

FAQs Regarding Personnel & COVID-19

This situation continues to evolve. Alabama's State of Emergency and Safer at Home Orders have expired, as have the mandatory provisions of the Families First Coronavirus Response Act ("FFCRA"). However, other Federal laws, including the Family and Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), and the Genetic Information Nondiscrimination Act ("GINA"), still apply to employees affected by COVID-19, as does the recent 'Vaccine Passport Ban,' Alabama Act 2021-493. The recent spike in cases has resulted in the issuance of new regulatory guidance, and there may be additional legislative, executive, and/or judicial action in the near future. It is still very important that you stay informed and work closely with your county attorney to ensure compliance and continued operations.

(1) What kind of information can I ask my employees about their health?

Under applicable federal law, employers can only seek information about an employee's health if the information is "job-related and consistent with business necessity," meaning that there is objective evidence that either 1) the employee's ability to perform essential job functions will be impaired by a medical condition or 2) the employee will pose a direct threat due to a medical condition. Information about an employee's possible exposure to COVID-19 meets this test even if the employee is not personally showing symptoms, since the virus may be contagious even without the employee feeling sick. As part of these inquiries, you may require regular temperature checks, ask about symptoms, and ask if they have been exposed to any person with COVID-19. You generally may not, however, initiate an inquiry into an employee's relative risk for increased complications due to COVID-19 based on their underlying health conditions or the health of their family members. ANY INFORMATION ABOUT AN EMPLOYEE'S HEALTH, OR THAT OF THEIR CONTACTS, SHOULD BE KEPT SEPARATELY FROM THEIR NORMAL PERSONNEL FILE. Employee health records are *not* public records. They should be kept in a separate, secured file with limited access. Other employees should only be notified of a suspected or confirmed COVID-19 diagnosis if ordered by

medical professionals and/or the public health authorities. If authorities recommend that co-employees be quarantined specifically because of their interaction with the affected co-worker, they should be placed on emergency paid administrative leave, which should not be counted against their leave balances.

You may also continue to ask employees who request leave, either under your general policies and/or the FMLA, for information and supporting documentation for such leave, such as a doctor's note or FMLA certification. At the beginning of the pandemic, it was recommended that employers consider waiving such requirements because of the strain on the healthcare system and the lack of tests. Tests are now widely available; however, you still have discretion to waive such requirements, particularly if needed to respond to local shortages of healthcare resources. The best practice is still to do so by general policy, but issues may be handled on a case-by-case basis if necessary (e.g., an employee's appointment is cancelled because the provider is ill) as long as appropriate documentation is maintained. Even if the employer chooses to waive the certification requirement, an employee who is placed on FMLA leave should still be provided with Eligibility and Determination Notices. Model notices are available online from the United States Department of Labor at <https://www.dhs.gov/e-verify/>. Your normal policy regarding the exhaustion of paid leave should be followed.

(1)(b) Can I ask my employees about their vaccination status?

Alabama Act 2021-493 now prohibits state and local governmental entities from requiring vaccination as a condition for receiving government services or for entry into a government building. You may ask employees about their vaccination status, but you may not require them to answer, to provide proof of vaccination, or to provide any explanation of their decision. Again, any such inquiries should be made privately, and all records must be kept confidential. Because COVID-19 and vaccinations are topics of general interest, it is only natural for employees to discuss them amongst themselves; however, as with other sensitive topics, you have a duty as an employer to ensure that nobody is harassed or discriminated against because of their vaccination status or personal risk tolerance. For example, unvaccinated employees should not be subjected to lectures, nor should those who choose to wear additional protective gear such as face shields, etc., be ridiculed. Further, no such discussions should take place around or with members of the

(2) Now that the FFCRA has expired, what are our obligations for employee leave?

The FFCRA mandated additional leave for certain reasons specifically arising out of the pandemic. This mandate expired December 31, 2020, but the general provisions of the FMLA are still in effect. The FMLA only applies to those employees who have worked at least 1,250 hours in the last year. Eligible employees are entitled to up to twelve weeks of leave per year either because of their own serious health condition or because of a family member's serious health condition. The law currently only guarantees job protection and protection of health insurance coverage for this period; whether the leave is paid or unpaid depends on the employer's policy. An employer may require an employee to exhaust all forms of paid leave before going on unpaid leave for the remainder of the twelve weeks.

