



**FYI**

## Covid-19 Emergency Leave Guidance **HEALTH AND SAFETY**

*Revised: September 2020*

### **Summary:**

COVID-19 is currently disrupting lives and businesses in the United States. Employees who are impacted by COVID-19 may be eligible for paid sick time, paid FMLA leave, state or private disability insurance, unemployment insurance, or, in limited circumstances, workers' compensation benefits.

### **Important Notice:**

*The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.*

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## CONTEXT

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COVID-19 is currently disrupting lives and businesses in the United States. Reports from the Centers for Disease Control (CDC) indicate that the illness is highly contagious and, though symptoms may be mild in much of the population, older workers and those who may be immunocompromised are at risk of more severe symptoms and additional complications. Given this, there is a growing consensus that Americans need to stay home to help prevent the spread of COVID-19, especially if they feel sick or have a suspected or confirmed case of COVID-19.

There exists a broad concern that many workers might be forced to choose between staying home and getting paid. Employees who are impacted by COVID-19 may be eligible for paid sick time, paid FMLA leave, state or private disability insurance, unemployment insurance, or, in limited circumstances, workers' compensation benefits.

## PURPOSE OF EMERGENCY LEAVE

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Emergency leave for COVID-19-related absences may be necessary to keep your workers safe and reduce the chance of greater disruption to your operations. An effective emergency leave policy should prioritize keeping COVID-19 out of the workplace while recognizing the personal and economic burdens that closures may have on employees. In an effort to help with this burden, Congress recently passed the Families First Coronavirus Act (FFCRA) which requires both paid sick time and paid FMLA leave under certain circumstances.

## POTENTIAL REASONS FOR EMERGENCY LEAVE

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The reasons for leave related to COVID-19 can be divided into four major categories:

*Sick Employees* - Employees who have been diagnosed with COVID-19 or who are exhibiting similar symptoms

*Exposed or Potentially Exposed Employees* - Employees who may have been exposed to COVID-19, such as those who have travelled to hotspots or those who have been in close contact or live with someone who has been diagnosed with COVID-19 or is exhibiting symptoms.

*Employees Needed to Care for Another* - Employees who are needed to care for a sick person or for a child due to school or daycare closures.

*Self-Isolating Employees* - Employees who may be at high risk for severe complications and death if they contract COVID-19.

## CURRENT LAWS

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Any provision of emergency leave should comply with our current regime of employment laws, which have various policy objectives and may not always align with the purposes of emergency leave.

### FMLA

The FMLA may or may not protect absences related to an employee's health condition due to the COVID-19 virus. Coverage depends upon whether the employee's condition qualifies as a serious health condition under the FMLA. Generally, flu-like symptoms have not been considered a serious health condition under the FMLA. However, when complications arise from the flu it can qualify as a serious health condition. Therefore, each request for FMLA based upon COVID-19 should be analyzed individually and in accordance with the FMLA regulations, 29 C.F.R. 825.113.

Normally, the FMLA provides 12 weeks of protected leave for an employee who is needed to care for the employee's spouse, son, daughter, or parent with a serious health condition. Again, whether the family member's condition due to the COVID-19 virus is a serious health condition will depend on the regulations usual analysis.

The FMLA has recently been amended by the Families First Coronavirus Response Act (FFCRA) to provide paid FMLA leave when an employee is needed to care for a son or daughter due to the COVID-19 public health emergency. This new paid FMLA leave is discussed further in the section on the FFCRA below.

### ADA

The EEOC is currently emphasizing that, "the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so."

Under the Americans with Disabilities Act (ADA), qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer sick leave policies as "reasonable accommodations." These are modifications or adjustments to jobs, work environments, or workplace policies that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities.

An employer may exclude an employee with a disability from the workplace if it:

- obtains objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- determines that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

(See the U.S. Equal Employment Opportunity Commission's Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the

Americans with Disabilities Act for additional information.  
<https://www.eeoc.gov/policy/docs/qanda-inquiries.html>)

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists. (See the U.S. Equal Employment Opportunity Commission's Enforcement Guidance: Pandemic Preparedness in the Workplace and the Americans With Disabilities Act available at: [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html))

During a pandemic health crisis, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require these assurances where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would:

- impair his ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, or,
- pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious. Therefore, federal and state agencies have encouraged employers to loosen documentation requirements during this health crisis.

