

# COVID-19 Employment Considerations for LTSS Providers

## Information & Frequently Asked Questions

For over 35 years, we at Rolf Goffman Martin Lang LLP (ROLF) have focused our practice on serving the legal needs of post-acute, long-term care and senior living providers.

In light of this critical time brought on by the COVID-19 pandemic, we are providing the information on the pages that follow as a service to Ohio's Long-Term Care Services and Supports (LTSS) providers.

As everyone knows, the situation right now is extremely fluid with recommendations changing frequently – often on a daily basis. Accordingly, you should understand that the information in these Frequently Asked Questions is current as of the time indicated below.

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Version History		
Version	Date	Summary of Changes (Significant additions or sections including substantive changes from the last version are in red)
1.0	3/18/20	Original FAQ
2.0	3/19/20	Addition of information reflecting the passage of federal Families First Coronavirus Response Act (FFCRA); change in title to reflect inclusion of information in non-FAQ format
2.1	3/20/20	Addition of information reflecting ODH procedures for all employees; technical changes
3.0	3/23/20	Addition of information reflecting ODH Director's "Stay-at-Home" Order
3.1	3/30/20	Additional information relating to clarification provided by Department of Labor of applicability of FFCRA; technical changes.



## General Information and Guidance

### ***What are the symptoms of COVID-19 infection?***

The generally reported symptoms of COVID-19 are coughing, fever (*i.e.*, 100.4 or higher) and shortness of breath. Some guidance also lists a sore throat among the symptoms.

### ***How should we communicate with employees regarding COVID-19?***

Each facility should designate a specific person to be the contact point for employees for information relating to COVID-19. This includes providing information to employees, and also receiving communications from employees regarding illness, the presence of symptoms of COVID-19 symptoms or absences from work due to quarantine, childcare or other COVID-19 related issues.

### ***What methods of communication should we use with employees?***

Contact information for the designated point-person should be widely shared with all employees, including a cell phone number and an email address. Employers should also ensure that contact information for employees is up to date so employees can be reached with emergency communication.

### ***What are general precautions that we should take?***

All employers should remind employees of the importance of careful hand washing (*i.e.*, at least 20 seconds) and/or use of hand sanitizers with greater than 60% ethanol or 70% isopropanol. Employees also should be reminded of coughing etiquette – to cover all coughs preferably in the elbow or with a tissue that should then be immediately discarded. If an employee coughs into his/her hand, he/she should immediately thoroughly wash his/her hands.

### ***How should employers communicate with employees regarding general precautions?***

Employers are encouraged to post reminders around the workplace – particularly at entrances and in restrooms – regarding the importance of careful hand washing and cough etiquette. Employers also are being encouraged to set up hand-washing stations at or near entrances to facilities for staff and others entering the building. For an example, please see the “Resources” below for a link to the CDC’s “Cover Your Cough” poster.

## Infection and Access Control

### ***Should employees work if they are exhibiting symptoms of COVID-19?***

No. Employees should be encouraged to self-isolate and refrain from working and/or coming to the facility if they are exhibiting symptoms of COVID-19. Employees should be encouraged to seek medical assistance if necessary.

