



# EMPLOYEE LEAVE ISSUES AND COVID-19

Personnel Administrators of North Carolina

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## DISCUSSION ITEMS:

1. Application of FFCRA
2. Employees with Disabilities

# Leave Issues



**NC State of Emergency Leave  
expired on June 15, 2020**

# Leave Options Available

- Families First Coronavirus Relief Act (FFCRA)
- Family Medical Leave Act (FMLA)
- Accrued Leave pursuant to State Law and Policies

# Leave Available under FFCRA

- Emergency Paid Sick Leave Act (EPSLA)
- Emergency – Family Medical Leave Expansion Act (E-FMLA)



# Key Differences between State and Federal Leave

- High risk employees not included in federal leave
- Childcare need broadly defined with federal leave
- Elder care not covered by E-FMLA



# EPSLA

## Emergency Paid Sick Leave Act

- Provides two weeks (80 hours) of leave for a full-time employee unable to work or telework due to a covered reason.

# Eligibility

- Applies to permanent (full-time and part-time) & temporary employees, regardless of start date
- Expires December 31, 2020



# Covered Reasons 1 – 3:

1. Unable to work because subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. Unable to work because advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. Unable to work because experiencing symptoms of COVID-19 and seeking a medical diagnosis.

## Covered Reasons 4 – 6:

4. Unable to work because caring for an individual who is either a) subject to a federal, state, or local quarantine or isolation order related to COVID-19 or b) advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
5. Unable to work because caring for a son or daughter whose childcare is unavailable due to COVID-19 precautions.
6. Catch-all provision that gives federal government flexibility to name reasons for EPSLA later.

# Compensation

- 100% of pay up to \$511 per day for Reasons 1-3  
(Maximum of \$5,110)
- 2/3 of pay up to \$200 per day for Reasons 4-6  
(Maximum of \$2000)

# Documentation

- Can require documentation from the government agency/healthcare provider issuing orders
- Can require evidence of school or childcare closure

# Other Issues

- May not require employee to use other paid leave first
- May allow employee to supplement EPSLA with other accrued leave
- Earnings may not exceed employees' regular wages

# Defining Childcare Need

- “Son or daughter” means “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.”
- Also includes a child who is “18 years of age or older who is incapable of self-care because of a mental or physical disability.”

# What is a Childcare Provider?

- Law states that the individual/entity receives compensation
- Regulations clarify that an eligible childcare provider need not be compensated or licensed.

# Other Childcare Issues

- What if the child is 14 or older?
- What if there is someone else in the home available to provide childcare?
- What if the child is not a son/daughter/ward of the employee?



# E-FMLA

## Emergency Family Medical Leave Expansion Act

Expands FMLA to cover leave needed because of childcare related to COVID-19.



# Eligibility

- Applies to permanent (full-time and part-time) & temporary employees who have been employed for at least 30 calendar days at the time the leave is requested.
- Regular FMLA eligibility rule (1250 hours in the past 12 months) does not apply
- Expires December 31, 2020

# “Qualifying Need”

- The employee “is unable to work or (telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” 29 U.S.C. §2620(a)(2)(A).
- Same as EPSLA

# Documentation

- Name of school, place of care, or childcare provider that has closed or become unavailable due to COVID-19
- Employee may be required to make a representation that “no other suitable person is available to care for the child during the period of requested leave.”

# Compensation – First 2 Weeks

- First 10 days are unpaid
- Employee may use EPSLA during first 2 weeks
- Employee may substitute other accrued leave
- Employer may not require the employee to substitute other accrued leave

# Compensation – 10 Remaining Weeks

- 2/3 of pay up to \$200 per day  
(Maximum of \$10,000)
- Employer may require employee to use other accrued leave in order to receive full pay

# Wages and Taxes

Applicable to both EPSLA & E-FMLA:

- Wages are subject to federal and state taxes, employer share of Medicare (1.45%), employee share of Medicare and Social Security (7.65%), and state retirement, if applicable.
- Guidance for employers is available from the IRS at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

# May Leave be Taken Intermittently?

Applicable to both EPSLA & E-FMLA:

- Leave may be taken intermittently if both Employer and Employee agree
- Exception to Intermittent Leave: Under EPSLA, if an employee reports to a worksite and is taking leave because of a) quarantine order; b) healthcare provider advises self-quarantine; c) experiencing COVID-19 symptoms; or d) caring for quarantined or symptomatic individuals.





