



STATE/LOCAL PUBLIC EMPLOYER COVID 19 FAQ SHEET¹

If an employee indicates that they have a pre-existing condition and cannot return to the employer's facility, but they are willing to work virtually, is this a reasonable accommodation request? What are the factors to consider?

If the individual has a disabling medical condition that prevents them from being able to perform an essential job function, then yes, the employer should evaluate this as a reasonable accommodation request under the Americans with Disabilities Act (ADA), and potentially state law, as well. An employer must provide a reasonable accommodation to employees who are disabled and who cannot perform an essential job function due to that disability, absent providing the accommodation imposing an undue hardship on the employer. As the EEOC has expressly indicated at <https://www.eeoc.gov/facts/telework.html>, telework is a form of accommodation that may need to be considered. That said, whether a requested accommodation imposes an undue hardship is an individualized assessment unique to each request. Ordinarily, to prove undue hardship an employer would have to show that the necessary accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the entity. For more information on reasonable accommodation and undue hardship issues under the ADA, please see: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

Note that if an employee's health care provider indicates that the employee is unable to work because of a particular vulnerability to COVID 19, and if telework is not available, then the employer must ensure compliance with the Families First Coronavirus Response Act (FFCRA), which may afford two weeks/80 hours of paid sick leave. For more information, please see: <https://www.dol.gov/agencies/whd/pandemic>.

What are the employer's rights and obligations if an employee indicates they have no underlying conditions, but have a fear of contracting COVID 19 that prevents them from coming in to work? The employee has offered to work virtually, but not in-person at the employer's facility.

If the fear of the virus is not related to a disabling medical condition, which can include mental health conditions, then absent a governing occupational health entity indicating an "imminent danger" or similar threat exists in the workplace, the individual generally does not have a right to refuse to come in. Employers should engage with the employee concerning the precise concerns that they have in the event the concerns can be addressed. This may include reviewing the entity's safety and health procedures for minimizing the risk of virus transmission for employees and the public alike. That said, absent there being a medical condition preventing the individual from being able to come in (See Question 1), or a collective bargaining agreement, county/local ordinance, or industry-specific regulation indicating otherwise, the individual will generally not have a right to refuse to come in.

If an employee's spouse has a pre-existing medical condition and the employee is fearful that they may potentially expose their spouse to COVID 19 by working at the employer's facility every day, is leave provided by law for the employee if they do not want to come to the employer's facility?

To the extent an employee does not want to return to work because they have a significant other at home who is particularly vulnerable to COVID 19, and the employee fears transmission of COVID 19 in the workplace, generally this will not result in a qualifying use of time under the Families First Coronavirus Response Act (FFCRA). Employers should note, however, that if an employee is unable to work or telework because they "are caring for an individual subject to a federal, state or local quarantine or isolation order, or advised by a health care provider to self-quarantine due to COVID-19 concerns," then this can constitute a qualifying use of FFCRA time.

The FFCRA Regulations explain that an employee can only take leave for this purpose if, "but for a need to care for an individual," the employee would otherwise be able to perform work for his or her employer, either at the employee's normal workplace or by telework. Further, the Regulations expressly state that the individual for whom the employee is needed to provide care must in fact depend upon the employee for such care, and the individual must either:

- “(i) be subject to a quarantine or isolation Order, or
- (ii) have been advised to self-quarantine by a health care provider because of a belief that:
 - (A) The individual has COVID–19;
 - (B) The individual may have COVID–19 due to known exposure or symptoms; or
 - (C) The individual is particularly vulnerable to COVID–19.”

If these conditions are met then the individual may have a qualifying use of FFCRA time and be entitled to up to two weeks/80 hours of FFCRA paid sick leave. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> for more information.