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but they should also maintain confidentiality as required by the ADA. Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)**

Congress has recently passed a legislative package, the Families First Coronavirus Response Act (FFCRA). The leave provisions of this law apply only to employers with fewer than 500 employees. The FFCRA provides two types of leave: paid sick leave and paid FMLA leave.

## PAID SICK LEAVE

The FFCRA mandates that an employer shall provide to each employee paid sick leave to the extent that the employee is unable to work or telework due to a need for leave because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

Quarantine 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. The relevant question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.

For example, an order either closing a workplace or preventing customers from travelling to the workplace does not trigger paid sick leave under the FFCRA. Whereas, an order forbidding travel to work by the employee, paired with an inability to telework, would qualify. In other words, there must be some causal relationship between the order and the specific employee’s inability to work.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

This reason for leave is only available if the employee has been advised to self-quarantine by a health care provider based on a belief that the employee either has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

As with the other reasons for paid sick leave under the FFCRA, there must still be a causal connection between the advice and the specific employee’s inability to work or telework. An employee who has been advised by a health care provider to self-quarantine may still be able to telework and would therefore have no need for the leave.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

If an employee is experiencing a fever, cough, or shortness of breath, she may take paid sick leave, but only for the time used to obtain a diagnoses, such as making, waiting for, or attending a doctor’s appointment.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

An employee may take paid sick leave to care for someone who is subject to a governmental quarantine or isolation order or who has been advised a health care provider that he has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19. The person must be an immediate family member, a person who regularly resides in home, or similar person, with whom the employee has a relationship that creates an expectation that the employee would care for the person and does not include persons with whom the employee has no personal relationship.

(5) The employee is caring for a 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.

A son or daughter includes children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability. This paid sick leave is only available if no other suitable person is available to provide the care.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The Secretary of Health and Human Services has not yet identified any “substantially similar condition” that would allow an employee to take paid sick leave. If HHS does identify any such condition, the Department of Labor will issue guidance explaining when you may take paid sick leave on the basis of a “substantially similar condition.”

Paid sick leave for all of the reasons above applies to all employees, regardless of how long the employee has been employed. Full time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to a proportional amount of hours equal to their average hours worked over a two week period. An employer may not require an employee to use other paid leave before the employee uses the paid sick time.

Paid sick time is capped at \$511 per day or \$5,110 in the aggregate for leave taken due to employee illness, suspected illness, or isolation (reasons (1), (2), and (3) above). The cap for when the employee is needed to care for someone else (reasons (4), (5), and (6), above) is \$200 per day or \$2,000 in the aggregate.

The rate of pay is the greater of either the employee’s regular rate of pay, the Federal minimum wage, or the applicable State minimum wage. However, paid sick time is reduced to two-thirds (2/3) this rate for when absences are due to the employee’s need to care for “family members” (situations that arise due to paragraphs (4), (5), and (6) above).

## PAID FMLA LEAVE

The FFCRA amends the FMLA to provide 12 weeks of protected leave to any employee who has been employed for at least 30 days and is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

After the first 10 days of this leave, the employee is entitled to pay at two thirds (2/3) the rate of their regular rate. This leave provision is effective 15 days from the date the FFCRA is enacted and ends on December 31, 2020.

Note that paid FMLA leave is not available for an employee who is needed to care for a family member other than a son or daughter. Rather, under such circumstances, and assuming the illness qualifies as a serious health condition, the FMLA will only provide leave protection (no pay).

For both paid sick time and paid FMLA leave, the FFCRA grants the Secretary of Labor authority to exclude certain health care providers and emergency responders and to

allow the employer of such workers to opt out. A similar exemption may be issued for small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.

If an employer allows it and if an employee is teleworking a normal schedule of hours, an employee may take both paid sick time and paid FMLA leave intermittently if needed due to one of the qualifying reasons.

If an employee is not teleworking, intermittent leave cannot be taken, unless it is to care for a son or daughter whose school or daycare is closed due to COVID-19. In other words, if not teleworking, then intermittent leave is only available for when an employee is unable to work due to the need to care for a son or daughter due to COVID-19 school or daycare closings.

## COLORADO HEALTHY FAMILIES AND WORKPLACES ACT

On July 14, 2020, Colorado enacted the Healthy Families and Workplaces Act (“HFWA”), which requires Colorado employers to provide three types of paid leave to its employees: 1) COVID-19-related paid leave; 2) paid sick leave; and 3) public health emergency-related paid leave. Certain provisions of the Act, in particular the paid sick leave and public health emergency-related paid leave, will not take effect until 2021 and 2022, depending on the size of the employer.

