

## COVID-19 Related Accommodations and Leave Requests

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# COVID-19 Related Accommodations and Leave Requests

By: Catherine R. Locallo and Jessica A. Milligan

September 25, 2020

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## Families First Coronavirus Response Act



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

FFCRA:  
COVID-19  
Employee  
Leave

- On March 18, 2020, the Families First Coronavirus Response Act (“FFCRA”) was enacted in response to COVID-19.
- Currently effective through December 31, 2020.

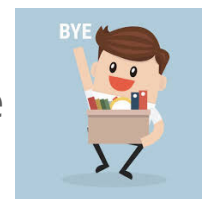
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FFCRA:  
COVID-19  
Employee  
Leave

- The FFCRA created two new categories of employee leave rights for certain COVID-19 qualifying reasons:



1. Emergency Family and Medical Leave Expansion Act
2. Emergency Paid Sick Leave Act

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## FFCRA: Emergency FMLEA Leave

- The Emergency Family and Medical Leave Expansion Act (“Emergency FMLEA”):
  - Expands the FMLA temporarily to allow eligible employees to take leave if they are unable to work (or telework) due to the need to care for a child because of a school or childcare closure related to COVID-19.

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## FFCRA: Emergency Paid Sick Leave

- The Emergency Paid Sick Leave Act (“EPSLA”):
  - Provides up to 2 weeks of paid sick leave for employees who are unable to work (or telework) due to certain COVID-19 qualifying reasons.



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## FFCRA: Who is an “Eligible Employee”?

- Emergency FMLEA Leave:
  - An employee who has been employed by the District for at least 30 calendar days.
- Emergency Paid Sick Leave:
  - All employees, regardless of how long they have been employed by the District.

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## What if an Employee can Work Remotely?



- Leave under the FFCRA is available to employees who are unable to work or telework.
- An employee is able to “telework” if the employer permits or allows the employee to perform work while at home or at a location other than the normal workplace.

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## FFCRA: Flexible Remote Work Hours

- U.S. DOL FFCRA Guidance:
  - If the employer agrees that the employee may work the normal number of hours, but outside of the normally scheduled hours, then leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

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## Emergency FMLA Leave



EMERGENCY  
**FMLA**  
EXPANSION

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## Emergency FMLEA Leave: Qualifying Reasons

- Eligible employees may use up to 12 weeks of leave if the employee is unable to work (or telework) based on either:
  - A need for leave to care for their son or daughter under 18 years of age if the school or place of care has been closed due to a public health emergency; or
  - The childcare provider of their son or daughter is unavailable due to a public health emergency.
- Employees are still limited to a total of 12 weeks of FMLA leave per 12-month period.

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## Break It Down: Important Definitions

<b>Public Health Emergency</b>	An "emergency with respect to COVID-19 declared by a Federal, State, or local authority."
<b>School</b>	Elementary school or secondary school.
<b>Son or Daughter</b>	An employee's own biological child, adopted child, foster child, stepchild, a legal ward, child for whom the employee is standing in loco parentis, and adult child incapable of self-care due to a disability.

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## Break It Down: Important Definitions

<b>Childcare Provider</b>	Receives compensation for providing childcare services or provides childcare on a regular basis.
<b>Closed</b>	The physical location where the child receives instruction or care is closed. <ul style="list-style-type: none"><li>• During hybrid attendance, a school is “closed” only on days the child cannot attend in person.</li><li>• A school is not “closed” if it is open for in-person instruction but the employee chooses to keep the child home.</li></ul>

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## Pay During Emergency FMLEA Leave

- Unlike traditional FMLA leave, certain weeks of Emergency FMLEA leave must be paid.
- During the first 2 weeks of Emergency FMLEA leave:
  - Leave is unpaid.
  - Employees may elect to apply leave under the EPSLA or other accrued paid leave.



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## Pay During Emergency FMLEA Leave

- After the first 2 weeks of Emergency FMLEA leave:
  - An employer must pay 2/3 of the employee's average rate of pay, up to \$200 per day and \$10,000 total.
  - An employee may elect, or may be required, to use accrued leave otherwise available to care for a child (vacation, personal leave, or other PTO).
  - If other accrued leave is applied concurrently, the employee must be paid at the regular rate of pay.

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## Emergency Paid Sick Leave Act ("EPSLA")



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## EPSLA Leave: Calculating Leave

- Employers must provide employees up to 2 weeks of paid sick leave for certain COVID-19 qualifying reasons.
  - Full-Time Employees: Up to 80 hours.
  - Part-Time Employees: Average number of hours the employee works over a 2-week period.
- Paid sick time does not carry over from 1 year to the next.

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## EPSLA Leave: Pay and Qualifying Reasons

- Paid leave at the employee's average regular rate or minimum wage, whichever is higher, when 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.
- Up to \$511 per day.



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## EPSLA Leave: Pay and Qualifying Reasons

- Paid leave at 2/3 the employee's average regular rate or 2/3 minimum wage, whichever is higher, when the employee:
  - Is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine for COVID-19 reasons;
  - Is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
  - Is experiencing any other substantially similar condition specified by the Secretary of HHS.
- Up to \$200 per day.