If the employee does not have a right to time off under the FFCRA, then the Americans with Disabilities Act (ADA) and/or state law may require that they not be treated any differently than any employee has been treated in the past who needed time off for a personal reason. As well, if the family member in question has a serious health condition and the subject employee needs leave to care for that person, then any covered employer must ensure compliance with the federal Family and Medical Leave Act (FMLA), and any similar state family leave obligations, and provide job-protected leave to the employee if eligibility requirements under the FMLA are met. For guidance on FMLA compliance in this regard, see <https://www.dol.gov/whd/fmla/employerguide.pdf>.

The employer should also review state paid sick leave obligations, where applicable, as well as any collective bargaining agreement, county/local ordinances, or industry-specific requirements.

If an employee has tested positive for COVID 19 and has been instructed by their health care provider not to return to work until after a quarantine period, how do the new COVID 19-related laws integrate with the employer's paid time off policy?

The paid sick leave under the FFCRA is in addition to an employee's other leave entitlements. An employer may not require an employee to use provided or accrued paid vacation, personal, medical, or sick leave before the FFCRA paid sick leave. An employer also may not require an employee to use such existing leave concurrently with the FFCRA

paid sick leave. But, if an employer and employee agree, the employee may use preexisting leave entitlements to supplement the amount he or she receives from FFCRA paid sick leave, up to the employee's normal earnings.

As for time under the expanded family and medical leave portion of the FFCRA, after the first two workweeks of such leave, an employer may require that an employee take concurrently for the same hours expanded family and medical leave and existing leave that, under employer policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if an employee (or a covered family member) is not ill. If this is required, the employer must pay the employee the full amount to which he or she is entitled under the existing paid leave policy for the period of leave taken. The employer must pay the employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per workday and \$10,000 in the aggregate, for expanded family and medical leave. If an employee exhausts all preexisting paid vacation, personal, medical, or sick leave, the employer would need to pay the employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per day and \$10,000 in the aggregate.

This is the case absent a collective bargaining agreement, county/local ordinance, or industry-specific requirement indicating otherwise. As well, if there is a multi-employer collective bargaining agreement, this may further alter how obligations under the FFCRA are met. For a discussion on this topic, see:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> at Questions 31-37.

If an employee has a child or spouse at home who has COVID 19 and the employee needs to take time off from work to care for them, what, if any, statutes provide such an employee with leave from work for this purpose?

If an employee is unable to work or telework because they "are caring for an individual subject to a federal, state or local quarantine or isolation order, or advised by a health care provider to self-quarantine due to COVID-19 concerns" then this can constitute a qualifying use of FFCRA time.

The FFCRA Regulations explain that an employee can only take leave for this purpose if, "but for a need to care for an individual," the employee would otherwise be able to perform work for his or her employer, either at the employee's normal workplace or by telework. Further, the Regulations expressly state that the individual for whom the employee is needed to provide care must in fact depend upon the employee for such care, and the individual must either:

- “(i) be subject to a quarantine or isolation Order, or
- (ii) have been advised to self-quarantine by a health care provider because of a belief that:
 - (A) The individual has COVID–19;
 - (B) The individual may have COVID–19 due to known exposure or symptoms; or
 - (C) The individual is particularly vulnerable to COVID–19.”

If these conditions are met then the individual may have a qualifying use of FFCRA time and be entitled to two weeks/80 hours of FFCRA paid sick leave. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> for more information.

If the employee does not have a right to time under the FFCRA, then the Americans with Disabilities Act (ADA) and/or state law may require that they not be treated any differently than any employee has been treated in the past who needed time off for a personal reason. As well, if the family member in question has a serious health condition and

the subject employee needs leave to care for them, then any covered employer must ensure compliance with the federal Family and Medical Leave Act (FMLA), and any similar state family leave obligations, and provide job-protected leave to the employee if they meet FMLA eligibility requirements and have FMLA time available. For guidance on FMLA compliance in this regard, see <https://www.dol.gov/whd/fmla/employerguide.pdf>.

The employer should also review state paid sick leave obligations, where applicable, as well as any collective bargaining agreement, county/local ordinances, or industry-specific requirements.