### ***Should we screen our employees?***

- For nursing homes, the answer is a definitive and unequivocal “**Yes.**” Guidance from CMS (QSO-20-14-NH) specifically directs nursing homes to screen all staff at the beginning of their shift for fever and respiratory symptoms – taking their temperature and documenting absence of shortness of breath, new or change in cough, and sore throat.
- CMS guidance for Hospice providers (QSO-20-16-Hospice) requires hospice agencies to monitor the health status of staff and volunteers for symptoms of COVID-19 “as needed throughout the day.” Recommended screening is to ask about international travel within the past 14 days to countries with sustained community transmission; signs or symptoms of respiratory infection (such as a fever, cough and sore throat – but should also include shortness of breath although not specified by CMS); contact with someone with COVID-19 or under investigation or ill with respiratory illness; and residence in a community where community spread of COVID-19 is occurring.
- CMS guidance for home health providers (QSO-20-18-HHA) requires employers to monitor the health of staff for signs or symptoms of COVID-19. Staff who have signs or symptoms should not report to work.
- DODD issued guidance that access should be restricted to those personnel “absolutely necessary for the operation of the Homes” and had been screened per CDC and CMS procedures. Screening is to include questions about exposure to COVID-19, and assessing for fever, shortness of breath and cough.
- In a March 13 Order, the Ohio Department of Health indicated that all “Homes” as that term is defined by Ohio’s statute and includes Residential Care Facilities/AL Facilities should follow the CMS guidance for visitors and staff. The Order states that all staff should be screened each time they enter the home, to include questions about exposure to COVID-19 and assessing for fever, shortness of breath and cough.
- On March 19, the Ohio Department of Health *recommended* certain guidelines for screening employees at all work locations – not just health care facilities. They recommended that employees who can work from home should be working from home. For employees who do need to come in for work, they should have their fever taken each day (it does not say when, but the start of shift seems prudent) and should be sent home if they have a fever of 100.4° or higher. Non-contact thermometers are recommended, and information is given on cleaning thermometers (see information in Resources, below). ODH recommends no return to work until fever is resolved for at least three days without fever-reducing medicines, and there is an improvement in respiratory symptoms (e.g., cough or shortness of breath) if any, and at least seven days have passed since the onset of

symptoms. If no thermometer is available, ODH recommends asking basic questions before permitting employees to work:

- 1) Do you have symptoms of a respiratory infection (fever, cough or shortness of breath)? If “yes,” ODH recommends sending employee home to return only after seven days have passed since first onset of symptoms, and three days have passed since fever resolves (without use of fever-reducing medicines), and symptoms have improved.
- 2) Have you been exposed to someone with COVID-19? If “yes,” and not experiencing symptoms, ODH recommends the employee be sent home to self-isolate for 14 days. If “yes,” and experiencing symptoms, ODH recommends the employee be sent home for at least seven days after onset of symptoms and at least three days after fever resolves (without fever-reducing medicines) and symptoms have improved.

### ***Should we screen others providing services to our residents?***

Again, for nursing homes, the answer is yes. Employees *must* be screened at the beginning of every shift and when returning to the building. Even in the absence of specific guidance for other providers, this clearly is the recommended practice.

### ***What should we do if an employee becomes ill or exhibits symptoms of COVID-19 while at work?***

The employee should immediately don a facemask and be isolated from residents and other staff. All individuals interacting with the employee should use appropriate PPE. The issue should be reported to the facility’s COVID-19-point person and the employee should then be sent home to self-monitor and/or quarantine as appropriate for the employee’s risk level.

### ***Is screening allowed under the Americans with Disabilities Act?***

Yes. While it is true that certain screening (including taking an employee’s temperature) are considered “medical testing” and normally prohibited under the ADA, the current situation with COVID-19 provides an exception. First, under the ADA, disability related inquiries and/or medical testing are permitted on a limited basis when an employer has a reasonable belief based on objective evidence that an employee may pose a direct threat to him/herself or others. Moreover, EEOC guidance specifically provides that CDC and/or state or local assessments would provide objective evidence supporting a disability-related inquiry or medical examination.

### ***Are employees infected with COVID-19 “disabled”?***

Generally speaking, illnesses of short duration are not considered disabilities under state and/or federal law. However, depending upon the level of impairment, it is possible that COVID-19 could be deemed a disability. Also, be aware that state and federal anti-discrimination laws also protect individuals who are “regarded as” being disabled.

***Should we limit points of access to the facility?***

Yes. Where possible, facilities should limit the points of access to a single location so that they can control and monitor access and screen all individuals entering the facility. In addition, hand-washing facilities and/or alcohol-based sanitizer should be available at all points of access. Other entrances and exits should remain available for emergency situations.

***What if we run out of PPE?***

Surveyors have been directed to not cite facilities for not having certain supplies (*e.g.*, PPE such as gowns, N95 respirators, surgical masks and ABHR) if the facility has been unable to get supplies for reasons outside of its control. Facilities should continue trying to obtain supplies as soon as possible. According to CMS, if you cannot obtain PPE, you should “contact the local and state public health agency to notify them of the shortage, follow national guidelines for optimizing their current supply, or identify the next best option to care for residents.”

