

School District Reference Guide

FFCRA is best understood by breaking it into two parts:

- (1) Leave to treat or seek treatment, including testing, for Covid-19. Employees requesting leave to personally treat for Covid-19 (referred to as “Covid-19 issues” in this reference guide), or comply with a medical or government order to quarantine related to Covid-19 issues, or care for a family member regarding the same; and
- (2) Leave to care for a child whose school or daycare is closed related to Covid-19. Employees requesting leave to care for a child whose school or daycare is closed due to Covid-19 precautions (referred to as “child-care issues” in this reference guide).

- (1) **Leave to treat for Covid-19 related issues.** This entitles every eligible employee to two weeks of paid leave under conditions where either the employee or an employee’s family member is ill, seeking treatment for, or under a quarantine order due to Covid-19,

(If the employee needs leave because of childcare issues, the Act is a bit different, so see reason two (2) below).

Eligible Employee (*Two-Week Emergency Paid Sick Leave*):

- Must have been employed at least 30 days
 - Is unable to work remotely AND meets one of the following conditions:
 - Is subject to a government or medical self-quarantine order
 - 2 weeks of regular pay (max of \$511/day)
 - Has Covid-19 symptoms and is actively seeking treatment
 - 2 weeks of regular pay (max of \$511/day)
 - Is caring for a family member described in bullets 1 and 2, above.
 - 2 weeks at 2/3 regular pay (max of \$200/day)
- (2) **Leave for childcare issues.** This provides a total of twelve weeks for an employee to care for a child who does not have care because of a school or day care closure because of Covid-19 precautions.

Eligible Employee (*Extended Leave for Child Care Issues*):

- Must have been employed at least 30 days
- Is unable to work remotely AND meets one of the following conditions:
 - Is caring for a child whose school or daycare is closed for Covid-19 reasons
 - 2 weeks’ pay at 2/3 regular pay (max of \$200/day)
 - 10 additional weeks of 2/3 regular pay as long as the child’s school or daycare is still unavailable (not to exceed \$12,000 over a 12-week period)

To summarize, if leave is requested based on the employee’s own health, they earn 100% of their pay for 2 weeks. If the leave is based on caring for another, they earn 2/3 of their pay for 2 weeks. Additional leave is available for childcare up to 10 weeks at 2/3 of their pay. Remember, this is all the temporary leave (thru December 31, 2020) under FFCRA. Employees still have rights to FMLA leave for non-Covid-19 issues (referred to as “Traditional FMLA” in this reference).

FREQUENTLY ASKED QUESTIONS

1. **Employee is scared to return to work because of fear of contracting Covid-19, what do I do?**

Unless the employee is under a valid government or medical order to not return to work due to the need to self-quarantine, the employee is not eligible for FFCRA leave and must use paid sick leave. Districts should allow the employee to use sick leave liberally for Covid-19 issues, but when the employee's sick leave has expired, the employee must either return to work or present valid documentation for traditional FMLA eligibility.

2. **An employee advises the District that a member of her family that lives in her home just tested positive for Covid-19. The employee has not been ordered or advised to quarantine. What do we do?**

The employee is eligible for two weeks of paid leave for making, waiting for, or attending an appointment for a test for Covid-19 and the subsequent results. Ideally, in this case, the employee would agree to get tested and this would allow for paid leave, although the employee is expected to return to work when the test results are received and if the test is negative, unless the employee is otherwise ordered to self-quarantine for fourteen days.

3. **Can the District require an employee to stay home if they have Covid-19 symptoms?**

Yes, and the employee would be entitled to full pay under the two-week paid leave provision of the Act. However, if the employee was tested and the test was negative, and the employee was not otherwise ordered to self-quarantine by a doctor or the government, thereby causing them to exhaust their two weeks of paid leave, you may be required to provide additional paid leave in the future if the employee subsequently contracted the virus and needed additional leave.

4. **If an employee tests positive for Covid-19, what is the District's obligation to other staff or students who interacted with the employee?**

The District's response should follow guidance provided by the Arkansas Department of Health or other designated government entity. Such guidance is not part of FFCRA. Under FFCRA, every employee who is ordered to self-quarantine or otherwise directed by the District to stay-home, would be entitled to two-weeks paid leave under the Act.

5. **Can the District require employees to use accumulated sick leave while using the paid leave requirements of the Act?**

No. Paid sick leave under the Act is in addition to any District paid sick leave entitlements. However, in the case of an employee taking leave to care for a family member with Covid-19 issues, the employee is only paid at 2/3 their daily rate of pay under the Act, and by agreement, the employee could use sick leave concurrently to supplement their pay up to normal earnings. However, an employee taking extended leave under the Act to care for a child whose school is closed would not generally be allowed to also take concurrent sick leave because childcare issues is not generally a valid reason for sick leave under District policy. The employee could take personal leave, concurrently and the District could modify policy to allow concurrent sick leave use when leave is taken for childcare issues, which only pays 2/3 daily pay under the Act.

