

Fear of Coronavirus Isn't Covered by FFCRA

By Allen Smith, J.D.

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Workers who remove their children from day care solely out of fear of the pandemic and employees who self-quarantine because they are afraid of catching the coronavirus aren't covered by the Families First Coronavirus Response Act (FFCRA).

But FFCRA coverage may apply if a local quarantine order precludes a child from using a child care facility or a health care provider has advised that a child be quarantined because of concerns of potential infection or transmission of the virus, said Ronald Schirtzer, an attorney with Weinberg Wheeler Hudgins Gunn & Dial in Miami and Orlando, Fla. Otherwise, a precautionary removal of the child when his or her child care facility remains open would not qualify for coverage, he said.

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FFCRA Requirements

The FFCRA provides different types of paid leave (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-releases-ffcra-regulations-coronavirus.aspx) when an employee is unable to work or telework due to a specified reason under the law.

Under the FFCRA, an employee at a business with fewer than 500 employees or at certain public entities is entitled to take leave related to COVID-19 if the employee is unable to work due to any of these circumstances:

- The employee is subject to a federal, state or local quarantine or isolation order.
- The employee has been advised by a health care provider to self-quarantine.
- The employee is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual subject to a quarantine or isolation order.
- The employee is caring for a child whose school or place of care is closed or unavailable due to coronavirus-related reasons.
- The employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

"Fear is not one of the six criteria for a leave" under FFCRA, noted Robert Boonin, an attorney with Dykema in Detroit and Ann Arbor, Mich.

Even if a day care is unavailable, to be eligible for emergency family and medical leave, the employee would still have to establish a need to be home with the child and that he or she could not telework, Boonin noted.

If an employee chooses to self-quarantine out of fear, the worker would not be entitled to FFCRA benefits, even if the employer permits the employee to self-quarantine, said Jenifer Bologna, an attorney with Jackson Lewis in White Plains, N.Y.

"This is true even if an employee decides to self-quarantine upon experiencing COVID-19 symptoms," she said. "An employee who is experiencing COVID-19 symptoms is entitled to leave under the FFCRA only if the employee seeks a medical diagnosis or if a health care provider directs or advises the employee to stay home."

The health care provider may make such a recommendation because he or she believes the employee may have COVID-19 or thinks that the employee is at high risk for a serious case of COVID-19.

"The analysis might be different, however, if an employee who is high risk decides to stay home and self-quarantine in response to a stay-at-home order or shelter-in-place order that advises those at higher risk for a serious COVID-19 infection to stay at home," she added. In such a case, if the employee's workplace remains open because it's an essential business, an employee may be entitled to paid time off under the FFCRA, even absent a health care provider's express order to quarantine, Bologna said.

If an employee is out because he or she has symptoms of the coronavirus—such as fever, dry cough and shortness of breath—the employee would be entitled to FFCRA sick-leave coverage from the time he or she became symptomatic, if the medical diagnosis confirms COVID-19 infection, Schirtzer said. The coverage would last until the employee recovered or his or her two weeks of sick leave coverage runs out, whichever happens first.

If the diagnosis is negative, the employee would be entitled to leave only from the time he or she became symptomatic until when he or she received the negative test result, he said. Again, this type of leave would not exceed two weeks.

"The employee cannot take FFCRA paid-leave time to self-quarantine without seeking a diagnosis," noted Andrew Murphy, an attorney with Faegre Drinker in Minneapolis.

Going Beyond What FFCRA Requires

Many employers go beyond FFCRA requirements and offer additional coronavirus-related paid time off and flexible work policies, Bologna said.

"An employee who does not have sufficient paid time off may be less likely to comply with doctor's orders to quarantine or to stay home if they feel mild symptoms," she said. Providing sick employees paid time encourages them to stay home, creating a healthier work environment. "This, in turn, may result in fewer employees being fearful of reporting to work."

The organization that offers leave beyond FFCRA requirements should ensure that the policy is applied consistently so its implementation does not have a disparate impact on any protected group of employees, said Linda Bond Edwards, an attorney with RumbergerKirk in Tallahassee, Fla.

Murphy cautioned employers to avoid defining voluntary paid sick leave in a way that would constitute an accrued benefit. Otherwise, unused portions might need to be paid at the end of the employment relationship.

"While it often makes sense to provide workers flexibility in the current crisis, the fact remains many jobs cannot be done remotely or effectively if employees are absent," Bologna said. "Thus, when considering extending coverage beyond legal mandates, it is important to balance an employee's need for leave with an employer's need to have employees report to work."

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