With limited exceptions, the HFWA covers all Colorado employers and employees, regardless of size. An exemption is provided for employers that, under a collective bargaining agreement, already provide equivalent or more paid leave than required by HFWA. The federal government and employees covered by the federal Railroad Unemployment Insurance Act are also not covered.

Starting July 15, 2020, through December 31, 2020, Colorado employers, regardless of size, must comply with the Emergency Paid Sick Leave Act (EPSLA) provisions of the federal Family First Coronavirus Response Act (FFCRA) and provide up to two weeks (up to 80 hours) of paid leave to full-time employees. For employees working fewer than 40 hours a week, an employer is required to provide up to the employee’s two-week equivalent of work hours. Paid leave already provided to an employee for any of the COVID-19-related reasons below may be counted toward the two weeks of leave required by the HFWA in 2020.

An employee is eligible to take paid leave if the employee is unable to work or telework due to the employee being:

1. Ordered by a government agent (federal, state, or local) to quarantine or isolate due to a risk of COVID-19;
2. Advised by a health care provider to self-quarantine due to a risk of COVID-19;
3. Experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Taking care of someone else who is ordered by a government agent or health care provider to quarantine or isolate due to a risk of COVID-19;
5. Caring for his or her child whose school, place of care, or child care is closed or unavailable due to COVID-19-related reasons; or

6. Experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

An employee taking leave for reasons #1 to #3 above must be compensated at the same hourly rate or salary and with the same benefits as the employee normally earns, or 2/3 of that rate for leave taken for reasons #4 to #6.

The rate of pay must not be less than the applicable minimum wage and doesn't include overtime, bonuses, or holiday pay. Employees who are paid commissions must be paid the greater of: (A) their hourly or salaried rate; or (B) minimum wage.

## THE ARIZONA FAIR WAGES AND HEALTHY FAMILIES ACT (PAID SICK LEAVE)

On November 8, 2016, Arizona voters passed Proposition 206, also known as the Fair Wages and Healthy Families Act (the "Act"). The Act requires that employers provide all employees at least 40 hours of paid sick time per year to care for themselves or a family member (24 hours if the employers has fewer than 15 employees). The paid sick time provision of the Act took effect on July 1, 2017.

In addition to the statutory requirements of the Act, the Industrial Commission of Arizona (the "Commission") has issued FAQs, as well as, formal regulatory guidance regarding some of the Act's provisions.

## Additional Resources on this Subject

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### A. REFERENCE MATERIAL

FYI

The Fair Wages and Healthy Families Act (Paid Sick Leave)  
ARIZONA

FYI

Colorado Healthy Families and Workplaces Act



# **SAMPLE EMERGENCY LEAVE POLICY**

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Emergency leave for COVID-19- related absences is necessary to keep our employees safe and to reduce the chance of greater disruption to our operations. Therefore, the following emergency leave policy is effective immediately.

## **PAID SICK TIME**

All employees may take paid sick time if:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 and said order makes it so that the employee unable to work (or telework).
- (2) The employee has been advised by a health care provider to self-quarantine based on a belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19; and following the advice of the health care provider to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by telework.
- (3) The employee is experiencing a fever, cough, or shortness of breath and is seeking a medical diagnosis. Such an employee may take paid sick leave, but only for the time used to obtain a diagnoses, such as making, waiting for, or attending a doctor's appointment.
- (4) The employee is caring for someone who is subject to a governmental quarantine or isolation order or who has been advised a health care provider that he has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19. The person must be an immediate family member, a person who regularly resides in home, or similar person, with whom the employee has a relationship that creates an expectation that the employee would care for the person.
- (5) The employee is caring for a 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.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Earned PTO, vacation, and sick leave need not be used before paid sick time may be taken.

The amount of paid sick time and the rate of pay are to be determined by the Families First Coronavirus Response Act, but in a typical case it will be 80 hours at the employee's regular rate of pay. If the employee's need for leave is based upon the need to care for "family members" (situations that arise due to paragraphs (4), (5), and (6) above), paid sick time is reduced to two-thirds of this rate.

## **PAID FMLA LEAVE**

Employees are eligible for paid FMLA leave after at least 30 days of employment.

An eligible employee who is needed to care for a minor son or daughter due to COVID-19-related school or daycare closings and is unable to work or telework is entitled to 12 weeks of FMLA protected leave.

The first 10 days of this leave is unpaid FMLA leave. After this 10 day period, the employee is entitled to pay at two thirds of their regular rate as determined by the Families First Coronavirus Response Act.