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## EPSLA Leave During Emergency FMLEA

- Employees may elect to apply EPSLA leave during the first 2 weeks of Emergency FMLEA leave.
- Employers may not require employees to first use any other source of paid or unpaid leave available before using EPSLA leave.

**PAID LEAVE**

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## Hypothetical 1

- A custodial employee used 6 weeks' FMLA leave last year to recover from hip surgery. He has requested Emergency FMLEA leave to care for his 6-year old daughter starting September 30, 2020, while her school is "closed" due to COVID-19.
  - Is the employee eligible for Emergency FMLEA leave? What if the school is only "closed" 2 days per week?
  - If so, how many weeks of Emergency FMLEA leave may he use?
  - Is he eligible for pay during the Emergency FMLEA leave?

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## Hypothetical 2

- An administrator who works remotely reports that she has a slight fever and cough.
  - Is she eligible for EPSLA leave?
  - Is she eligible for Emergency FMLEA leave?

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## FFCRA: Intermittent Leave Requests



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## FFCRA: Intermittent Leave

- Intermittent Leave from Remote Work:
  - With the employer's agreement, an employee may take FFCRA leave intermittently from remote work if the employee is unable to telework due to any COVID-19 qualifying reason.
- Intermittent Leave from In-Person Work:
  - With the employer's agreement, an employee may take intermittent FFCRA leave from in-person work **only if** the leave is taken because the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

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## FFCRA: Intermittent Leave

- An employee **may not** take intermittent FFCRA leave from in-person work if the leave is taken because the employee:
  - Is subject to, or is caring for an individual who is subject to, a Federal, State, or local quarantine or isolation order related to COVID-19;
  - Has been advised, or is caring for an individual who 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.

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## Hypothetical 3

- An administrative assistant has requested 2 weeks' Emergency FMLEA leave to care for his mother who has been advised to quarantine after testing positive for COVID-19.
  - Is the employee eligible for Emergency FMLEA leave?
  - May he use EPSLA leave?
  - May the employee take leave intermittently?

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## Application of Other Leave Rights to COVID-19



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## Application of Other Leave Rights to COVID-19

- Americans with Disabilities Act
- Family and Medical Leave Act
- Board Policies
- Collective Bargaining Agreements
- Individual Employee Contracts

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## Americans with Disabilities Act ("ADA")



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## ADA Generally

- An employee is protected under the ADA if the employee is a qualified individual with a disability.
- "Disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

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## ADA Generally

- A “qualified individual with a disability” is an employee who can:
  - Satisfy the requisite skills, experience, education, and other job-related requirements of the position; and
  - Perform the “essential functions” of the position with or without a reasonable accommodation.



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## ADA Generally

- The ADA “interactive process” is the process of determining:
  - Whether the employee has a “disability” under the ADA; and
  - Whether a reasonable accommodation is available that would allow the employee to safely return to the workplace to perform the essential functions of his or her position.

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## Is COVID-19 a Disability Under the ADA?

- Under the EEOC's most-recent guidance, it is unclear at this time whether COVID-19 is or would be a disability under the ADA.
- Notwithstanding, an employee may seek a reasonable accommodation for a disability that puts the employee at a greater risk of severe illness from COVID-19.

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## COVID-19: ADA Requests Based on Age

- Are employees eligible for ADA accommodations for COVID-19 based on their age?
  - *No. Although an employee over a certain age would be at a higher risk for developing complications from COVID-19, an employee would not qualify for an accommodation under the ADA solely on the basis of age.*



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## COVID-19: Excluding Employees Based on Age

- May an employer exclude from the workplace employees who are 65 years old or older solely because they are at a higher risk of severe illness if they contract COVID-19?
  - *No. The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over.*



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## COVID-19: ADA Requests for General Fears and Anxiousness

- Are employees entitled to accommodations based on a general fear of exposure to COVID-19?
  - *General fear or worry about returning to work due to COVID-19 is not a legal basis for an employee to remain off campus. However, certain preexisting mental health conditions could qualify as ADA disabilities, such as anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder.*



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## COVID-19: ADA Requests for General Fears and Anxiousness

- In response to accommodation requests based on a general fear or anxiety, the employer should first determine whether the condition is a disability under the ADA, including requesting medical documentation if needed.

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## COVID-19: ADA Requests for Family Members

- Are employees entitled to ADA accommodations based on a family member's medical condition?
  - *No. The ADA only requires employers to provide reasonable accommodations necessary for a qualified employee's own disability.*



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## COVID-19: ADA Interactive Process

- The employer may seek documentation verifying:
  - The employee has a disability as defined by the ADA; and
  - The accommodation is needed because the disability may put the individual at higher risk from COVID-19.
- Given the current demand on doctors and the health care system, consider accepting other forms of documentation to verify the medical condition.

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## COVID-19: ADA Interactive Process

- Reasonable accommodations to reduce the risk of exposure to COVID-19 might include:
  - Enhanced protective gowns, masks, gloves, or other gear.
  - Changes to the work environment to reduce contact with others.
  - Temporary job restructuring of “marginal” job duties.
  - Modifying a work schedule or shift assignment.
  - Remote work or a leave of absence.

