the Timberland Group
Employee Benefits & Consulting

Timber Alert

May - 2021

DOL Updates Q&As on COVID-19 and the FMLA

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The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has updated its "COVID-19 and the Family and Medical Leave Act Questions and Answers" web page, originally published in 2020. As before, the Q&As explain that—under the FMLA—covered employers must provide eligible employees with job-protected, unpaid leave for specified family and medical reasons. Additionally, employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms that were in effect before they took leave.

The updates reorient the Q&As toward employees (rather than employers), add information about employee leave under the Families First Coronavirus Response Act (FFCRA), and remove a question about preventing employee abuse of Family and Medical Leave Act (FMLA) leave.

The Q&A revisions also:

- Alert readers to state or federal leave requirements that might apply even when the FMLA does not;
- Update language explaining how telemedicine visits can establish a serious health condition under the FMLA; and
- Affirm the employer's ability to request a physician's note to certify the need for FMLA

In addition, the Q&As also expand the discussion of nondiscrimination laws employers must avoid violating during layoffs.

This Compliance Bulletin contains the DOL's Q&As.

Action Steps

Employers covered by the FMLA should review the new FAQs to ensure their policies comply with the DOL's guidance.

COVID-19 and the Family and Medical Leave Act Questions and Answers

If you are out with COVID-19 or are caring for ill family members, check with the DOL for information on whether such leave is covered under the FMLA. Under the FMLA, covered employers must provide employees job-protected, unpaid leave for specified family and medical reasons. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as existed before they took FMLA leave. (See the U.S. Department of Labor Wage and Hour Division (WHD) or call 1-866-487-9243 for additional information on the FMLA.)

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The FFCRA required covered employers to provide eligible employees with paid sick and expanded family and medical leave for certain COVID-19-related reasons. The requirement that employers provide paid sick or expanded family and medical leave under the FFCRA employer mandate provisions applies to leave taken or requested during the effective period of April 1, 2020, through Dec. 31, 2020. Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the FFCRA mandate. Employers who choose to provide such leave between Jan. 1, 2021, and Sept. 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website.

Additionally, certain state or local laws may have different requirements, which employers must also consider when determining their obligation to provide paid sick leave. See the State Labor Offices for information about leave laws in your state.

1. Who can take FMLA leave?

Employees are eligible to take FMLA leave if they work for a covered employer and:

- Have worked for their employer for at least 12 months;
- Have at least 1,250 hours of service over the 12-month period before their leave begins; and
- Work at a location where at least 50 employees are employed by the employer within 75 miles.

Private employers are covered employers under the FMLA if they have 50 or more employees in any 20 workweeks in the current or preceding calendar year. Public agencies (including federal, state and local government agencies) and public and private elementary and secondary schools are covered FMLA employers regardless of the number of employees they have.

Special hours-of-service requirements apply to airline flight crew employees and to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).

2. What benefits are available under the FMLA?

The FMLA provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Among other benefits, an eligible employee may take up to 12 workweeks of leave in a 12-month period for a serious health condition that makes the employee unable to perform the functions of the employee's job, and to care for the employee's spouse, child or parent who has a serious health condition. In addition to providing eligible employees an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or an equivalent job after leave. The law also protects employees from interference and retaliation for exercising or attempting to exercise their FMLA rights.

3. Can an employee who is sick with COVID-19, or who is caring for a family member who is sick with COVID-19, take FMLA leave?

An employee who works for a covered employer, is eligible for FMLA, and is sick, or is caring for a family member who is sick, with COVID-19 may be entitled to leave under the FMLA under certain circumstances. An FMLA-eligible employee can take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons, including a serious health condition as defined by the FMLA.

The most common serious health conditions that qualify for FMLA leave include:

- Conditions requiring an overnight stay in a hospital or other medical care facility;
- Conditions that incapacitate the employee or the employee's family member (for example, unable to work or attend school) for more than three consecutive days and that include ongoing medical

treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care, such as prescription medication); and
- Chronic conditions that cause occasional periods when the employee or the employee's family member is incapacitated, and which require treatment by a health care provider at least twice a year.

Workers who are ill with COVID-19 or have a family member with COVID-19 are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees. While the requirement that employers provide paid sick leave and expanded family and medical leave under the FFCRA expired on Dec. 31, 2020, tax credits may be available to employers who voluntarily continue to provide paid sick leave or paid family leave for COVID-19-related reasons. Employers who choose to provide such leave between Jan. 1, 2021, and Sept. 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website.

