

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

COVID-19 Employment Law Update: New Developments
July 31, 2020

Nonprofit employers should be aware of recently issued government agency guidance related to the Families First Coronavirus Response Act (sick and family leave), the Fair Labor Standards Act (wage payments), CDC return to work guidance for those who have had symptoms or a positive COVID-19 test, remote use of I-9 forms during COVID-19, and new Family and Medical Leave Act guidance and forms.

New Frequently Asked Questions on FFCRA Leave from the US Department of Labor

The US Department of Labor (USDOL) has issued additional [Frequently Asked Questions](#) (question numbers 94-97) regarding the Families First Coronavirus Response Act (FFCRA) and how it is applied to employees who may be returning to work. This new guidance includes information about how to determine if employees are still eligible for FFCRA leave when returning to work after a furlough, and information about requiring telework, leave or testing before an employee who may have been exposed to COVID-19 returns to work. See this [article](#) from Constangy Brooks with helpful hypotheticals for additional information.

Guidance on Wage Payments under the Fair Labor Standards Act for Telework During COVID-19

The US DOL has issued new [Frequently Asked Questions](#) (question numbers 14-19) regarding wage payments when employees are teleworking. Here are some key points:

- *Compensable Time for Teleworking:* Just like when they are working at your worksite, when nonexempt employees are teleworking, they must be paid for all hours actually worked, including overtime hours, even if the hours were not authorized by the employer. You should require nonexempt employees to track and report all hours worked to ensure that they are being paid accurately. Wages do not have to be paid for hours the employee is not actually working (but do keep in mind that time away from work may be compensable if it is qualifying leave under the FFCRA or other available paid leave).
- *Exempt Employees:* The FAQs clarify that (1) during COVID-19, exempt employees can be required *temporarily* to perform some non-exempt duties without losing their exemption; and (2) exempt employees will not lose their exemption by taking FFCRA leave.
- *Hazard Pay:* The FAQs clarify that hazard pay is not required by the FLSA.

For additional information about virtual workforce concerns, listen to this [podcast](#). And for information on the classification of employees as exempt or nonexempt and FLSA rules, see this [webcast](#). Please seek legal advice if you have questions about the exempt/nonexempt status of your employees, or if you are changing job duties and/or pay for employees.

Dated: 7/30/2020

www.pbpatl.org

© 2020 Pro Bono Partnership of Atlanta, Inc. All rights reserved.

Revised CDC Return to Work Guidance If Someone Has Tested Positive or Has Symptoms of COVID-19

In this previously published [Legal Alert](#) on Returning Employees to Work, we listed several factors that the Centers for Disease Control (“CDC”) recommended before allowing an employee who has been diagnosed with or tested positive for COVID-19 to leave isolation and return to work. Previously, the CDC recommended employers choose between a test-based and a symptom-based strategy for ending isolation after a positive test or the display of COVID-19 symptoms.

The CDC has now issued guidance revising its recommendations for when an employee may end isolation and return to work. With regard to testing, the CDC now recommends that testing mainly be used only for those who are severely immunocompromised. For all other situations, the CDC recommends a symptom-based return to work based on the following criteria:

- At least 10 days have passed *since symptoms first appeared* **and**
- At least 24 hours have passed *since last fever without the use of fever-reducing medications* **and**
- Symptoms (e.g., cough, shortness of breath) have improved.

If the person tested positive, but never developed any symptoms, the CDC recommends that isolation be discontinued 10 days after the testing. See this [link](#) to the CDC guidance.

Extension for Employer Use of Remote I-9 Review Process

Pre-COVID, if your organization hired a new employee, your new hire’s I-9 documents had to be inspected in person. In March of 2020, the US Immigrations and Customs Enforcement Agency (“ICE”) implemented a temporary policy to allow employers to conduct remote review and inspection of I-9 documentation for new employees. ICE has now extended that policy through August 19, 2020. For additional information about the extension and how to conduct remote I-9 reviews, see this [article](#) from Mayer Brown. For additional information about I-9s and when employers are required to complete them, see [this webcast](#).

Family and Medical Leave Act Developments

If your nonprofit has 50 or more employees, it may be subject to the Family and Medical Leave Act (“FMLA”), which requires the provision of up to 12 weeks of unpaid sick or family leave, including leave for an employee’s serious health condition. The DOL has provided updates outlined below:

- *Telemedicine Visits to Establish Serious Health Condition*: Previously, the USDOL required in-person visits to a health care provider for an employee to establish that he or she suffered from a serious health condition under the FMLA. Until December 31, 2020, a telemedicine visit is treated the same as an in-person visit to a health care provider for purposes of establishing a serious health condition under the FMLA so long as the visit includes an examination, evaluation, or treatment by a health care provider, is performed by video-conference, and is permitted and accepted by state licensing authorities.
- *New FMLA Forms*: New optional FMLA [forms](#) have been issued by the USDOL to provide notification, certification and leave to employees. These new forms are intended to be easier to

complete, however old forms can still be used. These new forms do not include any change to the required USDOL workplace notice posters for employers (which also appears in the link above). The new forms include:

- Eligibility Notice, form WH-381 – used to inform employees whether they are eligible for FMLA leave.
- Rights and Responsibilities Notice, form WH-381 (combined with Eligibility Notice) – used to notify employees of the requirements and expectations for an employee taking FMLA leave and inform employees that leave may be denied if information is not submitted promptly and properly.
- Designation Notice, form WH-382 – used to inform employees that a FMLA leave request has been approved or denied—or that additional information is needed—and disclose whether and how much of the leave will be paid and counted against FMLA entitlement for the year.
- Five Certification forms (WH-380-E, 380-F, 384, 385 and 385-V) – an optional tool used by employers to request information to support certain FMLA-qualifying reasons for leave.

If you have questions about FFCRA leave, paying teleworking employees, returning employees to work, using I-9 forms in the time of COVID-19, FMLA leave or other issues related to your employees, please contact your PBPA attorney.