## ODH “Stay-at-Home” Order

On Sunday, March 22, 2020, the Director of ODH issued an Order that All Persons Stay at Home Unless Engaged in Essential Work of Activity (the “Director’s Order”). Notwithstanding the broad order for people to stay at home, the Director’s Order does include exemptions that will apply to many in healthcare, long-term care and other similar settings. In fact, such organizations are specifically encouraged to remain open in order to ensure the provision of healthcare and other related services without disruption.

Importantly, Director’s Order states that “individuals may leave their residence to work for or obtain services at any Human Services Operations.” The term “Human Services Operations” includes, among other things:

- Providers funded by the Ohio Department of Aging, Department of Developmental Disabilities, Department of Health, Department of Job and Family Services, Department of Medicaid, Department of Mental Health and Addiction Services, Opportunities for Ohioans with Disabilities, Department of Veterans Services, and Department of Youth Services that is providing services to the public and including state-operated, institutional, or community-based settings providing human services to the public;
- Long-term care facilities;
- Day care centers, day care homes, group day homes;
- Residential settings and shelters for adults, seniors, children and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness;
- Transitional facilities; and
- Home-based settings to provide services to individuals with physical, intellectual, and/or developmental disabilities, seniors, adults and children.

The term “Healthcare and Public Health Operations” includes, among other things:

- Hospitals;
- Clinics;
- Dental offices;
- Pharmacies;
- Pharmaceutical, pharmacy and medical device and equipment companies (including operations, research and development, manufacture and supply chain);
- Home healthcare service providers; and
- Other healthcare facilities and suppliers and providers of any related and/or ancillary healthcare services.

Importantly, the Director’s Order states that both Human Services Organizations and Healthcare and Public Health Operations should be construed broadly to avoid any impacts on the delivery of healthcare, broadly defined.

In addition to encouraging to stay open, the Director's Order does require those working to follow certain Social Distancing Requirements:

- Maintaining at least six feet between individuals to the extent possible;
- Frequent and careful handwashing with soap and water (at least 20 seconds) or use of hand sanitizer if washing is not possible (sanitizer and similar products should be readily available to staff and others);
- Covering coughs and sneezes (into the sleeve or elbow, not hands);
- Regularly cleaning high-touch surfaces (e.g., countertops, railings, work stations, door handles and knobs, etc.); and
- Refraining from shaking hands.

The Director's Order also states that businesses who remain open should "actively" encourage sick employees to stay home until:

- They are free of fever (without the use of medication) for at least 72 hours (three full days); and
- Other symptoms (*i.e.*, cough or shortness of breath) have improved for at least 72 hours; and
- At least seven days have passed since symptoms first began.

As previously recommended by others, the Director's Order states that employers should not require a healthcare provider's note to validate the illness or return to work of employees sick with acute respiratory illness.

The Director's Order goes into effect at 11:59 p.m., on Monday, March 23, 2020, and lasts until 11:59 p.m., on April 6, 2020, unless otherwise rescinded or modified by the Director.

***Does the Director's Order apply to corporate offices or other locations where direct care is not provided?***

We believe that the broad definition of Human Services Organizations and Healthcare and Public Health Operations – including the statement that the definitions are to be interpreted broadly so as to avoid any impact on the delivery of healthcare – inescapably leads to the conclusion that corporate headquarters and "central offices" are exempted from the Director's Order. The administrative and managerial functions administered by Healthcare and/or Human Services corporate offices are necessary to the operation and delivery of healthcare services at the patient level. Please note, however, that the Social Distancing Requirements would apply.

Even if the Corporate Office were not an Essential Business, individuals are still permitted to leave their residence in order to perform Minimum Basic Operations, including processing payroll and employee benefits, preserving the physical plant, checking security, and performing those services necessary to ensure other employees can work remotely – such as collecting and scanning the mail and other deliveries.