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## COVID-19: ADA Requests to Work Remotely

- Must the District grant an employee's request to work remotely?
  - *Not necessarily. Employers are required to provide a reasonable accommodation if available. Employers are not obligated to grant the specific accommodation requested.*



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## COVID-19: ADA Requests to Work Remotely

- The District may consider whether an alternate reasonable accommodation is available that would allow the employee to safely return to the workplace.
- Employers are not required to reassign or remove an employee's essential functions as an accommodation.

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## Family and Medical Leave Act ("FMLA")



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## FMLA Generally

- An eligible employee is entitled to 12 weeks of unpaid leave during a 12-month period for the employee's own serious health condition that renders the employee unable to perform the essential job functions.

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## FMLA Generally

- “Eligible Employees”:
  - Employed by a covered employer;
  - Employed for at least 12 months; and
  - Worked at least 1,250 hours in the 12-month period immediately preceding the request for leave.



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## Is COVID-19 a Serious Health Condition?

- A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care; or
  - Continuing treatment by a health care provider.
- Depending on the severity of symptoms, COVID-19 and related conditions could be a “serious health condition” under the FMLA.

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## Employee Notice of COVID-19 FMLA Leave

- An employee is generally required to give notice of their need to take FMLA leave but need not specifically reference the FMLA.
- Notice is sufficient if the employee provides enough information to let the employer know that the FMLA may apply.
- Notice of the need for unforeseeable leave must be given as soon as practicable under the circumstances.

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## Other Leave Rights

- Additional preexisting leave rights might apply to COVID-19 requests:
  - Collective Bargaining Agreements
  - Individual Employment Contracts
  - Board Policies



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## Hypothetical 4

- A teacher has requested an ADA accommodation to work remotely. She submitted a doctor's note that states she is 65 years old and "has a medical condition placing her at high risk from COVID-19."
  - Is the employee eligible for FMLA leave?
  - Is the employee eligible for an accommodation under the ADA?
  - Must the District grant the employee's request to work remotely?

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## Questions?



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Catherine Locallo's practice focuses on labor and employment law and board governance matters. She counsels employers in all aspects of employment law including hiring, employment contracts, employee discipline issues, terminations and reductions in force, collective bargaining and labor relations, nonimmigrant worker visas and employment discrimination matters. She also counsels public bodies on compliance with Illinois' Freedom of Information Act and Open Meetings Act. Catherine has extensive experience representing clients in court and administrative agency proceedings involving discrimination, retaliation and harassment claims.

Catherine is approved by the Illinois State Board of Education to provide school board member training.

### **AWARDS**

Illinois "Rising Star," Employment & Labor Law (2015-2018)

### **RECENT PUBLICATIONS**

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (2015)

"Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award 'Drew Its Essence' from the CBA," *Justinian Society Newsletter* (2014)

"When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint," *The John Marshall Law Review*, (2009)

### **RECENT PRESENTATIONS**

*Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings*, IASPA Annual Conference (January 2020)

*A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act*, LUDA Annual Conference (October 2019)



### **PRACTICE AREAS**

Education Law  
Labor & Employment  
Litigation

### **EDUCATION**

J.D., *cum laude*, The John Marshall Law School,  
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B.S., Southern Illinois  
University

### **ADMITTED TO PRACTICE**

U.S. Court of Appeals for  
the Seventh Circuit

U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

*Community College Trustees Training Session, ICCTA (June 2019)*

*Community College Trustees Training Session, ICCTA (June 2017)*

**ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

Justinian Society of Lawyers; Scholarship Committee, Co-Chair

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Jessica counsels school districts and community colleges in all aspects of labor and employment law, including employee investigations, discipline and termination, civil rights, and federal and state employment discrimination matters under the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Illinois Human Rights Act, and Title VII. Jessica also advises employers regarding collective bargaining, contract interpretation, grievance arbitrations, and unfair labor practices. Jessica represents clients in a variety of venues including both federal and state court, as well as the U.S. Equal Employment Opportunity Commission and the Illinois Department of Human Rights.

### RECENT PRESENTATIONS

*Free Speech on Campus*, Illinois Community College Chief Student Service Officers (March 2020)

*Navigating Payroll Laws*, Illinois ASBO Bookkeepers Conference (March 2020)

*Administrators Legal Update*, Concordia University (December 2019)

*Navigating Background Checks in Today's Environment*, Illinois ASBO (May 2019)

*Employee Misconduct Issues: Effective Management Strategies for Defensible Discipline/Discharge*, Concordia University (April 2019)



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### EDUCATION

J.D., *cum laude*, Michigan State University College of Law

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U.S. District Court for the Northern District of Illinois

U.S. District Court for the Central District of Illinois

U.S. District Court for the Southern District of Illinois

U.S. District Court for the Eastern District of Michigan

U.S. District Court for the Western District of Michigan

Supreme Court of Illinois

Supreme Court of Michigan

**ORGANIZATIONS**

American Bar Association

Illinois Bar Association

Illinois Council of School  
Attorneys

Michigan Bar Association

National Council of School  
Attorneys