

BARSAMIAN & MOODY

A Professional Corporation

Attorneys at Law

1141 West Shaw Avenue, Suite 104

Fresno, California 93711-3704

E-mail: laborlaw@theemployerslawfirm.com

Tel: (559) 248-2360

Fax: (559) 248-2370

UPDATE on FAQs: DOL Issues More and DLSE Releases First Look

Late yesterday, March 26, 2020, the Department of Labor (“DOL”) published a new series of FAQs, supplementing the FAQs it published on Tuesday March, 25, 2020 on the new Emergency FMLA law, answering some critical questions that were left unanswered and unclear in the statute itself. Originally, the DOL published a series of 14 FAQs, however with last night’s addition, there are now 37 FAQs on the DOL website. We are addressing the most critical supplemental FAQs, including ones we anticipate getting the most questions from our clients. A complete list of the FAQs can be found at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

Additionally, the California Department of Fair Employment and Housing (“DFEH”) released their own FAQ list covering issues related to the pandemic. It covers employer rules on sending employees home, asking questions about illnesses and travel, taking temperatures and making reasonable accommodations. These FAQs do not modify the way CFRA is managed or who is entitled to use it. A copy of the DFEH’s FAQs is available at: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

ADDITIONAL DOL FAQs

What records do employers need to keep when employees take leave?

For paid sick leave, require your employee to provide you with appropriate documentation in support of the reason for the leave, including: the employee’s name, qualifying reason for requesting leave, a statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised the self-quarantine. Documentation may include a copy of quarantine or isolation order or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to coronavirus. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records.

For the expanded family and medical leave, (remember - this is only available to care for a child whose school or place of care is closed, or child care provider is unavailable, due to coronavirus) require the employee to provide you with appropriate documentation in support of such leave, just as you would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or childcare provider. This requirement also applies when the

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first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason. Again, these records should be retained for tax credit purposes.

What does it mean to be unable to work, including telework for coronavirus related reasons?

Employees are unable to work if the employer has work for the employee and one of the coronavirus qualifying reasons set forth in the FFCRA prevents employee from being able to perform that work, either under normal circumstances at the normal worksite or by means of telework.

If employee and employer agree that employee will work their normal number of hours, but outside of their normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary, unless a coronavirus qualifying reason prevents employee from working that schedule.

Questions Regarding Intermittent Leave

The FAQs provide generally that employees and employers may agree to intermittent and incremental use of emergency paid sick leave and emergency paid Family and Medical Leave benefits, but then seems to divide the remaining guidance into two situations - whether the employee is teleworking, or working onsite.

For employees who are teleworking, whether taking time off under sick leave or expanded FMLA, the employer and employee may agree to intermittent leave for any of the covered reasons. But for employees who are working on the employer's premises, intermittent paid sick leave is only permitted for employees who are taking leave for school closures or childcare unavailability (again, only if the employer agrees). Employees taking paid sick leave for one of the other five reasons under the Act must take such leave in full-day increments (because the intent of the FFCRA is to prevent employees who may be ill or caring for those who are ill from possibly spreading the virus to other individuals in the workplace).

Does employer closure before April 1, 2020 (the effective date of the FFCRA), affect eligibility for paid sick leave or expanded family and medical leave?

Yes. If the worksite closes, employees do not receive or continue to receive, FFCRA leave. It does not matter whether (1) the closure occurs before or after the law takes effect; (2) an employee is on leave when closure occurs; (3) an employer furloughs an employee; (4) the worksite temporarily closes and the employer says it will reopen in the future. This is true whether the worksite closes for lack of business or per federal, state, or local directive. If this occurs, an employee's only recourse is to seek unemployment benefits.

Can employees use leave to supplement reduced scheduled work hours?

No. If the employer reduces work hours because it does not have work for employees to perform, employees may not use paid sick leave or expanded family and medical leave for the hours that they are no longer scheduled to work. This is because employees are not prevented from working those hours due to a coronavirus qualifying reason, even if the reduction in hours was somehow related to coronavirus.

Are employers required to maintain health coverage?

Yes, employees with group health coverage are entitled to continued group health coverage during expanded family and medical leave on the same terms as if they continued to work. But, employees must make any normal contributions to the cost of your health coverage. See WHD Fact Sheet 28A: <https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections>.

DFEH FAQs

Can employers ask employees about an absence if the employer suspects it was due to a medical reason?

An employer is always entitled to ask why an employee has not reported to work. If an employee discloses an illness or medically-related reason for absence, employers must maintain that information as a confidential medical record.

What information may an employer reveal if an employee is quarantined, tests positive for COVID-19, or has come in contact with someone who has the virus?

Employers should not identify employees by name in the workplace to ensure compliance with privacy laws. If an employee tests positive for or is suspected to have coronavirus, the employer will need to follow the most current local, state, or federal public health recommendations.

Employers should take further steps at the direction of the local public health department that may include deep cleaning, and permitting or requiring telework. Employers may notify affected employees in a way that does not reveal the personal health-related information of an employee. For example, the employer could speak tell employees: “[Employer] has learned that an employee at [location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This is to notify you that you have potentially been exposed to COVID-19 and you should contact your doctor or local public health department for guidance and any possible actions to take based on individual circumstances.” Employers may not confirm the health status of employees or communicate about employees’ health.

Is an employee eligible for CFRA leave if they cannot work due to coronavirus symptoms or muse care for someone with coronavirus?

Yes, if the coronavirus illness rises to the level of a “serious health condition” under the CFRA laws. For example, it must result in inpatient care or continuing treatment or supervision by a health care provider. It may also qualify as a serious health condition if it leads to conditions such as pneumonia.

What This Means for Employers

Be sure to review the entire list of topics at the links above for a more thorough discussion of these topics. You can also get additional information via the Centers for Disease Control, the Department of Labor, and the EEOC.

We remain open and available to answer your questions. As legislation and DOL guidance is rapidly evolving, please feel free to contact us with your concerns or for further clarification. We will continue to keep you up to date as further developments surface and new regulations are enacted. Contact Barsamian & Moody for any questions on the Emergency Family Medical Leave Act and Paid Sick Leave.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.