***What if an employee refuses to come to work because of the Director's Order?***

As mentioned above, Essential Businesses – including Human Services Organizations and Healthcare and Public Health Organizations – are specifically *encouraged* to remain open. If an employee in an Essential Business cannot perform his or her work from home, he or she can be required to come to work, subject to the same disciplinary process generally applicable to employees who refuse to perform their jobs (*i.e.*, disciplinary action up to and including discharge). Employer expectations (*e.g.*, the requirement to come to work) should be very clearly and specifically spelled out, as well as the consequences of failure to comply (*e.g.*, discharge). However, please note that the Director's Order provides that if an employee can work from home, he or she should be permitted to do so if possible.

***If an employee calls off work because he or she has symptoms of COVID-19, does the Director's Order address how long he or she must be off work?***

Yes. According to the Director's Order, an employee who is sick must remain away from work until: 1) at least three days (72 hours) have passed since the employee's fever is resolved (without the use of fever-reducing medicine; *and* 2) at least three days (72 hours) have passed since other symptoms have improved; *and* 3) at least seven days have passed since the first onset of symptoms. You should note that this order would appear to be an "Isolation Order" from a State Official that would trigger the Emergency Paid Sick Leave requirements of the Families First Coronavirus Response Act (FFCRA) as described below.

**Attendance Control/Leave**

***Should employees report to work if they are feeling ill or exhibiting symptoms of COVID-19?***

No. Employees should self-isolate at home if they are ill or exhibiting symptoms of COVID-19. Employees should seek medical attention as appropriate for severe symptoms.

***Should we enforce our usual attendance and absenteeism policies in light of the COVID-19 outbreak?***

CDC has recommended that employers provide flexibility in connection with attendance and absenteeism policies in response to the COVID-19 pandemic. There are two primary reasons flexibility is requested. First, employees must be strongly encouraged to self-isolate at home if they are experiencing signs or symptoms of COVID-19. Accordingly, employers should consider modifying existing policies and practices to the extent they cause employees to feel compelled to report to work even if they may be experiencing symptoms of COVID-19. Employers should refrain from punitive measures under an attendance and/or absenteeism policy when employees miss work due to COVID-19-related issues (*e.g.*, symptoms, quarantines and/or COVID-19 related childcare issues).

Second, it is anticipated as the number of active cases of COVID-19 increases, the health care system will be substantially burdened. As a result, employers are encouraged to waive requirements for doctor's notes to justify an absence and/or for reinstatement.

***Can we continue to enforce our policy requiring an employee to provide a doctor's note to return to work?***

Because COVID-19 cases are expected to place a significant burden on our health care system, employers have been encouraged to waive the typical requirements that employees provide a note from a doctor in order to return to work after experiencing COVID-19 symptoms. Please note, healthcare personnel who have confirmed cases of COVID-19 and/or "have suspected COVID-19" should be returned to work pursuant to procedures that have been established by CDC.

***How can we help protect our residents if employees are not required to provide a doctor's note indicating that they are cleared to return to work?***

At minimum, employees who have missed work because of illness and/or COVID-19 symptoms should be screened upon return to work and should be asked to complete a certification indicating the reason they stayed home from work (*i.e.*, the symptoms they experienced); the date and time they last experienced symptoms; whether they have had contact with any individual known or suspected to have COVID-19 in the preceding 14 days; and whether they have traveled outside the country in the preceding 14 days to any country identified as a Level 3 risk by CDC. For an individual who does not fall into a high-risk category, the employer should ensure that he/she has been symptom free for at least 24 hours. If an employee has had close contact with someone who has tested positive for COVID-19 or has traveled to a Level 3 country, he/she should remain home until 14 days have passed since the exposure and/or travel. Note that this does not apply to employees who have tested positive for or who "have suspected COVID-19" (see below).

***Under what circumstances can an employee return to work after testing positive for or being suspected of having COVID-19?***

CDC guidance provides two paths for confirming that healthcare workers who contract COVID-19 or "have suspected COVID-19" are safe to return to work.

