

COVID-19 & the Workplace: Applying the FFCRA, ADA and EEO Rules

Sponsored by the American Bar Association Commission on Disability Rights

The Panel

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Participants will be able to ...

- Understand FFCRA's requirements, coverage, exemptions, and exclusions
- Determine who is covered under the ADA and other laws pertaining to leave
- Understand when telework or leave may be a reasonable accommodation under the ADA
- Understand applicable legal protections for workers who are age 65 or older, pregnant, or caretakers, or have symptoms of COVID-19
- Understand ADA rules pertaining to COVID-19 testing and exclusion of employees who may pose a direct threat

Key Guidance

EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

U.S. Dep't of Labor, Wage & Hour Div., *COVID-19 and the American Workplace*, <https://www.dol.gov/agencies/whd/pandemic>

The Families First Coronavirus Response Act (FFCRA)



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Family First Coronavirus Response Act (FFCRA)

- Signed into law March 18, 2020
 - Emergency Paid Sick Leave Act (EPSLA)
 - Emergency Family and Medical Leave Expansion Act (EFMLEA)
- Effective April 1, 2020
- Expires December 31, 2020
- Enforced by the U.S. Department of Labor Wage and Hour Division (WHD)



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FFCRA Requirements

- Coverage
- Employee Eligibility
- Qualifying Reasons for Leave
- Number of Weeks and Hours of Leave Available
- Calculation of Pay



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FFCRA – Employer Coverage

- Private Sector
 - Employers of fewer than 500 employees
 - Including not for profit employers
- Public Agencies
 - Regardless of the number of employees they employ



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FFCRA - Counting Employees

- Employer does not count employees working outside the U.S., U.S. territories, or D.C.
- Full-time AND part-time employees are counted.
- Employees who are working and on leave are counted.
- Temporary employees who are jointly employed are counted.
- Day laborers supplied by a temporary agency are counted
- Count is made when employee leave is initiated.



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FFCRA - Qualifying Reasons for Leave

An employee is entitled to take leave if the employee is unable to work or telework because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19,
- Has been advised by a health care provider to self-quarantine related to COVID-19,
- Is experiencing COVID-19 symptoms and is seeking a medical diagnosis,



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FFCRA - Qualifying Reasons for Leave (Continued)

- Is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine related to COVID-19,
- Is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons, or
- Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.



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FFCRA - Small Business Exemption

Applies to:

- Small businesses with fewer than 50 employees, AND
- Employee's leave is to care for his or her child whose school or place of care is closed (or childcare provider is unavailable), but only if
- Requirements of the FFCRA jeopardize business viability



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FFCRA - Small Business Exemption: Employer Determines

No application process - exemption applies if employer determines:

- Leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- Employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; OR
- Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.



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FFCRA - Exclusion of Health Care Providers and Emergency Responders

Employers may exclude employees who are either:

- Health Care Providers, or
- Emergency Responders.



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FFCRA – Exclusion of Health Care Providers

Health Care Provider is:

Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health provider, any facility that performs laboratory or medical testing, pharmacy, OR any similar institution, employer, or entity.



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FFCRA - Exclusion of Emergency Responders

Emergency Responder is:

- Anyone necessary for transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.
- Includes military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.



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FFCRA - Employer Notice Requirement

- Poster must be conspicuously posted, may be distributed online, posted on employer website, directly mailed or e-mailed to employees.
 - Does not have to be visible to job applicants.
- DOL Spanish and English FFCRA posters available online at www.dol.gov/whd
 - Translation not required



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FFCRA – Employee Layoffs

- FFCRA requirements are not applicable prior to April 1, 2020.
- If a business closes after April 1, but before an employee takes leave, FFCRA requirements do not apply except to the days from April 1 to the date employees are laid off.
- If a business is open but lays off part of its workforce, employees who are laid off or furloughed are not entitled to leave under the FFCRA.



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Emergency Paid Sick Leave Act (EPSLA)

Under the FFCRA



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Emergency Paid Sick Leave Act (EPSLA)

Benefit Basics:

- Six qualifying COVID-19 related reasons for job-protected leave
- During leave, continuation of health insurance
- Entitlement to paid sick leave over a two-week period
 - Full-time employees, based on their schedule, up to 80 hours
 - Part-time employees, hours based on their schedule



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EPSLA – Employee Eligibility

- All employees who work for covered employers are eligible.
- Covered employers
 - Private sector employer with fewer than 500 employees
 - Public sector employers
 - All federal employees are generally eligible for EPSLA leave; however, OMB has authority to exclude certain federal employees.



