

NOTES

COVID19

FMLA ADA FLSA

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TOPIC

COVID19

FAMILY MEDICAL LEAVE ACT

AMERICANS WITH DISABILITIES ACT

FAIR LABOR STANDARDS ACT

UPDATE

Employers are addressing their legal obligations to employees in light of the Covid19 virus. School districts and other mandated employers are responding to unique questions about how to characterize the time on mandatory hiatus.

This article reviews current employer obligations under the Family and Medical Leave Act and the Americans with Disabilities Act and discusses the Covid19 emergency relief legislation pending in Congress.

ABOUT

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Most employers are addressing the unplanned work hiatus now mandated for certain organizations and strongly encouraged for others by Executive Order or emergency administrative regulation. In Wisconsin, Governor Tony Evers has directed the State of Wisconsin Department of Health Services to close all public and private schools beginning March 18, 2020, until April 6, 2020, or further notice.¹ The mandatory hiatus creates questions for school districts about how to apply their Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) policies in the current situation.

Covid19 is unprecedented; however, the three-week hiatus can be managed without imposing a sea change in employer leave policies. This article discusses three aspects of the Covid19 hiatus – (1) current FMLA and ADA requirements as they apply to employees who are actively at work, (2) current FMLA and ADA requirements as they apply to employees who are already on leave, and (3) pending legislation in the Families First Coronavirus Response Act passed by the U.S. House of Representatives on March 14, 2020.

COVID19 and Employees Who Are Actively at Work

School districts and other mandated employers will soon close their workplaces and send employees home for a period of up to three weeks while public health officials work to manage the spread of Covid19. Employers who can facilitate remote worksites will continue service in some form during the hiatus. Employers who facilitate remote worksites may require some employees to remain on site to perform work that cannot be completed online. Examples include maintenance and custodial employees, daycare personnel and healthcare workers.

For required work –

- *FMLA* – Employers can require employees to perform assigned work remotely if the employer has continued the employee’s compensation. However, Covid19 will be considered a “serious health condition” allowing for FMLA leave if the condition requires ongoing care by a healthcare provider or an overnight hospital stay. Employees who have contracted Covid19 or who are caring for a family member with Covid19, as well as those under quarantine due to possible exposure, would be entitled to FMLA leave.
- *ADA* - Similarly, remote work, schedule adjustments or other changes may be required as a reasonable accommodation under the ADA if the employee has a health condition that could be compromised by exposure to Covid19. Employers should remain aware of the need to conduct a reasonable accommodation inquiry for employees who have not been diagnosed with Covid19 but who may be affected by exposure to the virus.
- *FLSA* - Employers who implement a mandatory or voluntary hiatus should remember that the Fair Labor Standards Act obligates them to continue compensation for hours worked, regardless of the setting. If the employer “tolerates” work from home, employees must be paid for the time worked, including overtime (time worked over 40 hours in a workweek) for non-exempt employees. Employers who intend to implement partial work schedules should be clear about hours worked expectations to avoid wage and hour questions.

¹/https://content.govdelivery.com/attachments/WIGOV/2020/03/13/file_attachments/1400831/DHS%20School%20Closure%20Order_3.13.20.pdf

COVID19 and Employees Who Are Already on Leave

- *FMLA* – The Covid19 hiatus does not count against employees' FMLA time. A strict construction of the FMLA regulations would allow the employer to continue unpaid FMLA leave status for those who were already on unpaid FMLA leave at the same time that all employees are on temporary paid hiatus. Unpaid FMLA status still exists, along with vacation and sick leave. Employees can take those types of leave during the hiatus.

However, it seems likely that employees on hiatus may work from home. For school district employers, depending on their positions with the District, employees may prepare lesson plans, catch up on grading, work on upcoming projects and meet together online.

Employees who are currently on FMLA leave could also choose to work from home and, therefore, put themselves in a position equivalent to employees on paid hiatus. Employees currently on FMLA can request or use intermittent leave, which would also put them in the same position as those on paid hiatus.

If an employee currently on FMLA leave could work during the hiatus, it would be best to move that employee to paid hiatus status, temporarily discontinue FMLA leave, and resume FMLA leave when the hiatus ends. Time on hiatus would not count against the employee's FMLA time.

There may be situations where an employee is so incapacitated that s/he could not work during the hiatus period. These situations are likely to be a small fraction of the employer's overall current FMLA leave use. Although the employer could keep these employees on unpaid status, a better approach may be to include them in the paid hiatus to avoid penalizing employees whose health conditions are likely to be quite serious.

Similarly, a strict construction of the FMLA regulations would allow an employer to hold employees to their initial application for FMLA leave, including the employee's choice to opt for substituted paid leave. Under the current unusual circumstances, however, the U.S. Department of Labor is urging employers to take a flexible approach and accommodate employees when possible.

- *ADA* – Employers should review all requests for remote work assignments, schedule adjustments, location transfers and job reassignments as potential reasonable accommodations for employees who would otherwise be returning from FMLA leave but who cannot risk Covid19 exposure due to a compromised health condition for themselves or a family member. The ADA protects employees who are otherwise qualified but who have a disability that requires accommodation to avoid Covid19 exposure.
- *FLSA* – Employees who work remotely while on FMLA leave must be paid for the hours worked. If the Covid19 hiatus is unpaid, employers must be vigilant and ensure that all work obligations are eliminated. Questions about work projects, quick to-dos and other "this will just take a minute" work requests will create compensation obligations for the employer. If the situation does not allow for all work to stop, it would be best to develop a full or partial paid work schedule during the hiatus.