- Under the "testing-based" approach, an employee who has confirmed or suspected COVID-19 must be excluded from work until: 1) his/her fever is resolved (without use of fever-reducing medicine); 2) there is an improvement in his/her respiratory symptoms (*e.g.*, cough and shortness of breath); and 3) he/she has negative results on tests of two specimens collected at least 24 hours apart.
- Under the "non-test-based" approach, an employee who has confirmed or suspected COVID-19 must be excluded from work until: 1) at least three days (72 hours) have passed since resolution of fever (without use of fever-reducing medicine) and improvement of respiratory symptoms (*e.g.*, cough and shortness of

breath) occurs; and 2) At least seven (7) days have passed since symptoms first appeared.

Under either approach, certain precautions are required after the employee's return to work.

- Employee should wear a face mask at all times while inside the facility until all symptoms are completely resolved or until 14 days have passed since first symptoms, whichever is longer.
- Employee should be restricted from contact with severely immunocompromised patients until 14 days after first symptoms.
- Employee should follow good hygiene practice and cough etiquette.
- Employee should self-monitor for symptoms and seek re-evaluation if symptoms recur or worsen.

The CDC also included a provision to accelerate healthcare workers' return to work in cases of staffing shortages.

***Is there any specific guidance for isolating employees who are exposed to individuals infected with COVID-19?***

The CDC has provided specific recommendations regarding how long an employee must be restricted from work – if at all – following contact with a COVID-19 patient. The duration of isolation and/or restrictions depends heavily on the specific nature of the contact. This very helpful resource, which includes many specific examples, can be found at the link provided in the “Resources” below (see “CDC Recommended Monitoring Following Exposure”).

***Are employees who miss work due to COVID-19 covered by FMLA?***

Clearly illness caused by COVID-19 would be considered a “serious health condition” under FMLA and would be covered for eligible employees. Employees eligible for FMLA leave are entitled to up to 12 weeks of unpaid leave every 12 months. Employers should be aware that key features of the “Families First Coronavirus Response Act” (or “FFCRA”) relate to expansions of FMLA (both in terms of who is eligible and reasons for leave). These issues are addressed below.

***Can employees refuse to come to work because they are afraid of contracting COVID-19?***

Generally speaking, no. Employees can be subject to discipline for refusing to work except in very limited circumstances where they believe they are in imminent danger. This standard is promulgated under the U.S. Occupational Safety and Health Act (“OSHA Act”) and is not triggered by general concern or fear. Rather, this standard is applied when there is an immediate risk of death or serious injury. However, employees might argue this

standard applies if employees were being asked to work with patients infected with COVID-19 without PPE.

## Paid Time Off

***Do we have to pay employees for time missed because of the COVID-19 outbreak?***

Probably not. The FFCRA does include provisions requiring employers to provide emergency paid sick leave and extended paid FMLA leave under certain circumstances, but employers have the option of excluding employees who are “health care providers” from the application of FFCRA, and recent guidance from DOL clarified that the definition of “health care provider” is quite broad and includes any employee of, among other things, nursing homes, nursing facilities, retirement facility, home health care provider or any similar institution, employer or entity. See FFCRA section below for additional information.

Aside from the benefits that are required to be provide to some employees in certain cases under FFCRA (see discussion of “health care provider” exemption), there is no specific legal requirement that an employee missing work due to COVID-19 be paid. Employers should look to their own PTO/sick leave policies. However, due to the unique nature of this situation – and the importance of having employees remain home if they are experiencing symptoms and/or are exposed to someone with COVID-19 – employers should consider modifications to their PTO/sick leave policies including:

- “First-day” paid leave for policies that typically require longer absences before employees can be paid;
- Pay for employees who have received an order or recommendation to self-isolate from a public health authority or doctor even if that employee is not exhibiting symptoms;
- Excusing the requirement of a doctor’s note for an employee to be paid for sick time.

Employers should note that some of these changes are part of the FFCRA which was recently passed by the U.S. House.

***Can we withhold pay from exempt employees for absences?***

Under the Fair Labor Standards Act, exempt employees must be paid their full salary for any week in which they perform any work. If an exempt employee misses work due to experiencing COVID-19 symptoms or other illness, he or she may be paid under a PTO policy for those days and “charged” under his/her PTO account. If the employer has a PTO policy and an exempt employee exhausts all available PTO under that policy and requires

additional time off, he/she may be given unpaid time off in increments of one or more full days. Again, please note that the FFCRA may change these requirements.

