



Don't forget the FMLA: Large employers still face Family and Medical Leave Act (FMLA) obligations due to coronavirus (COVID-19)

By **Andrea Chavez, Irene Scholl-Tatevosyan, and David Rosenthal**

Private employers with 500 or more employees who fall outside the ambit of the recently mandated paid leave provisions of the Families First Coronavirus Response Act (FFCRA) may still have leave obligations related to COVID-19 under the Family and Medical Leave Act (FMLA) and its state law equivalents. The FMLA, which generally applies to businesses who employ 50 or more employees in 20 or more workweeks, may require your company to provide coronavirus-related leave. This alert discusses in what situations the FMLA may or may not apply to COVID-19 cases, and reminds employers not to forget the FMLA.

Which employers are covered?

The FMLA covers all employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year. The FFCRA only covers private employers with less than 500 workers.

What are the criteria for employee eligibility?

Employees are eligible for FMLA leave if they work for a covered employer, have worked for the employer for at least 12 months as of the date leave commences, have worked at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and work at a worksite where the employer employs at least 50 employees within 75 miles.

When can an employee take FMLA leave for an illness caused by COVID-19?

An employee who is unable to perform the essential functions of his or her job because of a serious health condition is entitled to an FMLA leave. For purposes of FMLA, a serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider, as defined by the FMLA. Although the regulations provide that the flu is “ordinarily” not an incapacitating serious health condition, it may be treated as a serious health condition where the illness results in inpatient care or requires continuing treatment by a health care provider. A serious health condition involving continuing

treatment by a health care provider includes a period of incapacity of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves either:

- In-person treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist regarding the follow-up visit, by a health care provider
- In-person treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment (e.g., antibiotics) under the supervision of the health care provider

Incapacity means inability to work, attend school, or perform other regular daily activities due to the serious health condition.

Can an employee stay home to prevent getting COVID-19?

Pursuant to recent Department of Labor (DOL) guidance, leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA.

When can an employee take FMLA leave to care for a family member with COVID-19?

FMLA leave can be taken to care for a child (biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis), spouse, or parent (or in loco parentis) with a serious health condition. A “serious health condition” under the FMLA for an employee's son, daughter, spouse, or parent has the *same* meaning as for an employee's own “serious health condition.” An employee may take FMLA leave to care for a family member with COVID-19 if complications arise for the family member that create a “serious health condition” as defined above. The term “care for” includes both physical and psychological care, and includes circumstances where a family member is unable to care for basic medical, hygienic, or nutritional needs or safety, or is unable to transport themselves to the doctor. In the Ninth and First Circuits, caring for a family member with COVID-19 should involve some level of participation in the ongoing treatment.

Can an employee take FMLA leave to prevent a family member who has a compromised immune system from getting COVID-19?

The potential danger of a possible contagious illness, by itself, does not qualify as a serious health condition. Similar to how the DOL makes no exceptions regarding employees trying to avoid getting COVID-19, an employee likely cannot take FMLA leave to care for a close family member with a compromised immune system who is simply trying to avoid getting COVID-19. However, an employee may take FMLA leave to care for a family member who has a chronic serious health condition or a permanent/long-term condition requiring supervision if the close family member is experiencing a period of incapacity or treatment for incapacity.

Can an employee take FMLA leave to prevent an elderly family member from getting COVID-19?

FMLA leave cannot be taken to care for elderly family members who have no serious medical condition. Similar to how the DOL makes no exceptions regarding employees trying to avoid

getting COVID-19, an employee most likely cannot take FMLA leave to care for an elderly close family member who is simply trying to avoid getting COVID-19.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

- Andrea Chavez, 213-629-6089, andrea.chavez@nixonpeabody.com
- Irene Scholl-Tatevosyan, 213-629-6012, itatevosyan@nixonpeabody.com
- David Rosenthal, 617-345-6183, drosenthal@nixonpeabody.com
- Benjamin Kim, 213-629-6090, bkim@nixonpeabody.com
- Michael Lindsay, 213-629-6112, mlindsay@nixonpeabody.com