An eligible employee who misses work either because they are personally ill and/or have been advised by a medical professional that they should self-quarantine, or to care for a sick family member, should be placed on FMLA leave.

(2)(b) What if the employee is out of leave?

Under the FMLA as currently written, an employer has the discretion to define a "leave year" in several different ways, as follows: 1) The calendar year; 2) Any fixed 12-month period (e.g., the fiscal year); 3) The 12-month period measured forward from the date FMLA leave begins; or 4) A "rolling" 12 month period measured backward from the date of leave use. If an employer does not specify a particular year, the default is whichever definition is most beneficial for the employee. You cannot currently change your current policy without at least 60 days' notice to employees, so you should plan on continuing to use the same definition.

If an employee has exhausted or will exhaust all of his or her FMLA leave (for example, if an employee had already used up some of her available leave because of a surgery and so only has 2 weeks left), current law provides that the employer should next look to any policy that might exist regarding extended leaves of absence and/or reasonable accommodation under the Americans with Disabilities Act. A brief,

unpaid leave of absence may be a “reasonable accommodation” under the ADA.

Of course, if the employee still has accrued, paid leave left despite the exhaustion of their FMLA entitlement, then they should remain on paid leave under normal policies until that is exhausted. Otherwise, this leave may be unpaid, and an employee may be required to pay the full cost of continuing health insurance during this time.

Be aware when dealing with unpaid leave that exempt (or “salaried”) employees must receive a full day’s wage for any day in which they have worked, or they will lose their exempt status. In other words, an exempt employee who gets sent home early and is out of paid leave must still be paid for the entire day.

(2)(c) What if an employee is either sick or has a known risk of being sick, but refuses to stay home?

Supervisors with authority to approve and direct leave (whose identity will vary based on policy) may affirmatively direct employees who are either sick or have a known risk of being sick, and thus infecting others, to stay home until they have been cleared by a medical professional and/or for the recommended period of time. The Centers for Disease Control (“CDC”) still recommends that exposed employees quarantine for fourteen days; however, this time period may be shortened to 10 days if there are no symptoms, and seven days if there are no symptoms and the person can produce a negative test. The CDC now recommends that fully vaccinated individuals with a known exposure to COVID-19 be tested within 3-5 days following the exposure, and that they wear a mask either for 14 days after exposure or until receiving a negative test result. Additional information may be required for medical releases from employees with ongoing symptoms. For example, if an employee reports on Monday with a return-to-work certification dated Friday, but still has a terrible cough, you may ask the employee to provide you with additional information about whether the cough is new (possibly suggesting a new infection) or whether the doctor diagnosed the cough as a lingering, harmless symptom of seasonal allergies. You can also ask the employee to sign a release allowing direct contact with their physician’s office.

Failure to obey an order to keep away from the workplace may be treated as grounds for disciplinary

action under your current policies (i.e., insubordination)

(2)(d) What about employees who request leave because their children's school is canceled?

At this time, requesting leave to care for well children is once again not covered by the FMLA. Employers should follow their standard leave policies, treating this break from school like any other regularly scheduled break.

(2)(e) We are short-staffed; do I have to honor previously approved vacation leave requests?

No. Vacation or annual leave is a benefit that is administered in accordance with employer policy; in the absence of a specific contract with an individual employee, no employee is entitled to take paid leave at any specific time. Any changes should be well-documented and supported by evidence to avoid claims of discrimination or favoritism.

(2)(f) Do I have to let my employees use compensatory time earned in lieu of overtime pay as requested?

Not necessarily. Public employers may adopt policies allowing non-exempt (or hourly) employees to accrue up to 480 hours of compensatory leave, which is earned at time-and-a-half. The Fair Labor Standards Act (FLSA) requires that employees be allowed to take this leave in a reasonably timely fashion, depending on the employers' needs. Even though the declared emergency has ended, you are still not required to approve compensatory time requests if your County is short-staffed. Again, it is recommended that all such determinations are well-documented. Earned compensatory time may also be substituted for other forms of paid or unpaid leave depending on your FLSA and FMLA policies. Care must be taken to ensure that employees do not accrue too much additional compensatory time. Overtime pay may need to be substituted if an employee begins to approach this limit.

