain coronavirus-related reasons. Employees may be eligible for an additional ten weeks of family leave paid at two-thirds of their regular wages under the EFMLEA to care for a child whose school or place of care

is closed or whose childcare provider is unavailable because of COVID-19. The FFCRA does not have requirements for private-sector employers with 500 or more employees. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business.

Initially, the goal of FFCRA was to disincentivize employees from entering the workplace while potentially carrying COVID-19 and enable them to care for family members either suffering from the virus or affected by school closures. As such, the FFCRA was made temporary with an expiration date of December 31, 2020. However, the pandemic appears to be far from over, and Congress is currently negotiating another pandemic relief package, which may include an extension of the FFCRA.

**Washington Paid Family & Medical Leave (PFML).**

The PFML program is a mandatory statewide insurance program administered by the Employment Security Department, which provides paid family and medical leave to eligible employees. The PFML program does not replace the federal FMLA, and, in many cases, PFML and FMLA will run concurrently. An employee who has been diagnosed with COVID-19 or who is caring for a family member who has been so diagnosed may be eligible for paid leave if a healthcare provider certifies that the illness meets the definition of a "serious health condition" and the employee is otherwise qualified. Employees who have been laid off or furloughed may still qualify for paid medical leave if they satisfy the PFML hours requirement. Quarantine and school closures are not PFML-qualifying events at this time.

**Washington State Paid Sick Leave (PSL).** Non-exempt employees in Washington accrue paid sick leave. Such employees are permitted to take paid sick leave for themselves or a family member, as necessary to diagnose, care for, or treat a COVID-19 infection. Paid sick leave is also available to employees who have been directed to quarantine themselves or, in some cases, to

employees who are immunocompromised and have been advised to self-isolate. Non-exempt employees may also take paid sick leave if their workplace or their child's school has been closed by a public official for health-related reasons. Employers may allow workers to use paid sick leave if the business decides on its own to temporarily close in response to COVID-19 but are not required to do so.

To reduce the strain on the healthcare system, Washington's Department of Health has issued guidance recommending that employers not require verification from employees who take sick leave. In support of this guidance, Washington's Department of Labor and Industries has indicated that employers may temporarily waive any verification requirements contained in their written sick leave policies.

**Local Leave Laws.** Employees may have rights to use accrued, unused leave under local sick leave laws. For example, Seattle's Paid Sick and Safe Time Ordinance (PSST) applies to all employers with employees working in Seattle and allows employees to use PSST hours that they accrue over time. The Seattle City Council amended the PSST ordinance to expand the uses of PSST in light of the region's COVID-19 crisis. The PSST law now also requires employers to provide employees who work in Seattle with paid leave when an employee's family member's school or place of care has been closed, and for employers of businesses with 250 or more full-time employees when the employee's place of business has been closed for any health or safety reason.

**Paid Time Off Policies.** Employers who have a general PTO policy that allows employees to take time off for vacation, sick, and/or personal reasons should continue to allow employees to use those days in accordance with their policy. However, it is not unlawful for employers to revise PTO policies to reduce costs.

**Enhanced Protections for High-Risk Employees.** In July 2020, Gov. Jay Inslee issued an amendment to his prior emergency proclamation concerning workers who are at a high risk of contracting COVID-19. Under the amended proclamation, high-risk employees include

people who are 65 years or older and people with underlying medical conditions. Employees who fall under one of these categories are entitled to certain workplace protections, including the choice of an alternative work assignment, such as telework, alternative or remote work locations if feasible, and social distancing measures; permission to use any accrued leave or unemployment benefits if an alternative work assignment is not feasible; continuation of health insurance benefits while the employee is off the job; and protection from employers permanently replacing high-risk employees for exercising their rights under the proclamation. Employers may not require verification from a medical provider for employees who are older than 65 or who fall within the "at increased risk" category. However, employers may require such verification when the employee either falls within the "might be at an increased risk" category or seeks to use any leave where a state or federal law, collective bargaining agreement, or contractual obligation requires such verification. These protections remain in effect for the duration of Washington's current state of emergency.

### **The Americans with Disabilities Act (ADA) and Washington Law Against Discrimination (WLAD).**

Under the ADA and the WLAD, an employer is required to consider providing unscheduled leave, unpaid leave, or modifications to the employer's sick leave policies to qualified individuals with disabilities who may need a "reasonable accommodation."

**Preventing Potential Litigation.** COVID-related lawsuits are on the rise, including lawsuits claiming leave discrimination and retaliation related to leaves. Before an employer takes action with respect to an employee remaining on leave (or recently returning from leave), the employer should consider all options, including modifying work schedules, extending leave, or bringing employees back to a position other than their former role. There is no bright-line test for whether to grant any particular accommodation request, and employers should analyze each employee's circumstances on a case-by-case basis.

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