## Unemployment Compensation

***Is anything being done to help employees get unemployment compensation if they lose their jobs due to COVID-19?***

Governor DeWine issued an executive order making it easier for employees to receive unemployment benefits during the COVID-19 situation.

- Benefits will be available for any eligible individual who is requested by a medical professional, local health authority or employer to be isolated or quarantined, even if not actually diagnosed with COVID-19. The usual waiting period is waived – employees are immediately eligible.
- Laid off employees will be eligible.
- An asymptomatic employee who self-imposes a quarantine typically will not be eligible.

## Child Care

***How will the closure of schools and daycare affect employees' ability to come to work?***

On March 17, 2020, the Director of ODJFS signed an order authorizing emergency “pandemic childcare licenses” permitting childcare centers (existing and/or new) to provide care for children of individuals working in health care and other essential service fields. More information will be forthcoming.

## Privacy

When investigating and/or interviewing employees in connection with an employee's reported illness, the affected employee should not be identified.

## Labor Law Issues

***Can employers discipline employees for complaining about measures we are taking in response to COVID-19?***

Whether or not a union represents employees in your facility, employees have the right to engage in protected concerted activities for mutual aid or protection. Two or more employees discussing and/or raising concerns about safety, overtime, hours, protective measures or other terms and conditions of employment may be protected from retaliation.

***In light of the emergency status, can we just make changes without discussing it first with our union?***

Employers with unions that represent their employees should remember that changes to terms and conditions of employment generally are mandatory subjects of bargaining and they often must negotiate with the union before making changes. However, many collective bargaining agreements have broad "management rights" provisions that allow employers to manage scheduling, staffing or other issues. Employers should refer to their collective bargaining agreement and consult legal counsel before making any changes.

***Do we have to respond to our union's information request?***

Employers with unions should be aware that the union may request a variety of information regarding your response to COVID-19 (e.g., availability of PPE, benefits, staffing). The Union almost certainly has a right to such information. If a union requests information, employers should consult legal counsel.

## Families First Coronavirus Response Act (FFCRA)

On March 18, 2020, the President signed the Families First Coronavirus Response Act (FFCRA). **The FFCRA takes effect on April 1, 2020.**

**Important Update: Guidance from DOL Recognizing the Importance of Direct Care Staff**  
On March 29, the DOL issued guidance (see Resources, below) that makes it clear that the definition of "health care provider" will be interpreted quite expansively – far more broadly than pre-existing FMLA regulations. **The DOL's guidance affords most providers an option to exclude their employees from the coverage of FFCRA, meaning that staff will not be eligible for the Public Health Emergency Leave and Emergency Paid Sick Leave benefits described below.** This clarification from DOL recognizes important role that



direct care staff will play in fighting the coronavirus outbreak and the public need for staff to be available to help respond to the public health emergency

It appears that the DOL intends for a very broad interpretation aimed at providing the employers of health care workers flexibility in determining whether they want to, or can, grant their employees the leave offered under the FFCRA. Based upon the guidance, providers are able to opt out of FFCRA and not offer Public Health Emergency Leave and/or Emergency Paid Sick Leave under FFCRA if it would impact their operations. However, employers of health care workers are still subject to the leave requirements under the FMLA, ADA, and other existing laws. Further, employers should continue to ensure that employees who have symptoms of COVID-19 or are otherwise sick are encouraged not to come to work.

There are two key portions of the FFCRA that are of particular interest to employers. First, the “Emergency Family and Medical Leave Expansion Act” provides some significant expansions to the Family and Medical Leave Act (“FMLA”) in response to the coronavirus outbreak. Second, the “Emergency Paid Sick Leave Act” creates new requirements for paid sick leave for certain employees. Both will be summarized below.

Not surprisingly, there are some unanswered questions in these laws resulting from the fact that they were drafted and enacted quickly. We expect regulations and guidance to be issued by the Secretary of Labor in the coming days and weeks, and will update as such information becomes available.