# Interplay Between Regular FMLA & E-FMLA

- 12 week limit on leave taken during a 12 month period still applies
- After leave ends employee must be restored to same/comparable position like with regular FMLA

# Designation Notice

Unlike regular FMLA, E-FMLA does not require specific notice/written designation that the use of leave will count against the employee's FMLA entitlement.



# Healthcare Coverage


Like regular FMLA, an employee is entitled to continued group healthcare coverage during E-FMLA on the same terms as if employee continued to work.

# Recommendations

- Make sure notice of FFCRA requirements have been posted/provided
- Provide same Designation Notice that is provided with regular FMLA
- Make sure employees are aware that exhaustion of E-FMLA leave also exhausts regular FMLA
- Maintain same medical documentation requirements as regular FMLA

# ISSUE #1: What About An Employee Who Contracts COVID-19?

E-FMLA applies only to COVID-19–related childcare needs. If an employee contracts coronavirus then regular FMLA and leave rules apply, including the requirement that the employee must have worked for at least 12 months and worked at least 1250 hours in order to qualify.



## ISSUE #2: What About Employee Who Exhausts E-FMLA And Then Has A Serious Health Condition or Has Baby/Adopts?

Once E-FMLA is exhausted, FMLA is exhausted until the Employer's FMLA year resets. Apply state leave rules and allow use of accrued leave or unpaid leave. After exhaustion of FMLA, employee will not be entitled to healthcare coverage while on unpaid leave.

# Resources

- **Department of Labor Model Notice:**  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- **DOL Q&A:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- **NC School of Government COVID-19 resources:**  
<https://www.sog.unc.edu/resources/microsites/coronavirus-covid-19/employment-law>



# Implications of COVID-19 for Employees with Disabilities

And other legal hoops to jump through



# Topics

- ADA
  - RTW and Accommodations
  - Overactive Benevolence
- Other Legislative Concerns
  - ADEA
  - Pregnancy
  - OSHA
- Algorithms and Decision Trees

# Return to Work

- Employers are allowed to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity.
  - Standard – is it necessary to exclude employees with a medical condition that pose a direct threat to health or safety?
  - This includes employee screenings (temperature taking, asking about symptoms or requiring self-reporting) so long as the screening is consistent with advice from the CDC and public health officials.

# Return to Work and PPE

- Employers may require employees to wear protective gear (masks, etc.) and observe infection control practices.
- If an employee has a disability that needs a reasonable accommodation under the ADA regarding PPE or other protocols, the employer should discuss this request and provide the accommodation (or an alternative) unless providing the accommodation is an undue hardship on the operation of the business.
- Religious accommodations should be considered as well, under Title VII of the Civil Rights Act (e.g. modified equipment due to religious clothing).

# Return to Work

## Requesting an Accommodation

- **IMPORTANT:** It is up to the employee (or her medical provider) to request the accommodation due to a medical condition.
- Be on the lookout! This can be done in writing or just in conversation.
  - **Practice Note:** Ask supervisors (or designated health official) to report employee requests to HR. For example, a custodian reports to her supervisor that she cannot wear a mask due to a chronic lung condition.
- Ask for medical documentation supporting the request. Ask questions or seek additional medical information to determine if the employee has a disability and whether a reasonable accommodation can be provided.

# Return to Work

## The Known Medical Condition

- What happens if you know an employee has a medical condition that places the employee at a higher risk of severe illness, but the employee hasn't requested leave or an accommodation?
- It is up to the employee to request an accommodation, including the use of leave.
- The ADA does not allow employers to exclude this individual solely because of a known medical condition.
  - Exclusion is allowed only when the employee's medical condition poses a **direct threat** to his health or to others that cannot be eliminated or reduced by an accommodation.

# Return to Work

## The Known Medical Condition

- This doesn't mean the employer cannot talk with the employee to discuss options, including possible accommodations, including available leave.
- The assessment of whether the employee poses a direct threat cannot be based solely on the fact the medical condition is listed on the CDC's list of underlying health conditions regarding COVID-19.
- It is an extremely high bar to exclude an employee with an underlying medical condition without the employee requesting that type of accommodation.

# Return to Work

## The Known Medical Condition

- To make a “direct threat” assessment, consider the following:
  - Severity of the pandemic in your area
  - The employee’s current condition (is the medical condition/ disability under control)
  - Particular job duties
  - Potential exposure to the virus (does the employee interact with a lot of other people)
  - Other protocols in place (such as PPE and social distancing)
  - Can the school provide a reasonable accommodation that reduces the threat
  - Can the employee telework



# Return to Work

## The Known Medical Condition

- Go through the interactive process
- Unless the facts support the conclusion that the employee poses a significant risk of harm to himself or others and that risk cannot be reduced through an accommodation, the school cannot exclude the employee.



