



FREQUENTLY ASKED QUESTIONS:
DEPARTMENT OF LABOR TEMPORARY REGULATIONS
AND FLORIDA STAY-AT-HOME EXECUTIVE ORDER

On April 1, 2020, the Secretary of Labor issued Temporary Regulations pertaining to the paid sick leave and expanded FMLA provisions of the Families First Coronavirus Response Act. Also on April 1, Florida Governor Ron DeSantis signed Executive Order 20-91, a statewide “stay-at-home” order for Floridians who are senior citizens, have underlying health conditions placing them at greater risk, and/or who are not conducting “essential” activities.

This summary is meant to highlight only the provisions of the regulations and stay-at-home order about which employers are likely to have urgent questions. This summary is not meant to constitute legal advice. If you seek legal advice, please contact Keith L. Hammond, Esq., at (407) 730-9909 or keith@hammondlawcenter.com.

Helpful links:

Department of Labor’s COVID-19 webpage, with links to FAQs, Employer’s Guidance, and the Temporary Regulations: <https://www.dol.gov/coronavirus>

Florida’s Stay-At-Home Executive Order: https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91.pdf

Frequently Asked Questions

Who must stay at home under Florida’s Stay-At-Home Order?

Senior citizens;

Individuals with a significant underlying medical condition (such as chronic lung disease, moderate-to-severe asthma, serious heart conditions, immunocompromised status, cancer, diabetes, severe obesity, renal failure and liver disease); and

Any person not obtaining or providing essential services or conducting essential activities.

What are services or activities are considered “essential”?

Only those specifically listed in the Stay-At-Home Order. The Order describes multiple businesses and business activities that are considered “essential,” but if your line of business is not specifically described within the Order (and the various orders and guidelines attached to the Order), Floridians are not permitted to leave their homes to engage in such activities. A link to the Order is above.

Who is eligible to take Paid Sick Leave?

Employees who are employed by an Employer with fewer than 500 employees are eligible to take Paid Sick Leave if the Employee is unable to work due to any of the following reasons:

(i) The Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

(ii) The Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(iii) The Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider;

(iv) The Employee is caring for an individual who is subject to an order as described in (i) or directed as described in (ii), above;

(v) The Employee is caring for his or her Son or Daughter whose School or Place of Care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID-19; or

(vi) The Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the Effective Period, April 1, 2020, to December 31, 2020.

Is an Employee who is unable to work due to a Stay-At-Home Order eligible for Paid Sick Time?

Yes, if the reason the Employee is unable to work is because of the Stay-At-Home Order. The Temporary Regulations make clear that a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, *or stay-at-home orders* issued by any Federal, State, or local government authority. The Temporary Regulations also make clear that the Stay-At-Home Order must cause the Employee to be unable to work *even though his or her Employer has work that the Employee could perform but for the order.*

However, if the Employer does not have work for the Employee as a result of the Stay-At-Home Order (for example, because the employer does not provide an “essential” service), the Employee is not eligible for Paid Sick Leave.

Is an Employee eligible for Paid Sick Time if the Employer permits the Employee to work from home?

If the Employee is able to Telework, the employee is not entitled to Paid Sick Time. Under the Temporary Regulations, an Employee is considered “able to Telework” if:

(a) his or her Employer has work for the Employee;

(b) the Employer permits the Employee to work from the Employee's location; and

(c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the Employee from performing that work.

Can an Employee take Expanded FMLA leave to care for a child whose school is closed even though somebody else is available to care for the child?

No. An Eligible Employee may take Expanded Family and Medical Leave because he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID-19. However, an Eligible Employee may take Expanded Family and Medical Leave for this purpose only if no suitable person is available to care for his or her Son or Daughter during the period of such leave. An Eligible Employee may not take Expanded Family and Medical Leave to care for his or her Son or Daughter unless, but for a need to care for an individual, the Eligible Employee would be able to perform work for his or her Employer, either at the Eligible Employee's normal workplace or by Telework.

Is an Employee entitled to Expanded FMLA leave if the Employer has no work for the Employee?

No. An Eligible Employee caring for his or her Son or Daughter may not take Expanded Family and Medical Leave where the Employer does not have work for the Eligible Employee.

I have fewer than 50 Employees. Am I exempt from the Paid Sick Leave and Expanded FMLA requirements?

Possibly. The Temporary Regulations provide that an Employer with fewer than 50 Employees is exempt "when the imposition of such requirements would jeopardize the viability of the business as a going concern." A small business is entitled to this exemption if an authorized officer of the business has determined that:

(i) The Paid Sick Leave or Expanded FMLA leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

(ii) The absence of the Employee or Employees requesting Paid Sick Leave or Expanded FMLA leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the

Employee or Employees requesting Paid Sick Leave or Expanded FMLA leave, and the labor or services are needed for the small business to operate at a minimal capacity.

How do I elect this small business exemption?

The Employer must document that a determination has been made pursuant to the criteria set forth above. The Employer should not send such documentation to the Department of Labor, but rather retain the records in its files.

Can an Employee take Paid Sick Leave or Expanded FMLA leave on an intermittent basis?

In some instances, yes. As a preliminary matter, an Employee may take Paid Sick Leave or Expanded Family and Medical Leave intermittently (*i.e.*, in separate periods of time, rather than one continuous period) only if the Employer and Employee agree.

The Temporary Regulations specifically permit intermittent Paid Sick Leave or Expanded Family and Medical Leave to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, because of reasons related to COVID-19. Under such circumstances, intermittent Paid Sick Leave or paid Expanded Family and Medical Leave may be taken in any increment of time agreed to by the Employer and Employee.

If an Employer directs or allows an Employee to Telework, or the Employee normally works from home, the Employer and Employee may agree that the Employee may take Paid Sick Leave for any qualifying reason or Expanded Family and Medical Leave intermittently, and in any agreed increment of time (but only when the Employee is unavailable to Telework because of a COVID-19 related reason).

However, an Employee may not take Paid Sick Leave intermittently while occasionally returning to the workplace if the leave is taken for any of the qualifying reasons other than child care. Once the Employee begins taking Paid Sick Leave for one or more of those reasons, the Employee must not return to the workplace and must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave.

Can I require an Employee to provide notice of the need for leave?

Yes, but no earlier than after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave for any reason other than child care.

Further, an Employer may require only "reasonable notice procedures." Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case.

What if an Employee fails to provide notice?

According to the Temporary Regulations, the Employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for

leave.

What information can I require an Employee to provide with the notice?

The Temporary Regulations suggest that an Employer may require oral notice and sufficient information for an Employer to determine whether the requested leave is covered. Generally, it will be reasonable for the Employer to require the Employee to comply with the Employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

What type of documentation may I require an Employee to provide?

At a minimum, an Employee may be required to provide: (1) Employee's name; (2) Date(s) for which leave is requested; (3) Qualifying reason for the leave; and (4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

Additional documentation may be required depending upon the reason for the leave. However, Employers may not insist upon any documentation beyond the following:

- the name of the government entity that issued the Quarantine or Isolation Order;
- the name of the health care provider who advised the Employee or the individual the Employee is caring for to self-quarantine due to concerns related to COVID-19;
- for leave taken for child care purposes: (1) the name of the Son or Daughter being cared for; (2) the name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and (3) a representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

Finally, the Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-providedby-small-and-midsize-businesses-faqs>.