

New Week, New Guidance and New FMLA Forms: The U.S. Department of Labor Publishes Additional Guidance for Employers as Employees Return to Work.

By: Samantha Koeninger Rittgers on July 22, 2020 on graydon.law

The new guidance provides plain-language FAQs addressing critical issues under all three laws. Specifically, the FAQs address questions about telework, telemedicine, and the new paid sick leave and expanded family and medical leave law. The guidance reiterates common knowledge like “employees must be compensated for all hours worked” but also provides insight on new issues we continue to run into as the workplace continues to evolve.

- I am an employer who allows my employees to telework during the COVID-19 emergency. Now that my employees are no longer at my worksite, how do I determine their hours of compensable work? Do I have to pay my employees for hours I did not authorize them to work? Do I have to pay them for hours worked even when they do not report those hours?** Employees must be compensated for all hours of telework actually performed away from the primary worksite, including overtime work, in accordance with the FLSA, provided that you knew or had reason to believe the work was performed. This is true even of hours of telework that you did not authorize.
- I am an employer who allows my employees to telework during the COVID-19 emergency. I would also like to give my employees flexibility in hours of work so they can take time out of the normal workday for personal and family obligations, such as caring for their children whose schools have closed. If I allow my employees to begin work, take several hours in the middle of the workday to care for their children, and then return to work, do I have to compensate them for all of the hours between starting work and finishing work?** Employees must be compensated for hours actually worked, but if an employee takes a break in the middle of the day (perhaps to assist their children with schooling), ~~that time is not compensable~~

- **Can a salaried executive, administrative, or professional employee who is exempt from the Fair Labor Standards Act's (FLSA's) minimum wage and overtime requirements under Section 13(a)(1) perform other nonexempt duties during the COVID-19 public health emergency and continue to be treated as exempt?** Yes, during the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption.
- **Is hazard pay required under the Fair Labor Standards Act (FLSA) for employees working during the COVID-19 pandemic?** No.
- **I am a salaried employee exempt from the minimum wage and overtime pay requirements under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) as a bona fide executive, administrative, or professional employee. Will I lose my exempt status if I take leave under the Families First Coronavirus Response Act (FFCRA)?** Taking paid sick leave or expanded family and medical leave does not affect a person's status or eligibility for any exemption from the FLSA's minimum wage and overtime requirements.
- **I am a salaried employee exempt from the minimum wage and overtime requirements under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) as a bona fide executive, administrative, or professional employee. Can my employer reduce my salary during the COVID-19 pandemic or an economic slowdown? Would I lose my exempt status if my employer does?** Generally, an employer may prospectively reduce the amount regularly paid to a salaried exempt employee for economic reasons related to COVID-19 or a related economic slowdown. However, any such reduction must be predetermined rather than an after-the-fact deduction from the salary based on the employer's day-to-day or week-to-week needs. Moreover, any such salary change must also be bona fide, meaning the change is not an attempt to evade the salary basis requirements and is actually because of COVID-19

or an economic slowdown as opposed to the quantity or quality of work you performed.

- **Due to safety and health concerns related to COVID-19, many health care providers are treating patients for a variety of conditions, including those unrelated to COVID-19, via telemedicine. Telemedicine involves face-to-face examinations or treatment of patients by remote video conference via computers or mobile devices. Under these circumstances, will a telemedicine visit count as an in-person visit to establish a serious health condition under the FMLA?** Until December 31, 2020, the WHD will consider telemedicine visits to be in-person visits, and will consider electronic signatures to be signatures, for purposes of establishing a serious health condition under the FMLA.

- **I was out on FMLA leave unrelated to COVID-19. While I was out, my company implemented a new policy requiring everyone to take a COVID-19 test before they come to the office. Under the FMLA, can my employer require me to get a COVID-19 test under this policy?** The FMLA does not prohibit the employer’s testing requirement. When your FMLA leave is over, your employer must reinstate you to the same job or an equivalent position. However, you are not protected from actions that would have affected you if you were not on FMLA leave. For example, if a shift has been eliminated, or overtime has been decreased, you would not be entitled to return to work that shift or the original overtime hours. That principle also applies here, where your employer’s requirement for testing isn’t related to your having been out on FMLA leave but instead, all employees, regardless of whether they have taken any kind of leave, are required to be tested for COVID-19 before coming to the office. Other laws may impose restrictions on the circumstances when your employer can require COVID-19 testing, and what types of tests are permitted.