#### **Emergency Family and Medical Leave Expansion Act**

- FMLA is expanded to create an entirely new category of leave. Eligible employees will not be entitled to leave for a “qualifying need related to a public health emergency.” This is defined as leave to care for a minor son or daughter if their school or place of care has been closed or the childcare provider (defined as someone who receives compensation for providing childcare on a regular basis) is unavailable due to the coronavirus. For clarity, in this document we will refer to this as “Public Health Emergency Leave.”
- Notably, all of the new provisions under the FMLA expansion relate to Public Health Emergency Leave only, and not traditional FMLA leave. In other words, the new rules or benefits contained in the FMLA expansion contained in the FFCRA do not apply to leave for an employee’s own serious health condition (e.g., COVID-19).
- Employees who have been with an employer for “at least 30 calendar days” are eligible for Public Health Emergency Leave. The traditional requirements of 12 months and 1,250 hours still apply to FMLA leave for other reasons.
- The requirement to provide Public Health Emergency Leave applies to employers with fewer than 500 employees.

- Eligible employees taking more than 10 days of Public Health Emergency Leave are entitled to compensation *from their employer* at 2/3 of their usual rate of pay for the remainder of their FMLA leave (*i.e.*, weeks 3-12). Employers' payments under this provision are capped at \$200/day or \$10,000 in the aggregate.
- The first 10 days of Public Health Emergency Leave need not be paid, but employees can elect to use PTO if they wish. Employers cannot require employees to use PTO for the first 10 days of Public Health Emergency Leave.
- As has historically been the case with FMLA, employees using Public Health Emergency Leave will be entitled to reinstatement. There is a limited exception to this requirement for certain small employers (*i.e.*, under 25 employees) if the employee's position no longer exists.
- The FFCRA provides payroll tax credits to employers who pay employees using Public Health Emergency Leave to offset the expense to the employer.
- **Employers of "an employee who is a health care provider or an emergency responder" are able to elect to exclude the employee from the provisions of the FMLA expansion act. The DOL's March 29 guidance clarified that "health care provider" is defined very broadly and includes "anyone employed at any...nursing facility, retirement facility, nursing home, home health provider...or any similar institution, employer or entity." Accordingly, an employer of any such person has the *option* of exempting him or her from eligibility for Public Health Emergency Leave. Employers are also free to *not* exempt "health care providers." If an employer chooses to make the benefits available to employees who are health care providers, the employer must have less than 500 employees to claim the tax benefit.**
- In addition, the Secretary of Labor would have authority to issue regulations that would *exclude* certain "health care providers and emergency responders" from the definition of "eligible employee" and also to exempt certain smaller employers (*i.e.*, under 50 employees) if compliance would jeopardize the viability of the company. Importantly, if an employer is excluded, it would not be eligible for the payroll tax credit provided under FFCRA.

#### **Emergency Paid Sick Leave Act**

- Employees unable to work for certain specified reasons will be entitled to up to two weeks of *paid sick leave*. For clarity, in this document we will refer to this as "*Emergency Paid Sick Leave*."
- The Emergency Paid Sick Leave is *in addition to* any paid time off offered by an employer (*e.g.*, sick time, PTO, etc.) and must be applied *before* the employer's usual PTO.
- Emergency Paid Sick Leave is required for absences relating to:



- Employee is subject to Federal, state or local quarantine or isolation order related to COVID-19;
  - Employee is advised by health care provider to self-quarantine due to concerns related to COVID-19;
  - Employee has symptoms of COVID-19 and seeking medical diagnosis;
  - Employee is caring for individual who is subject to quarantine or isolation order or is has been advised to self-quarantine from a health care provider;
  - Employee is caring for son or daughter of such employee if the school or place of care of the son or daughter has been closed or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
  - Employee is experiencing any substantially similar condition as specified by HHS/DOL/Treasury.
- The pay rate required for Emergency Paid Sick Leave and applicable caps is determined by the reason for the employee's absence.
    - For absences relating to the employee's own situation (*i.e.*, the first three bullet points listed above), the employee is entitled to receive full pay with a cap of \$511/day and \$5,110 total.
    - For absences relating to other covered situations (*i.e.*, the last three bullet points listed above), the employee is entitled to receive no less than 2/3 pay with a cap of \$200/day and \$2,000 total.
  - Full-time employees are eligible for 80 hours of Emergency Paid Sick Leave; part-time employees are eligible for the number of hours that they typically work in a two-week period.
  - Employees can use Emergency Paid Sick Leave before using any employer-provided PTO and employers cannot require employees to use PTO first.
  - Employers would not be permitted to change their usual PTO benefits that are in effect as of the date of enactment of the new law (*i.e.*, March 18, 2020).
  - Employers would not be permitted to require employees to search for or find a replacement as a condition of providing the paid sick time.
  - This Emergency Paid Sick Leave would be available to employees regardless of how long they have been employed.