(2)(g) What if an employee just fails to show up?

Employers can and should continue to fully enforce current policies regarding call-in procedures.

(3) Can we decide to close the courthouse and/or other facilities if we have a

significant outbreak? Do we need to follow normal FMLA or sick/annual leave procedures in this situation?

You may exercise your discretionary authority to close facilities if necessitated by a significant outbreak. To the extent that employees cannot work at all during this period, it is still recommended that employees receive emergency paid administrative leave during the period of closure. If there is already a policy in place regarding the accrual of leave or other benefits during such times (i.e., for weather closures), it should be followed. Otherwise, the employer must decide on a policy at the time. Employees who are out on other forms of leave at the time the facilities close should be switched to the same emergency leave as other employees.

It is important to note that, if the courthouse and/or other facilities are closed, exempt employees (often referred to as “salaried” employees) must receive full pay for the week if they have performed any work.

(4) How does an employer decide which employees are “essential” in this situation?

As with many employment matters, employers have discretion to make such decisions as long as they are not made for any unlawful or discriminatory reason. The key is to make sure that the basis for such decisions is articulated and documented. Generally, determining which positions, and which duties in those positions, are essential and non-essential – and which duties can be performed remotely – will require a review of job descriptions and office policies. This task may be complicated if job descriptions have not been recently updated. A good place to start may be to have both employees and supervisors undertake a review (this can be done relatively informally) of their job descriptions to make sure that they are accurate and up-to-date. After this review is completed, prioritize duties both by position and by office with the goal of ascertaining what are the most basic tasks needed to ensure continuing operation, how often those tasks need to be completed, and whether those tasks can be done remotely in part or in whole.

You are not necessarily bound by ‘essential employee’ designations that were made in Spring of

2020. You may change such designations either because of experience gained over the last year, or to reflect seasonal considerations; however, such designations should be done in accordance with your policy and communicated appropriately.

(5) Can employees volunteer to perform emergency-related tasks?

An employee can never volunteer to perform duties related to his or her normal job for his or her employer. This rule cannot be waived by an employee. However, in general, employees can volunteer to perform special tasks outside their normal job (i.e., a clerk in the probate office might volunteer to help with a shelter the weekend after a storm), as long as the service is truly voluntary. Given the unique nature of this situation, it is anticipated that healthy employees may be needed to perform tasks outside their normal duties to cover essential functions as other departments become short-staffed. The best practice in such cases is to continue to treat employees as employees even if they are working outside their normal assignment areas.

(6) Can an employer choose to give employees additional benefits?

Yes. The FMLA, ADA, FLSA, and other employment laws set a floor, not a ceiling. Many employers already have procedures allowing for additional call-in pay or the accrual of compensatory time as a benefit outside the FLSA's requirement in situations where an employee may be required to work additional hours in a day (in other words, even if they do not work over forty hours in a week) or to report to work at an unusual time or location. Employers should review any such current policies and consider whether any changes need to be made. Employers also have discretion to extend additional paid or unpaid leaves beyond the law's requirements, as well as the discretion to differentiate between employees who are working and those receiving such additional leave as long as any such incentives are done across the board and do not discriminate against or in favor of any individuals. For example, a policy may specify that employees who work while others are on emergency leave will continue to accrue leave and/or may accrue annual leave at an accelerated rate during the time of the emergency.

(7) Can I require employees to take other protective measures, like wearing masks or providing proof of negative COVID test results?

Yes. Recent guidance from the Alabama Attorney General suggests that you can adopt policies that apply only to unvaccinated employees; however, such policies must be carefully written to avoid unlawfully penalizing unvaccinated employees. For example, you may not impose any conditions that would amount to a fee or fine, or other negative employment action for those who refuse to show proof of vaccination. Because you cannot require proof of immunization status, the best practice is to adopt policies that apply to all employees regardless of vaccination status.

If an employee states that they are unable to wear a mask or follow other protocols due to a disability, the ADA requires you to engage in the interactive process. As with any other request for accommodation, you may request additional information from an employee's health care provider regarding the claimed restriction. The interactive process requires an employer to engage with the employee in good faith to identify any reasonable accommodations that would allow them to continue to perform their essential job duties. Whether a particular accommodation is "reasonable" depends on the employee's specific position, knowledge, skills, or abilities.