Due to safety and health concerns related to COVID-19, many health care providers are treating patients for a variety of conditions, including those unrelated to COVID-19, via telemedicine. The WHD will consider telemedicine visits to be in-person visits for purposes of establishing a serious health condition under the FMLA where certain conditions exist. Please see Question 11 and Field Assistance Bulletin 2020-8: Telemedicine and Serious Health Conditions under the Family and Medical Leave Act (FMLA) for more information.

4. Can an employee stay home under FMLA leave to avoid getting COVID-19?

No. The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee solely for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.

Certain state or local laws may have different requirements, which employers must also consider when determining their obligation to provide leave. See the State Labor Offices for information about leave laws in your state. Additionally, there may be other protections or guidance available under federal or state health and safety laws that are not enforced by the WHD if you are concerned that your employer is not following federal or state guidelines.

5. I was not paid for COVID-19-related leave in 2020. Do I still have rights under the FFCRA?

Yes. The WHD will enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through Dec. 31, 2020, for complaints made within the statute of limitations. The statute of limitations for both the paid sick leave and expanded family and medical leave provisions of the FFCRA is two years from the date of the alleged violation (or three years in cases involving alleged willful violations). Therefore, if your employer failed to pay you as required by the FFCRA for your leave that occurred before Dec. 31, 2020, you may contact the WHD about filing a complaint as long as you do so within two years of the last action you believe to be in violation of the FFCRA. You may also have a private right of action for alleged violations. Please visit WHD's FFCRA Questions and Answers page for more information.

6. Can parents or other caregivers take time off from work to care for a child whose school is closed or whose care provider is no longer available due to COVID-19 reasons?

There is currently no federal law covering nongovernment employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for a child whose school is closed or whose care provider is unavailable due to COVID-19 reasons. However, given the potential for

significant illness under pandemic scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families. Federal law requires that these leave policies be administered in a manner that does not discriminate against employees because of race, color, sex, national origin, religion, age (40 and over), disability or veteran status. Covered employers must abide by the FMLA as well as any applicable state family and medical leave laws. An employee who is sick or whose family members are sick may be entitled to leave under the FMLA.

Additionally, the FFCRA, which applies to leave taken or requested during the effective period of April 1, 2020, through Dec. 31, 2020, required covered employers to provide eligible employees with up to two weeks of paid sick leave and up to an additional 10 weeks of expanded family and medical leave if the employee was unable to work or telework due to a need for leave to care for a child whose school, place of care or child care provider was closed or unavailable for reasons related to COVID-19. Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the FFCRA.

Employers are not required to provide employees with FFCRA leave after Dec. 31, 2020, but employers who choose to provide such leave between April 1, 2021, and Sept. 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website.

7. Is an employer required by law to provide paid sick leave to employees who are unable to work because they have COVID-19, have been exposed to a family member with COVID-19 or are caring for a family member with COVID-19?

Currently, federal law generally does not require employers to provide paid leave to employees who are absent from work because they are sick with COVID-19, have been exposed to someone with COVID-19 or are caring for someone with COVID-19. Under Executive Order 13706, some federal contractors may be required to provide such leave to employees under certain circumstances, such as if the employee or a family member is sick with COVID-19 or seeking care related to COVID-19. Certain state or local laws may have different requirements, which employers must also consider when determining their obligation to provide paid sick leave.

If the leave qualifies as FMLA-protected leave, the employee may elect, or the employer may require the employee, to substitute accrued paid sick and paid vacation/personal leave for unpaid FMLA leave in some circumstances. Substitute in this case means the accrued paid leave runs concurrently with unpaid FMLA leave. Employers should encourage employees who are ill with COVID-19 to stay home and should consider flexible leave policies for their employees.

Additionally, under the FFCRA, covered employers were required to provide eligible employees up to two weeks of paid sick leave for specified reasons related to COVID-19 for leave taken or requested from April 1, 2020, through Dec. 31, 2020, including where the employee is unable to work because he or she is quarantined (pursuant to federal, state, or local government order or advice of a health care provider), experiencing COVID-19 symptoms and seeking a medical diagnosis, or has a need to care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider). Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the FFCRA.

Employers are not required to provide employees with FFCRA leave after Dec. 31, 2020, but employers who choose to provide such leave between Jan. 1, 2021, and Sept. 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website.