- An employer who fails to pay Emergency Paid Sick Leave when required under the Act will be considered to have failed to pay minimum wage under the Fair Labor Standards Act.
- It is unlawful to retaliate against an employee for exercising his or her rights under the Act.
- This Act applies to employers with fewer than 500 employees.
- For employees who work varying schedules, the number of hours of Emergency Paid Sick Leave required is calculated by taking the average number of hours worked per week in the preceding six months or, if the employee has not been there six months, the “reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.”
- After the first workday the employee receives Emergency Paid Sick Leave, the employer may require the employee to follow reasonable call-off/notice procedures to continue receiving Emergency Paid Sick Leave.
- The FFCRA provides payroll tax credits to employers who pay employees using Emergency Paid Sick Leave to offset the expense to the employer.
- **Employers of “an employee who is a health care provider or an emergency responder” are able to elect to exclude the employee from the provisions of the FMLA expansion act. The DOL’s March 29 guidance clarified that “health care provider” is defined very broadly and includes “anyone employed at any...nursing facility, retirement facility, nursing home, home health provider...or any similar institution, employer or entity.” Accordingly, an employer of any such person has the *option* of exempting him or her from eligibility for Emergency Paid Sick Leave. Employers are also free to *not* exempt “health care providers.” If an employer chooses to make the benefits available to employees who are health care providers, the employer must have less than 500 employees to claim the tax benefit.**
- In addition, the Secretary of Labor would have authority to issue regulations that would *exclude* certain “health care providers and emergency responders” from the definition of “eligible employee” and also to exempt certain smaller employers (*i.e.*, under 50 employees) if compliance would jeopardize the viability of the company.
- **Employers are required to post a notice of Employee’ Rights under FFCRA. The Secretary of Labor has developed and provided a Notice that can be used for this purpose (see Resources, below).**
- All requirements under the Act expire on December 31, 2020.

## Resources

- **CDC** - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- **CDC Preventative Poster** - [https://www.cdc.gov/flu/pdf/protect/cdc\\_cough.pdf](https://www.cdc.gov/flu/pdf/protect/cdc_cough.pdf)
- **CMS Guidance (QSO Memos)**
  - **Nursing Homes** - <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>
  - **Home Health** - <https://www.cms.gov/files/document/qso-20-18-hha.pdf>
  - **Hospice** - <https://www.cms.gov/files/document/qso-20-16-hospice.pdf>
- **CDC Recommended Monitoring Following Exposure** - <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assessment-hcp.html>
- **CDC Return to Work Criteria for Healthcare Personnel** - <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/hcp-return-work.html>
- **Ohio Department of Health** - <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/>
- **ODH Order on Access** - <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/public-health-orders/directors-order-amending-order-to-limit-access-nursing-homes-amended>
- **EEOC Pandemic Guidance** - [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- **ODH Guidance on Employee Screening** - <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/resources/screening-employees-for-covid-19>
- **ODH Director's Order to Stay at Home** - <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf>
- **ODH Stay at Home Order FAQ** - [https://content.govdelivery.com/attachments/OHOOD/2020/03/22/file\\_attachments/1407841/Stay%20At%20Home%20FAQ%2003.22.20.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/03/22/file_attachments/1407841/Stay%20At%20Home%20FAQ%2003.22.20.pdf)
- **DOL FAQ on FFCRA** - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- **DOL FFCRA Notice** - [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)