# Return to Work

## Possible Accommodations

- Alternative Screenings
- Enhanced or less PPE worn by other employees
- Enhanced protective measures
  - Barriers or shields in work areas
  - Heightened distancing
- Elimination of a marginal duty/temporary reassignment of duties
- Modification of schedule (temporary)
- Moving work location
- Use of accrued leave or unpaid leave (including a leave of absence)

# Age Discrimination & RTW

- Employers MAY NOT prohibit an employee from working simply because the employee is 65 years of age or older!
- What if a 67-year old employee requests a modification or accommodation?
  - The ADEA does not require accommodations; however, employers are welcome to be flexible
  - Be consistent in the flexibility offered to employees in a certain age category
  - Employee may be eligible for Federal Emergency Sick Leave or E-FMLA; or an accommodation under the ADA if the employee has a medical condition

# Sex Discrimination & RTW

- Be consistent in the application of Emergency Sick Leave and E-FMLA regardless of the employee's sex
- Do not unilaterally exclude a pregnant employee from work; however, a pregnant woman may be entitled to a job accommodation if requested.
- Possible Accommodation: up to 1 year of parental leave



But Wait, There's More!

# RTW & OSHA

- By March, OSHA had received 20 complaints from around the country from employees alleging their employer was not providing a safe workplace due to fears that other employees were infected
- Every employer is required to provide a safe and healthy workplace, free from recognized hazards that could cause death, serious injury, or serious physical harm.
  - Translation: follow local, state, and federal recommendations re: COVID-19 protocols.
  - Keep employees informed on protocols and how to report issues
  - Have someone available on site to address these issues or report issues to HR

# OSHA & RTW

- Conduct Hazard Assessments for employees at-risk of exposure
  - OSHA – those that frequently come into contact with the general public are considered a “medium exposure” risk
- If there is a serious workplace hazard, and the employee brings the concern to the employer’s attention and is subsequently fired, the employee may have a retaliation claim under REDA (Retaliatory Employment Discrimination Act – State law).
- Implementation of recommended COVID-19 protocols is considered a feasible abatement measure to reduce workplace hazards related to COVID-19
- Train employees on PPE, screening, and other protocols

# The “Must I Come to Work” Algorithm\*

- Is the employee eligible for Emergency Paid Sick Leave?
  - Yes: apply 80 hours of leave; after leave, move to next question
  - No: Move to next question
- Is the employee eligible for E-FMLA?
  - Yes: apply additional 10 weeks of partially paid leave
  - No: move to next question

\*For those employees who are currently not sick.

# The “Must I Come to Work” Algorithm\*

- Does the employee have a medical condition that might be a disability?
  - If yes, seek medical information and engage in interactive process; provide accommodation if required. (Remember, using accrued leave may be a possible accommodation, but there are other accommodations as well.)
  - If no, move to next question
- Is the employee 65 or over?
  - If yes, will district provide flexible modifications for employees in this age category?
  - If no, then . . . .

\*For those employees who are currently not sick.





# But Wait, There's More!

For the same low price, you get an extra federal law . . .

# The “Must I Come to Work” Algorithm\*

- Does the employee present/articulate a reasonable concern for his/her safety?
  - Yes: evaluate employee’s concern regarding whether it is over a known hazard.
    - Is there an actual hazard?
      - Yes: then address it (if it can be addressed);
        - \* termination of employee may be “retaliatory.”
      - No: then can direct employee to report to work
        - \* Employee may still have retaliation claim

# The “Must I Come to Work” Decision

- Employer has broad latitude in directing an employee to come to work but HR must navigate through the legal issues.
- However, if an employee is not willing to come to work at all and has no leave or other protections, is it best to:
  - Terminate employment (and risk a claim or losing an otherwise good employee)?

**OR**

  - Give the employee an extended unpaid leave of absence?

# The “I am Worried About This Employee” Algorithm

- Employee wants to show up to work despite underlying medical condition or age, and I want to exclude this employee from work because I am worried about them getting sick.
- Can I talk to this employee about work or possible accommodations if I know they have a disability (or because employee is over 65)?
  - Yes, you can speak with them. Discuss leave options, job modifications, etc.