8. May an employer require an employee who is out sick with COVID-19 to provide a doctor's note, submit to a medical exam or remain symptom-free for a specified amount of time before returning to work?

Yes, a doctor's note may be required. However, the DOL encourages employers to consider that, during a pandemic, health care 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. Not requiring employees to secure a note from a doctor can help reduce strain on the medical system during this critical time.

Under the Americans with Disabilities Act (ADA), 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, where the employer 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.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present a fitness-for-duty certification from the employee's health care provider that confirms the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions apply. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

Due to safety and health concerns related to COVID-19, many health care providers are treating patients for a variety of conditions, including those unrelated to COVID-19, via telemedicine. The WHD considers telemedicine visits to be in-person visits for purposes of establishing a serious health condition under the FMLA where certain conditions exist. Please see Question 11 and Field Assistance Bulletin 2020-8: Telemedicine and Serious Health Conditions under the Family and Medical Leave Act (FMLA) for more information.

9. May my employer require me to submit a doctor's note to use FMLA leave if I am sick and unable to work because of COVID-19?

Yes, a doctor's note may be required in order to take FMLA leave. Under the FMLA, an employer may require a certification by a health care provider when an employee requests leave because of a serious health condition. The certification allows the employer to obtain information related to the FMLA leave request, and verify that an employee has a serious health condition. Leave when you are sick with COVID-19 may be an FMLA serious health condition under certain circumstances. Please see Question 2 for more information. The DOL encourages employers to consider that, during a pandemic, health care 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. Not requiring employees to secure a note from a doctor can help reduce strain on the medical system during this critical time.

An employee can provide the required information in any format, for example, on the letterhead of the health care provider. Employers must accept a complete and sufficient certification, regardless of the format. A certification is considered "incomplete" if one or more of the applicable entries on the form have not been completed. A certification is considered "insufficient" if the information provided is vague, unclear or nonresponsive. After acquiring a complete and sufficient certification, an employer is not permitted to ask for more information, such as requiring a doctor's note for each FMLA-related absence.

Please see Fact Sheet 28G for more information.

10. Are there protections that apply if an employer temporarily closes his or her place of business because of a pandemic and chooses to lay off some but not all employees?

The federal laws prohibiting discrimination in the workplace on the basis of race, sex (including pregnancy, gender identity and sexual orientation), age (40 and over), color, religion, national origin, disability, genetic information and retaliation may apply (see the U.S. Equal Employment Opportunity Commission (EEOC) or call 1-800-669-4000 if you have questions). Other specific federal laws that prohibit discrimination on these or additional bases may also govern if an employer is a federal contractor or a recipient of federal financial assistance.

Additionally, the Worker Adjustment and Retraining Notification (WARN) Act helps ensure advance notice in cases of qualified plant closings and mass layoffs. For more information about the WARN Act, click here.

Employers are also prohibited from discriminating against an employee because the employee has requested or used qualifying FMLA leave or leave under the FFCRA. In addition, employers are prohibited from discriminating against an employee because they are a past or present member of the United States uniformed service (see the U.S. Department of Labor, Veterans' Employment and Training Service for additional information or call 1-866-889-5627 if you have questions). Finally, in some circumstances, employers are prohibited from discriminating against an employee because of his or her citizenship or immigration status (see the U.S. Department of Justice, Immigrant and Employee Rights Section for additional information or call 1-800-255-8155).

11. I am unable to work because I need to take care of sick family members. Can my employer terminate or lay me off for this reason?

If an employee is **covered and eligible** under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. An employer is prohibited from interfering with, restraining or denying the exercise of an employee's rights under the FMLA. Employers are also prohibited from discriminating or retaliating against an employee for having exercised or attempted to exercise any FMLA right. Examples of prohibited conduct include using an employee's request for or use of FMLA leave as a negative factor in employment actions such as hiring, promotions or disciplinary actions, or failing to provide benefits to an employee on unpaid FMLA leave if the employer provides those benefits to employees who use other types of unpaid leave. Please see Question 1 and Fact Sheet 77-B for more information.

Some states may have similar family leave laws. In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees.

Additionally, under the FFCRA, covered employers were required to provide eligible employees up to two weeks of paid sick leave for specified reasons related to COVID-19 for leave taken or requested from April 1, 2020, through Dec. 31, 2020, including where the employee is unable to work because he or she is quarantined (pursuant to federal, state, or local government order or advice of a health care provider). The FFCRA prohibits discrimination on the basis of FFCRA leave used. Employers' requirement to provide FFCRA leave expired Dec. 31, 2020. However, WHD will enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through Dec. 31, 2020, for complaints made within the statute of limitations, which permits complaints to be filed for up to two years from the date of the alleged violation. A three-year statute of limitations applies in cases involving willful violations. Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the FFCRA.