## GENERAL PROVISIONS

Employees whose need for emergency leave arises from their own diagnoses of COVID-19 or having symptoms similar to COVID-19 must:

- remain absent from the workplace,
- notify their supervisor immediately, and
- [OPTIONAL] must complete a Self-Certification before returning to the workplace.

Employees who have travelled to a CDC Warning Level 3 location must:

- notify their supervisor, and
- Self-Quarantine for 14 days.

Employees who live with or have had close contact with someone who has been diagnosed with COVID-19 or is exhibiting similar symptoms must:

- notify their supervisor, and
- Self-Quarantine for 14 days.

Close contact is defined as being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case, or having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on).

[OPTIONAL] Employees who Self-Quarantine are required to complete a Self-Certification before returning to work.

Employees who are needed to care for someone who has been diagnosed with COVID-19 or is exhibiting similar symptoms must:

- notify their supervisor,
- Self-Quarantine for 14 days after they are no longer caring for the individual

[OPTIONAL] Employees who are considered higher risk by CDC [or consider themselves higher risk] and are unable to work or telework may take paid sick time as if they qualified under the FFCRA. The CDC considers older adults and people who have serious chronic medical conditions (e.g., heart disease, diabetes, and lung disease) to be higher risk.

## Employee Self-Certification Form

Please note that [COMPANY] is relying on your honesty to maintain the health and safety of the workplace.

### RETURN FROM CONFIRMED COVID-19 ILLNESS OR COVID-19 SYMPTOMS

If employee has not been tested for COVID-19:

I, \_\_\_\_\_, certify that:

- I have not had a fever (100.4 F or higher) for at least 72 hours (that is without the use of fever-suppressing medicine); AND
- My symptoms, such as cough or shortness of breath, have improved; AND
- At least 10 days have passed since my symptoms first appeared.

If employee has been tested for COVID-19:

I, \_\_\_\_\_, certify that:

- I have not had a fever (100.4 F or higher) for at least 72 hours (that is without the use of fever-suppressing medicine); AND
- My symptoms, such as cough or shortness of breath, have improved; AND
- I have received two negative tests in a row, 24 hours apart.

### RETURN FROM QUARANTINE OR TRAVEL TO LEVEL 3 AREA

I, \_\_\_\_\_, certify that I have not been ill with COVID-19 or experienced COVID-19-like symptoms, such as fever, cough, or shortness of breath, within the past 14 days.

Furthermore, I certify that within the past 14 days, I have not visited any Level 3 Travel Health Notice Countries. For a list of such countries:

<https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>.

Nor have I violated the April 3, 2020 travel.state.gov Global Level 4 Health Advisory <https://travel.state.gov/content/travel/en/traveladvisories/ea/travel-advisory-alert-global-level-4-health-advisory-issue.html>

**DISCLOSURE OF DOMESTIC TRAVEL  
(LAST 14 DAYS)**

In the last fourteen (14) days, from date of this executed document, I travelled to the following domestic locations (including counties outside of my county of residence).

- |    |       |   |       |
|----|-------|---|-------|
| 1. | _____ | 5 | _____ |
| 2. | _____ | 6 | _____ |
| 3. | _____ | 7 | _____ |
| 4. | _____ | 8 | _____ |

**RETURN FROM CARING FOR OR LIVING WITH AN INDIVIDUAL WHO  
HAS HAD CONFIRMED COVID-19 ILLNESS OR COVID-19 SYMPTOMS**

I, \_\_\_\_\_, certify that:

- It has been 14 days since I have cared for or been in close contact\* with an individual who has had confirmed covid-19 illness or covid-19 symptoms, AND
- I have not been ill with COVID-19 or experienced COVID-19-like symptoms, such as fever, cough, or shortness of breath, within the past 14 days.

\*Close contact is defined by the CDC as (a) being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case, or (b) having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on).

***This policy is subject to change in accordance with any changes in circumstances or guidance from the CDC, public health officials, or government (federal, state, or local).***

Employee Name (please print)

\_\_\_\_\_

Employee Signature

\_\_\_\_\_

Date \_\_\_\_\_

REVIEWED BY:

HR Name (please print) \_\_\_\_\_

HR Employee Signature \_\_\_\_\_ Date \_\_\_\_\_

Disposition Status:

Cleared to Return to work      Y / N      Effective Date: \_\_\_\_\_

Reevaluate on \_\_\_\_\_

- ❖ Completed form will be maintained in a confidential file, separate from your personnel file.