# The “I am Worried About This Employee” Algorithm

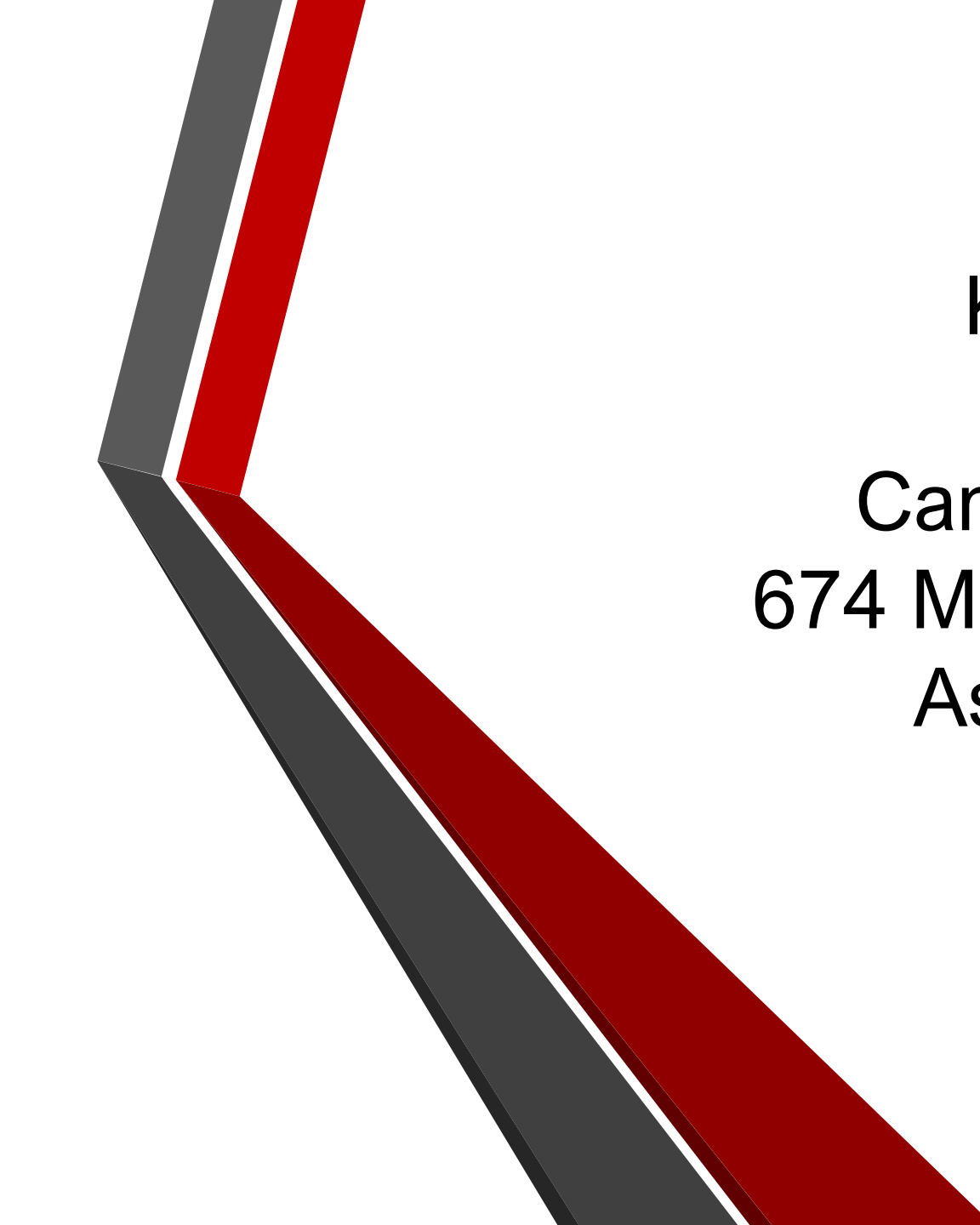
- Despite my best efforts, employee still wants to come to work, what do I do?
  - Is there a direct threat to the health and safety of others?
    - Yes: you may exclude the person from work. (See “Direct Threat” assessment slide)
    - No: allow the person to come to work.
    - ‘No’ is likely the right answer!

# Best Practices

- Principals/Supervisors/Designated Health Official must understand that requests need to be funneled to Human Resources!
- Inform employees how to request leave and accommodations.
- Be consistent and flexible on application of leave but make individual determinations under the ADA based on the information you have.
  - Seek additional information if necessary.
- Do not let benevolent concern affect how you address an employee beyond reaching out and talking to them
- Practice Note: Under E-FMLA or FMLA, do not require employee to work at all while on leave (e.g. do not require teacher to draft lesson plans).

# Best Practices

- Keep employees informed of protocols, recommendations, and expectations.
- Develop a plan (and contingencies) for how to process employees that do not feel safe coming to work.
- Consider shifts in employee roles and responsibilities.
- Be flexible, creative and consistent in processes



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