Employers are not required to provide employees with FFCRA leave after Dec. 31, 2020, although employers who choose to provide paid sick and family leave for COVID-19 related reasons between Jan. 1, 2021, and Sept. 30,

2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website.

In lieu of laying off employees in this situation, we encourage employers to consider other options, such as telecommuting.

12. I am unable to work because I have COVID-19. Can my employer terminate or lay me off for this reason?

If an employee works for an **FMLA-covered employer and is eligible** under the FMLA and is unable to work because of a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. In some cases, COVID-19 may be a serious health condition. See Question 2. An employer is prohibited from interfering with, restraining or denying the exercise of an employee's rights under the FMLA. Employers are also prohibited from discriminating or retaliating against an employee for having exercised or attempted to exercise any FMLA right. Examples of prohibited conduct include using an employee's request for or use of FMLA leave as a negative factor in employment actions such as hiring, promotions or disciplinary actions, or failing to provide benefits to an employee on unpaid FMLA leave if the employer provides those benefits to employees who use other types of unpaid leave. See Question 1 and Fact Sheet 77-B for more information.

Some states may have similar family leave laws. In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees. The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the Americans with Disabilities Act and other federal workplace discrimination laws. Click here for more information.

Additionally, under the FFCRA, covered employers were required to provide eligible employees up to two weeks of paid sick leave for specified reasons related to COVID-19 for leave taken or requested from April 1, 2020, through Dec. 31, 2020, including where the employee is unable to work because he or she is quarantined (pursuant to federal, state or local government order or advice of a health care provider). The FFCRA prohibits discrimination on the basis of FFCRA leave used. Employers' requirement to provide FFCRA leave expired Dec. 31, 2020. However, WHD will enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through Dec. 31, 2020, for complaints made within the statute of limitations, which permits complaints to be filed for up to two years from the date of the alleged violation. A three-year statute of limitations applies in cases involving willful violations. Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the FFCRA.

Employers are not required to provide employees with FFCRA leave after Dec. 31, 2020, although employers who choose to provide paid sick and family leave for COVID-19 related reasons between Jan. 1, 2021, and Sept. 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website. In lieu of laying off employees in this situation, we encourage employers to consider other options, such as telecommuting.

13. Due to safety and health concerns related to COVID-19, many health care providers are treating patients for a variety of conditions, including those unrelated to COVID-19, via telemedicine. Telemedicine involves face-to-face examinations or treatment of patients by remote video conference via computers or mobile devices. Under these circumstances, will a telemedicine visit count as an in-person visit to establish a serious health condition under the FMLA?

Yes. The WHD will consider telemedicine visits to be in-person visits for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include an examination,

evaluation, or treatment by a health care provider; be permitted and accepted by state licensing authorities; and, generally, should be performed by video conference. This approach serves the public's interest because health care facilities and clinicians around the nation are under advisories to prioritize urgent and emergency visits and procedures and to preserve staff personal protective equipment and patient-care supplies. Please see Field Assistance Bulletin 2020-8: Telemedicine and Serious Health Conditions under the Family and Medical Leave Act (FMLA) for more information.

14. I was out on FMLA leave unrelated to COVID-19. While I was out, my company implemented a new policy requiring everyone to take a COVID-19 test before they come to the office. Under the FMLA, can my employer require me to get a COVID-19 test under this policy?

The FMLA does not prohibit the employer's testing requirement. When your FMLA leave is over, your employer must reinstate you to the same job or an equivalent position. However, you are not protected from the employer's actions that are unrelated to your use of or request for FMLA leave. For example, if a shift has been eliminated, or overtime has been decreased, you would not be entitled to return to work that shift or the original overtime hours, so long as the employer did not eliminate the shift or decrease overtime because you took or attempted to take FMLA leave. That principle also applies here, where your employer's requirement for testing isn't related to your having been out on FMLA leave but instead, all employees, regardless of whether they have taken any kind of leave, are required to be tested for COVID- 19 before coming to the office. Other laws may impose restrictions on the circumstances when your employer can require COVID-19 testing and what types of tests are permitted. Click here for more information.