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EPSLA – Qualifying Reasons for Leave (Reasons 1 – 3)

An employee is entitled to take leave under the EPSLA if the employee is unable to work or telework because the employee:

- 1) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19,
- 2) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19,
- 3) Is experiencing COVID-19 symptoms and seeking a medical diagnosis,



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EPSLA – Qualifying Reasons for Leave (Reasons 4 – 6)

- 4) Is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19,
- 5) Is caring for his or her child whose school or place of care is closed (or child provider is unavailable) due to COVID-19 precautions, or
- 6) Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.



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EPSLA – Duration of Leave

Two-week period

- Full-time employees may use up to 80 hours.
- Part-time employees may use a number of hours equal to the number of hours they work, on average, over a two-week period.



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EPSLA – Required Rate of Pay

The applicable rate of pay is the **highest applicable wage rate**, either the:

- Employee's regular rate of pay,
- FLSA minimum wage, or
- Highest applicable state or municipal minimum wage.



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EPSLA – Paid Leave, 100% Calculation (Reasons 1 – 3)

- The employee is due 100% the required rate of pay for leave hours taken because the employee:
 - Is subject to a federal, state, or local quarantine or isolation order related to COVID-19,
 - Has been advised by a health care provider to self-quarantine related to COVID-19, or
 - Is experiencing COVID-19 symptoms and is seeking a medical diagnosis
- Total pay capped at \$511 per day or \$5,110 in total.



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EPSLA – Paid Leave, Two-Thirds Calculation (Reasons 4 - 6)

- The employee is due two-thirds of the required rate of pay for leave hours taken because the employee:
 - Is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19,
 - Is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons, or
 - Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
- Total pay capped at \$200 per day or \$2,000 in total.



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Emergency Family and Medical Leave Expansion Act (EFMLEA)

Under the FFCRA



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EFMLEA - Employee Eligibility

All employees, including full-time and part-time employees, of covered employers are eligible for EFMLEA if they have been employed by their employer for at least 30 calendar days.

- Reminders:
 - Private sector employers, including not for profit employers, are covered if they employ fewer than 500 employees.
 - Public agencies are covered regardless of the number of employees they employ.
 - Federal employee eligibility notes – employees under Title I of the FMLA are eligible under EFMLEA; OMB has authority to exclude certain federal employees.



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EFMLEA – Qualifying Reason for Leave

- **There is only one qualifying reason for leave under the EFMLEA: Employee leave to care for his or her child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.**



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EFMLEA – Unpaid and Paid Leave Periods

- Initial two weeks of EFMLEA leave is “unpaid”
 - Employee may choose to use paid sick leave under the EPSLA, or accrued paid time under their employer benefits package, at the same time as unpaid EFMLEA leave.
- Up to 10 weeks paid leave available
 - Hours of leave are paid at two-thirds the employee’s regular rate of pay.
 - Employer does not have to pay more than \$200 a day or \$10,000 total under EFMLEA.



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EFMLEA Leave – Interaction with the FMLA

This is a new leave reason under the FMLA, *not more weeks*

- An employee who has already used 12 weeks of leave under the FMLA is not able to use EFMLEA leave.



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The Americans with Disabilities Act (ADA)

ADA - Employer Coverage

- Private sector
 - 15 or more employees
 - Includes not-for-profit
- Public
 - State or local government agencies with 15 or more employees
 - Includes not-for-profit

ADA - Counting Employees

1. Determine number of employees on payroll.
2. Exclude discharged employees and independent contractors.
3. Add temporary or other staffing firm employees.
4. Must be 15 or more in 20 calendar weeks in the same calendar year as, or in in the calendar year prior to, alleged discrimination.

What if the Employee Doesn't Want to Come Back Just Yet?

- If the employee makes clear that the reason is a medical condition, the employer must consider reasonable accommodations.
 - Do not need to use words “ADA” or “reasonable accommodation”

What if the Employee Doesn't Want to Come Back Just Yet? Cont'd

- Only employees with current disabilities (and maybe employees who are pregnant) are eligible.
 - Not employees who are older, but do not have a medical condition.
 - Employees do not qualify on the basis of a family member, or a generalized quarantine or isolation order.

ADA – Definition of “Disability”

- To be entitled to a reasonable accommodation, must be needed because of a “current” or “past” ADA disability
- Mental or physical impairment that substantially limits a major life activity
 - Impairment: Just a medical condition/diagnosis
 - Major life activity: sitting, standing, lifting, walking communicating, concentrating, regulating thoughts and emotions, endocrine functions, cell growth, brain functions...

ADA – Definition of “Disability” cont’d

- An impairment “substantially limits” a major life activity if it **would, in the absence of treatment, during an active episode,** impose functional limitations on the activity.
- The (hypothetical) level of functional impairment **does not need to be high**—does not need to be permanent, long-term, or severe; may qualify by making performance of the activity more uncomfortable or time-consuming as compared to the average person.