Special Rules for Instructional Employees under FMLA

The federal FMLA regulations include special rules for K-12 instructional employees regarding intermittent leave, leave near the end of an academic term, the duration of FMLA leave and restoration to an equivalent position. *See*, 29 C.F.R. § 825.600, et seq. These rules provide additional flexibility to school districts to transfer or limit leave to accommodate instructional requirements.

Limits on intermittent leave

Leave that starts before the end of the school year and carries over to the fall semester is continuous leave, not intermittent leave.

If intermittent leave would occur on more than 20 percent of the days of the total approved leave period, the school district can –

- Limit intermittent leave to periods of particular duration (e.g., planned treatment period)
- Transfer the employee temporarily to an alternate position with equivalent pay/benefits.

If the required notice is not given for intermittent leave, the school district can limit the leave period or transfer the employee or require a delayed leave until notice is provided.

Leave near the end of an academic term

A school district can require instructional employees to take leave until the end of the term (stay out beyond the leave period) if –

- The leave begins more than five (5) weeks before the term ends and will last at least three (3) weeks;
- The leave begins during the final five (5) weeks of the term and will last more than two (2) weeks; or
- The leave begins during the final three (3) weeks of the term and will last more than five (5) days.

Duration of FMLA leave

If intermittent or reduced schedule leave is taken over a defined period of time, the entire period will count as FMLA time.

If the school district requires an instructional employee to stay on leave through the term end, the time after the requested leave period does not count as FMLA time.

Restoration to equivalent position

The process of returning an employee to an equivalent position must be made based on established written school board policies and practices that are clearly communicated to employees before FMLA leave is taken. For example, a school district cannot restore an instructional employee to a position that requires additional licensure or certification.

COVID19 Pending Legislation

On March 11, 2020, the U.S. House of Representatives passed House Bill H.R.6201 making emergency appropriations for Covid19-related temporary employment or job loss.² The “Families First Coronavirus Response Act” provides for special rights under the FMLA along with paid sick leave for certain jobs and employment-related tax credits. The Coronavirus Response Act is expected to be taken up by the Senate within a matter of days. Resulting legislation would be effective within two weeks of the date the President signs the bill into law.

Employment-related items in House Bill H.R. 6201 include –

Emergency Family and Medical Leave Expansion Act

Employees of government employers and employers with fewer than 500 employees who have 30 days of employment would receive up to 12 weeks of job-protected leave -

- To adhere to a quarantine requirement or recommendation
- To care for an at-risk family member who is adhering to a quarantine requirement or recommendation or
- To care for the employee’s child if the child’s school or daycare provider is closed due to coronavirus.

After two weeks of paid sick leave, employers would pay a benefit of two-thirds of the employee’s wage during the remainder of the leave.

Emergency Paid Sick Leave

Employees of government employers and employers with fewer than 500 employees must provide two weeks of paid sick leave at full wage for employees who are quarantined or seek preventive care for coronavirus and two weeks of paid sick leave at two-thirds wage for employees who must stay home to care for their children when school or daycare is closed due to coronavirus. This emergency benefit applies to all employees regardless of the number of days of employment with the employer (*i.e.*, no 30 days of employment requirement).

Emergency Unemployment Insurance Stabilization

The federal government will provide extended unemployment compensation for 26 additional weeks paid for at 100 percent for states that experience a 10 percent increase in claims along with \$1 billion in funding to states to assist with the anticipated increase in administrative claim processing.

The State of Wisconsin Department of Workforce Development has posted a reminder to employers and employees that unemployment compensation in Wisconsin is only available to employees who are unemployed due to no fault of their own. Employees who choose to self-isolate would not be eligible for unemployment compensation, as a general matter.³

Health Insurance

Private and public health plans are required to provide COVID19 testing at no charge.

² / <https://docs.house.gov/billsthisweek/20200309/BILLS-116hr6201-SUS.pdf>

³ / <https://dwd.wisconsin.gov/Covid19/partners/ui.htm>

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Tax Credits

Employers would receive a tax credit against the employer share of payroll tax for the amount of paid sick leave and paid family leave provided under the Act.

KEY POINTS

<i>Employees actively at work</i>	Employers can require employees to work remotely but employees will be entitled to FMLA leave to care for themselves or a family member with a Covid19 diagnosis or Covid19 exposure-related quarantine. Work at home must be paid as required under the Fair Labor Standards Act and reasonable accommodations may be required.
<i>Employees currently on leave</i>	If employees who are already on leave may work from home during the Covid19 hiatus, their leave status should be adjusted to the paid hiatus. FMLA time would resume as needed when the hiatus ends.
<i>Instructional employees under FMLA</i>	Instructional employees on FMLA can be kept out through the end of the academic term under certain restrictions. Intermittent leave can be limited to a period of particular duration or the employee can be transferred to an alternate position.
<i>House Bill H.R. 6201</i>	The Families First Coronavirus Response Act provides for 12 weeks of FMLA and two weeks of paid sick leave when employees are out due to a quarantine, to care for an at-risk family member or because the employee's child's school or daycare has been closed.