- **My employee used two weeks of paid sick leave under the FFCRA to care for his parent who was advised by a health care provider to self-quarantine because of symptoms of COVID-19. I am concerned about his returning to work too soon and potentially exposing my other staff to COVID-19. May I require him to telework or take leave until he has tested negative for COVID-19?** It depends. In general, an employee returning from paid sick leave under

FFCRA has a right to be restored to the same or an equivalent position, although exceptions apply. However, due to the public health emergency and your employee’s potential exposure to an individual with COVID-19, you may temporarily reinstate him to an equivalent position requiring less interaction with co-workers or require that he telework. In addition, the employee must comply with job requirements that are unrelated to having been out on paid sick leave. For instance, a company may require any employee who knows he has interacted with a COVID-infected person to telework or take leave until he has personally tested negative for COVID-19 infection, regardless of whether he has taken any kind of leave. Such a policy would apply equally to an employee returning from paid sick leave. However, you may not require the employee to telework or be tested for COVID-19 simply because the employee took leave under the FFCRA.

- I have an employee who used four weeks of expanded family and medical leave before she was furloughed. Now I am re-opening my business. When my employee comes back to work, if she still needs to care for her child because her child care provider is unavailable for COVID-related reasons, how much expanded family and medical leave does she have available?** Under the FFCRA, your employee is entitled to up to 12 weeks of expanded family and medical leave. She used four weeks of that leave before she was furloughed, and the weeks that she was furloughed do not count as time on leave. When she returns from furlough, she will be eligible for eight additional weeks of leave if she has a qualifying reason to take it. Because the reason your employee needs leave may have changed during the furlough, you should treat a post-furlough request for expanded family and medical leave as a new leave request and have her give you the appropriate documentation related to the reason she currently needs leave. For example, before the furlough, she may have needed leave because her child’s school was closed, but she might need it now because her child’s summer camp is closed due to COVID-19-related reasons.
- My business was closed due to my state’s COVID-19 quarantine order. I furloughed all my employees. The quarantine order was lifted and I am returning employees to work. Can I extend my former employee’s furlough because he would need to take FFCRA leave to care for his child if he is called back to work?** Employers may not discriminate or retaliate against employees (or prospective employees) for exercising or attempting to exercise their right to take

leave under the FFCRA. If your employee’s need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it. You may not use his request for leave (or your assumption that he would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough.

- **I was working full time for my employer and used two weeks (80 hours) of paid sick leave under the FFCRA before I was furloughed. My employer said I could go back to work next week. Can I use paid sick leave under the FFCRA again after I go back to work?** Employees are only entitled to a total of 80 hours of paid sick leave under the FFCRA.

The DOL previously released an Online Tool to help employees determine eligibility under the FFCRA for paid sick leave or expanded family and medical leave. A similar online tool for employers is coming soon!

New FMLA Forms - If you haven’t had too much already, one more gift from the DOL: new FMLA forms. The new forms are voluntary. Many employers choose to use them to comply with many technical nuances of the FMLA. The DOL announced that the new forms are intended to be easier to understand for employers, leave administrators, healthcare providers, and employees seeking leave. The new forms include:

- WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition
- WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition
- WH-381 Notice of Eligibility of Rights & Responsibilities
- WH-382 Designation Notice
- WH-384 Certification of Qualifying Exigency for Military Family Leave
- WH-385 Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave
- WH-385V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

To continue its recent trend of providing useful plain language guidance, the DOL also included, in question and answer format, guidance as it relates to the new forms.

- **The Department revised the optional-use FMLA forms in June 2020. Can I still use the old DOL forms?** Yes. The FMLA does not require the use of any specific form or format.
- **Do these forms have any applicability to the Families First Coronavirus Response Act (FFCRA)?** No. The FFCRA has different documentation requirements.

We are here to help. If you have any compliance questions or would like additional clarification, please reach out to us at Graydon. We will continue to keep you up to date with the latest and greatest from the DOL!