

MEMORANDUM

TO: Agency and Human Resource Directors of all agencies, departments, institutions and commissions

FROM: Karen L. Wingo

DATE: June 16, 2020

SUBJECT: Families First Coronavirus Response Act and U.S. Center for Disease Control and Prevention Guidance Concerning Higher Risk Employees

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law which included the Emergency Family and Medical Leave Expansion Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSL). Since that time, the U.S. Department of Labor (DOL) has continued to issue [additional guidance](#) concerning the implementation of the FFCRA. In addition, the U.S. Center for Disease Control and Prevention (CDC) has recently [issued guidance](#) concerning how employers should address the specific needs of employees who may be particularly vulnerable to the impact of COVID-19. This memo is to provide information and guidance concerning the FFCRA, the guidance provided by the CDC and to address various questions received by the Division of State Human Resources related to COVID-19 and its impact on employers and the workplace.

**Families First Coronavirus Response Act**

- **When is an employee eligible for paid sick leave to care for someone who is subject to a quarantine or isolation order?**

An employee may take paid sick leave to care for an individual who, as a result of being subject to a quarantine or isolation order, is unable to care for him or herself and depends on the employee for care and if providing care prevents the employee from working and from teleworking.



The employee may only take paid sick leave to care for an individual who genuinely needs their care. Such an individual includes an immediate family member or someone who regularly resides in the employee's home. The employee may also take paid sick leave to care for someone if the relationship creates an expectation that the employee would care for the person in a quarantine or self-quarantine situation, and that individual depends on the employee for care during the quarantine or self-quarantine.

The employee may not take paid sick leave to care for someone with whom the employee has no relationship. Nor can the employee take paid sick leave to care for someone who does not expect or depend on the employee's care during his or her quarantine or self-quarantine.

- **My employees have been teleworking productively without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?**

You may require that an employee provide the qualifying reason he or she is taking leave and submit an oral or written statement that the employee is unable to work because of this reason and provide other documentation as required. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so.

The DOL has stated that the fact that your employee has been teleworking despite having his or her children at home previously does not mean that the employee cannot now take leave to care for his or her children whose schools or child care providers are closed for a COVID-19 related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

- **If an employee took paid sick leave and is now taking expanded family and medical leave to care for their children whose school was closed for a COVID-19 related reason and the children's school is now closed for summer vacation, can the employee take paid sick leave or expanded family and medical leave to care for their children because their school is closed for summer vacation?**

No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take

leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason.

### **CDC Guidance for Employers with Workers at High Risk**

- **What employees are considered higher risk for severe illness from COVID-19?**

According to the CDC the employees at higher risk for severe illness from COVID-19 include those over age 65 and employees with underlying health conditions including, but not limited to, the following:

- Chronic lung disease
- Moderate to severe asthma
- Hypertension
- Severe heart conditions
- Weakened immunity
- Severe obesity
- Diabetes
- Liver disease
- Chronic kidney disease that requires dialysis

- **How do agencies know employees are at higher risk for severe illness?**

Employees at higher risk for severe illness should be encouraged to self-identify, and employers should avoid making unnecessary medical inquiries.

- **What should I do if an employee self-identifies as being at a higher risk?**

Employers should take particular care to reduce these workers' risk of exposure to COVID-19, while making sure to be compliant with relevant Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA) regulations.

The CDC recommends that higher risk employees continue to shelter-in-place until an employer returns to normal operation. For many state agencies, this will be during Phase III, at which time all employees will be returned to the workplace, except for those who have been identified as appropriate for working from home permanently and those allowed to work from home as a temporary accommodation. Therefore, agencies are encouraged to allow individuals who are considered higher risk to work-from-home to the maximum extent possible until Phase III. However, if the employee's job duties and the agency's operations do not permit the agency to allow the employee to continue to work-from-home, the agency should work closely with the employee to put in place measures to mitigate the risk of exposure to the employee including considering options like a staggered shift.

## Leave for Higher Risk Employees

- **What do I do if an employee notifies the agency that they are at higher risk for severe illness associated with COVID-19 and will not return to the workplace?**

If an employee indicates he or she does not want to report to the workplace because they are at higher risk for severe illness related to COVID-19, an agency is advised to explore all work from home options and, if possible, allow the employee to work from home. Agencies are advised to use maximum flexibility when reviewing work from home options.

If there is no work from home option, the employee may take available paid leave or take leave without pay. Leave available to employees may include accrued leave or Emergency Paid Sick Leave. If the employee is at higher risk because of a serious health condition they may also qualify for unpaid leave under the Family and Medical Leave Act. Leave provided for this reason would not likely qualify the employee for Emergency Family and Medical Leave Expansion Act (EFMLA) Leave.

If an employee has exhausted all available FFCRA leave and does not qualify for leave pursuant to the FMLA or ADA, the employee must use accrued leave or leave without pay until a medical professional deems it appropriate for the employee to return to the workplace.

If the employee is at higher risk due to an underlying health condition which is considered a disability under the ADA and prevents the employee from returning to the workplace, the agency should work with the employee through the interactive process to determine if a reasonable accommodation exists. This accommodation could include extended leave or work from home options.

- **What documentation can I require from my employee if they self-identify as being at higher risk?**

If an employee indicates that they are at higher risk due to an underlying health condition you may request documentation of this underlying health condition or, alternatively, a statement from the employee identifying the basis for the self-identification. This information should be protected and kept confidential as with all other confidential health information.

- **What should I do if a higher risk employee who previously indicated they could not return to the workplace because they were at higher risk now asks to return to the workplace because there are no work from home options available and/or they have exhausted their leave?**

An employee who has previously indicated they could not return to the workplace because they are at higher risk should generally only return to the workplace prior to resumption of normal operations if the CDC or other health official has indicated it is no longer necessary for higher risk individuals to shelter in place or if the underlying health condition no longer

exists.

If the employee indicates they can return because they no longer suffer from the underlying health condition, it is recommended that the employee request a return to work release from a health care provider or a statement from the employee indicating they no longer self-identify as higher risk.

Recently, the Department of Labor shared a FFCRA poster that employers may display in the workplace. Currently, there is no indication this poster is mandatory. However, it does contain a useful overview of the FFCRA and may help address common questions from employees. A copy of the posting can be found [here](#).

This memorandum and the guidance contained in it are based on information provided at the time of issuance. The Division of State Human Resources will continue to closely monitor developments related to COVID-19 and provide additional guidance as needed. If you have questions regarding the information in this memo please contact your agency's human resources consultant.