6. **If an employee contracts Covid-19 while at work for the District, can they file a workers' compensation claim?**

Yes. Governor Hutchinson signed an executive order allowing employees to file claims for workers' compensation, which would require the employee to prove a causal connection between their employment and the virus. The order is set to expire in August, but may be extended. This would be in addition to the two weeks paid leave the employee would be entitled to under the Act.

7. **Employee is sick with symptoms of Covid-19, but has yet to receive a medical diagnosis, is this sufficient for employee to receive the two-weeks leave?**

No. This is enough for the employee to initially stay home, but the employee would need to provide documentation that he was making, waiting for, or attending an appointment for a test for Covid-19 and the subsequent results, to receive the full pay under the Act. Otherwise, the employee must use accumulated sick leave.

8. **How do we handle employees who have no Covid-19 issues, but are concerned about returning to work because of underlying health conditions, advanced age, need to still be in contact with elderly parents, etc.**

The employee in this instance would not qualify for the FFCRA leave. However, traditional FMLA would still be available to them if they present sufficient documentation of the presence of underlying health conditions. Give the employee the traditional FMLA paperwork and in all likelihood, they will be able to obtain the medical documentation needed for traditional FMLA leave. This leave is NOT paid, but the employee can use the accrued sick leave concurrently. Also, the eligibility provisions of traditional FMLA remain intact, including the 1,250 hours of employment prior to leave. See your model FMLA policy.

9. How many times can an employee get the two weeks paid leave because of COVID-19 issues?

The employee is only entitled to a total of two weeks (10 workdays) of paid leave under the Act, which expires at the end of the year. The two weeks can be broken up as needed, but only a total of ten days is required to be provided by the District for Covid-19 issues. Thereafter, the employee needs to take sick leave or apply for traditional FMLA. The 10 additional weeks for childcare issues under the Act is also available.

10. Can the employee take any portion of the FFCRA leave incrementally?

Yes. For instance, if an employee needs leave to take a Covid-19 test because of an infection scare, and the results return negative in three days, and the employee is not otherwise directed to quarantine, the employee can return to work and has seven paid days remaining. The employee can use those seven days if another Covid-19 issue later arises.

11. Is an employee qualified for the two-week paid leave even if they have already used all days under FMLA or otherwise do not qualify for FMLA (i.e. they have not previously worked 1250 hours in the District)?

Yes. The two-week sick leave under the Act is available to any eligible employee (one having worked 30 days and meeting the requirements discussed above) regardless of entitlement to FMLA.

12. Does an employee who gets two weeks leave because of Covid-19 issues (a quarantine or medical order or seeking treatment) also get an additional 12 weeks of leave if their child's daycare is closed due to Covid-19, or just 10 weeks of additional leave?

Yes and No. This part is a bit tricky.

If the employee received two weeks of paid leave because he/she was eligible due to Covid-19 issues and then later discovers he/she is eligible because of childcare issues, the employee gets an additional twelve weeks, at 2/3 their pay. However, in this case, the first two weeks of the 12-week leave is not paid, as the employee already received the two weeks paid, previously, and the remaining ten weeks is paid at 2/3 regular pay. If the employee has received no prior leave for Covid-19 issues and discovers a need for leave due to childcare issues, the employee is entitled to twelve weeks leave at 2/3 pay, and that employee can use the first two weeks as paid leave at full pay and then the remaining ten weeks is at 2/3 regular pay.

13. If the employee's child's school or place of care has moved to online instruction where children are required to complete instruction at home, is this "closed" under the Act, thereby entitling the employee up to 12 weeks at 2/3 pay to care for the child?

Yes. If the physical location where the child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave under the Act.

14. Who is a family member under the Act?

The term used in the Act is actually "individual," ... i.e. an employee is eligible for leave at 2/3 pay for two weeks if they are caring for an *individual* subject to a quarantine order due to Covid-19. Individual is an immediate family member or someone who regularly resides in the employee's home, or someone who has a relationship with the employee where it creates an expectation that care will be provided.

15. How exactly does leave work for childcare issues?

The leave for childcare is a bit tricky because you have two types of leave. Here is how that works:

Weeks 1-2 –Leave at 2/3 regular pay up to \$200/day

Weeks 3-12 – Extended FMLA leave at 2/3 regular pay up to \$200/day

However, if the employee has not used their two weeks of full paid leave for Covid-19 issues, they can use that leave first, which is paid at full rate, and then move to extended FMLA leave for 10 additional weeks at 2/3 pay.

16. Can we request a doctor's note from the employee taking the paid leave to treat or seek treatment for Covid-19?

Yes. But, be mindful that it can be difficult for employees to get notes timely due to the use of telemedicine and lag times. An employee can certify in writing they were treating and should be allowed to present medical documentation upon their return to work.

17. Will Districts be reimbursed for the cost of all the FFCRA leave?

Probably not. Some private employers will receive tax credits, but school districts will not.

18. Can we discipline an employee for taking FFCRA leave?

Absolutely not. As always, it is illegal to retaliate against an employee who exercises their protected rights. In the case of an employee taking the extended FMLA leave for childcare, you could reassign them on return if you needed to fill their position in their absence, but it could not affect their pay or contract terms or appear retaliatory in any way.