ADA – Conditions that Should Easily Be Determined to Be Disabilities

- Immunocompromised due to treatment of cancer
- HIV Infection, AIDS
- Major depressive disorder
- Bipolar disorder
- Pregnancy-related health conditions
- “High-risk” pregnancies
- OCD
- PTSD

ADA – Conditions that May Be Disabilities

- Chronic lung disease; asthma
- Serious heart condition
- Other immunocompromised individuals
- Severe obesity
- Chronic kidney disease
- Liver disease
- Generalized anxiety disorder
- Covid-19

ADA – Telework as an Accommodation

- Only possible if it is possible to do the essential functions of the job
 - An essential function is an outcome / work product / required accomplishment
 - May need to eliminate marginal functions
 - Does not include lowered productivity
- Undue hardship
 - No significant expense
 - Significant difficulty? What about Zoom?

ADA – Other Accommodations

- Regular job
 - One-way aisles
 - Plexiglass or other barriers
 - Modified work schedule or shift assignment to reduce exposure in the workplace or while commuting
- Other (may affect pay)
 - Temporary transfer
 - Restructuring
 - Part-time

ADA – Leave as an Accommodation

- Does not need to be paid
- Required until continuation becomes an undue hardship
 - E.g., difficulty covering or hiring temporary replacements, significant loss of income for business
- Employer must not penalize the individual
- Job-protected
- Health insurance must be continued if the employer would do so for other individuals on leave

ADA – Documentation

- From medical professional
- Sufficient information to allow the employer to determine whether the employee has a disability
 - Minimal—diagnosis, and effects on a major life activity in absence of treatment during an episode
- And to show need for accommodation
 - “Employee has higher risk of severe illness”
 - “Experiences worsening symptoms of anxiety when at office”

What if the Employer Doesn't Want the Employee to Return?

- If the reason is to protect the employee because he/she is older or pregnant—prohibited
- If the reason is to protect others, because the employee has Covid-19—permitted

What if the Employer Doesn't Want the Employee to Return?

- If the reason is to protect the employee because he/she has a different medical condition—only if the individual poses a “direct threat” to self
 - Objective evidence: significant risk of substantial harm that cannot be reduced or eliminated with a reasonable accommodation
 - Individualized assessment, not just because the condition is on the CDC list

ADA – Return-to-Work

- May test for Covid-19 consistent with updated advice from the CDC and public health authorities
- If returning from Covid-19, may request certification of fitness for duty

ADA – Return-to-Work

- May require protective gear and infection control practices
 - Request exemption due to disability: consider reasonable accommodations
 - E.g., non-latex gloves, modified face masks for interpreters who uses lip reading, or gowns designed for individuals who use wheelchairs
 - May ask for supporting documentation
 - Subject to undue hardship

Hypothetical 1

- Jamal is a 65 and a radiological technician at Georgia State Hospital. On April 1, he requests to telework from home because his grandchildren need to be supervised during the day because of the COVID pandemic. Jamal spends his entire workday looking at radiological slides, and there is nothing in his workday that he cannot do remotely, but his boss asks that he accept a significant salary pay cut. Jamal teleworks until May 20, at which point he tests positive for COVID.

Hypothetical 2

- Charles works as a receptionist for a real estate firm. He has had lupus his entire life, which is largely managed through medication and stress relief efforts. Charles, who has been teleworking from home during the pandemic, is concerned that his lupus will flare up if he is asked to return to work in person. He and his doctor are concerned about the added stress of in-person interactions and the consequent risks of contracting COVID.

Hypothetical 3

- Mary is an associate attorney at a law firm who is six months pregnant. She has one week of paid vacation available every year, and accrues sick leave by the pay period. By April, Mary has exhausted her sick leave for the year. On May 1, 2020, she reports feeling nauseous, and her employer tells her she cannot return because of COVID concerns. She is not able to get tested for COVID, as her doctor does not want her exposed to COVID from being tested. On May 7, her nausea resolved, Mary tries to return, but her boss advises to stay home for “her own good.”

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Additional FFCRA Resources

- [Families First Coronavirus Response Act: Employee Paid Leave Rights](#) - *Also available in Spanish*
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#) - *Also available in Spanish*
- [Families First Coronavirus Response Act: Questions and Answers](#)
- [Field Assistance Bulletin \(FAB\) No. 2020-1](#)
- [\(Poster\) Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#) - *Also available in Spanish*
- [Families First Coronavirus Response Act Notice - Frequently Asked Questions](#)
- [\(Poster\) Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under the Families First Coronavirus Response Act](#) - *Also available in Spanish*



WHD_COVID19@dol.gov - *Email address for questions*



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