If an employee was voluntarily in a state that has been a “hot spot” for COVID 19 cases, and needs to quarantine upon return to our state, are they entitled to time under the Families First Coronavirus Response Act (FFCRA) while under such quarantine? Would the answer be different for individuals who were already in the state when it became a hotspot?

As for paid sick leave, under the Families First Coronavirus Response Act (FFCRA), employees may be entitled to up to two weeks/80 hours of paid sick leave benefits if they cannot work or telework because, among other things, they are subject to a federal, state or local quarantine or isolation order related to COVID-19, or have been advised by a health care provider to self-quarantine due to COVID-19 concerns, or are experiencing COVID-19 symptoms and seeking medical diagnosis. An employee who has been potentially exposed to COVID-19 but is not experiencing any symptoms, and/or who is not otherwise subject to a quarantine issued by a government or healthcare provider, would not appear to qualify for FFCRA benefits.

However, for employees who return from travel, the Regulations to the FFCRA provide that “[q]uarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.” To the extent an employee’s post-travel quarantine is subject to a government post-travel quarantine order (a number of states now require this), or otherwise meets criteria under the FFCRA, then the time off for this purpose would arguably qualify and the employee should be paid for the time off taken for this purpose in accordance with the FFCRA. For more information, see Questions 60 and 87 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. This same analysis applies even if an individual was already in a state at the time it was identified as being a COVID 19 “hot spot.”

The employer should also review state paid sick leave obligations, where applicable, as well as any collective bargaining agreement, county/local ordinances, or industry-specific requirements.

If an employee was exposed to someone who tested positive for COVID 19 and now needs to quarantine, do they need to use sick time?

As to entitlement to time away from work, and to the potential for that to be paid time, under the new Families First Coronavirus Response Act (FFCRA), employees may be entitled to up to two weeks/80 hours of paid sick leave benefits if they cannot work or telework because, among other things, they are subject to a federal, state or local quarantine or isolation order related to COVID-19, or have been advised by a health care provider to self-quarantine due to COVID-19 concerns, or are experiencing COVID-19 symptoms AND seeking a medical diagnosis. By contrast, an employee who has been potentially exposed to COVID-19 but is not experiencing any symptoms, and/or who is not otherwise subject to a quarantine issued by a government or healthcare provider, would not appear to qualify for FFCRA benefits.

In such a circumstance an employee would be entitled to a reasonable accommodation if their condition constitutes a disabling medical condition for purposes of the Americans with Disabilities Act (ADA) or similar state law. See the recent guidance from the Equal Employment Opportunity Commission on this topic here: <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar> at Questions 17 and 19. As well, if an employee has a “serious health condition” for purposes of the federal Family and Medical Leave Act (FMLA) (and perhaps similar state law) and meets eligibility requirements for the FMLA (which include working for a covered employer) then they may be entitled to such leave. That said, leave under the ADA and FMLA is unpaid absent there being a collective bargaining agreement, county/local ordinance, or industry-specific requirement indicating otherwise.

1. DISCLAIMER

This information is not intended to provide legal or tax advice as to any of the subjects mentioned, but rather, is presented for general information only. You should not rely on this general information to address specific circumstances. You should consult knowledgeable legal counsel or other knowledgeable experts as to any legal or tax questions you may have.

As well, the guidance concerning employer responsibilities to employees in relation to COVID 19-related matters **changes frequently**, including at the federal, state, and local level. As such, the general guidance included above could also change at any time, and in fact, this is likely to happen. Therefore, conferring with knowledgeable legal or tax professionals as to any questions you may have is recommend.

The guidance above does not account for obligations arising from any collective bargaining agreement, state law, county/local ordinance, or industry-specific regulations. Conferring with local counsel as to any such obligations is recommended.

APPENDIX OF HELPFUL RESOURCES

Families First Coronavirus Response Act - Poster:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Families First Coronavirus Response Act - Frequently Asked Questions – U.S. Department of Labor:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Families First Coronavirus Response Act – Regulations: <https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf>

Centers for Disease Control and Prevention – Employer Frequently Asked Questions:

<https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>