19. If an employee does not use their leave under FFCRA this school year, do they carry over?

No. Currently FFCRA expires as of December 31, 2020.

20. What happens to employees who exhaust their two weeks of leave for Covid-19 issues but are still unable to return to work?

The employee needs to be moved to traditional FMLA, which will require additional medical documentation and that the employee has worked 1,250 hours the year prior. The employee is eligible for 12 weeks of traditional FMLA leave, which is not paid, unless the employee has accrued sick leave.

21. Can I require an employee who took two weeks leave because of a Covid-19 medical quarantine order to present documentation that he has been cleared to return to work?

Yes, but this is discouraged. This is a request for a fitness-for-duty or return-to-work certification and such a request is not advised because it would be difficult to obtain such documentation given the current strain on the healthcare industry. Also, you would be required to pay the employee for each day he remained off while waiting to obtain such documentation. If he is no longer under a quarantine order and is not otherwise infected or treating for Covid-19, you need to allow him to return to work or you must pay him to stay at home.

22. Can we screen employees before entering the building, including taking temperatures and asking the standard questions about symptoms and past travel?

Yes. The law would even allow you to test employees onsite, although we do not recommend districts getting into the business of Covid-19 testing. We advise following guidance from DESE and ADH on these protocols.

23. If an employee alerts the District she tested positive for Covid-19, what is our obligation to alert other staff members?

Contact ADH or your local health official for guidance. The law is clear that you cannot reveal the identity of the employee unless consent is given. You should ask the affected employee to provide names of everyone they have been in contact with so you can then begin contact tracing.

24. An employee has a heart condition and has been instructed by her physician to not return to work until further notice.

This employee must take traditional FMLA leave, which is 12 weeks of unpaid leave, although she can use her accumulated sick leave concurrently. The employee must either return to work at the end the FMLA leave.

25. A teacher has been advised by her doctor to not return to work because of an underlying health issue, but she has offered to work remotely helping with online instruction and homebound instruction. Do we have to provide this accommodation?

No. Such an accommodation is not required and is generally discouraged because what you allow for one employee must be allowed for any other similarly situated employee.

26. **A teacher has alerted the District she will be returning to work, but she will be wearing a face covering and wants every student in her classroom to also wear a face covering to protect her health. Can the teacher require this of her students?**

Wait for guidance from DESE and ADH on final protocols for returning to school. If face coverings for staff and students is left to the District to decide, and your District is not requiring students to wear face coverings, you may still need to consider students wearing face coverings in this teacher's class as a reasonable accommodation under the Americans with Disabilities Act. Seek further legal counsel here.

27. **A teacher is returning to work but has alerted the District of an underlying health condition that makes her more vulnerable to infection and she has asked that she not have to perform certain tasks (hall duty and cafeteria duty) and that she would like a protective shield installed in front of her podium and desk. Must the District comply?**

The teacher has implicated the Americans with Disabilities Act ("ADA") and is asking for a reasonable accommodation, though she does not have to use that exact term. You are on notice that you need to engage in the ADA interactive process. If the teacher provides you medical documentation that she needs certain accommodations, you need to determine if these accommodations are reasonable and will still allow the teacher to perform the essential functions of her job. While each case is different, generally speaking, this request appears reasonable if the teacher indeed needs the accommodations.

28. **If the District has allowed a teacher to not perform certain duties as a reasonable accommodation under ADA, can we ask him to perform other duties to make up duties not performed?**

Yes. For instance, if a teacher is not required to perform hall duty because he needs to social distance, even with a mask, because of an underlying health condition, you can require him to perform bus duty or a related duty that is outside or more open. Or, any task that may be needed. Moreover, the ADE State Board recently voted to allow Districts to seek a waiver as it relates to the amount of time a teacher can perform non-instructional duties per week, which gives Districts more flexibility with personnel schedules.

29. **Can we require students and staff to wear mask?**

Yes, but this issue is evolving. Recently, the Governor said it was a decision for each District and ADH guidance strongly encourages mask for ages 10 and above. Even if you only encourage the wearing of mask, you may need to require mask be worn in certain classrooms if the teacher has presented you with information that a certain disability necessitates it. Start the ADA interactive process.

30. **Do we need a policy regarding the wearing of mask?**

No. A District policy would need board approval and input from your PPC and CPPC. A simple written directive would accomplish the same goal and give Districts more flexibility if the directive needed to be modified. Regardless, we recommend such a decision be board approved.

31. **If the District has a directive that masks are only "highly recommended" can individual teachers require face masks be worn in their classroom?**

It is discouraged to allow individual teachers to set rules that are not consistent with the District directive. If the teacher expresses a need to have students wear masks in her classroom, consider this a request for an accommodation under the ADA. Does the teacher have an underlying medical condition that necessitates this need? If so, then yes, requiring students to wear mask in a particular teacher's classroom would be appropriate. Consider the request on a case-by-case basis under ADA.

Prepared by Cody Kees, Esq., BBK Law Firm. Current through July 7, 2020.

Legal Notice: This is a basic overview of the applicable law specifically designed for school districts. Consult your legal counsel on specific questions.