

Top COVID-19 Questions

MAY 2020

QUESTION:

Can you fire an employee who refuses to work because of feeling “unsafe”?

ANSWER:

This is a common question we’ve received, and we know OSHA is also receiving many calls from returning employees who think their employers are not doing enough to make the workplace safe. You will want to proceed with caution in a situation where you have recalled an employee from furlough and they decline.

The best first response is to inform the employee of how you are creating and maintaining a safe work environment. Then, in responding to an employee who declines to return due to fear of infection, you can point out your mitigation strategy and let the employee know under what conditions they may stay home (eligibility for FFCRA/EFMLA leave). Let them know without such reason and documentation under covered reasons 1-6 under FFCRA/EFMLA, refusal may be considered job abandonment and thus voluntary resignation.

Given the unique circumstances surrounding this pandemic, we recommend you review the case thoroughly with your employment law attorney.

QUESTION:

Is the employer obligated to hold the employee’s position and pay them once the employee has exhausted the 80 hours of paid sick leave?

ANSWER:

Should the leave of absence extend beyond the two weeks FFCRA paid sick leave for one’s own health condition, the employer may request a doctor’s certification for extended leave. Once certified, this leave may qualify either as traditional FMLA (if the employee is eligible) or as a reasonable accommodation under the Americans with Disabilities Act (if the company has 15+ employees) and therefore be job-protected.

To terminate the employee at the end of the two weeks without seeking a return-to-work certification or extension certification, the employer risks the appearance of retaliating against the employee for having taken a protected leave under FFCRA.

Should the employee fail to provide a doctor’s certification for the extended leave within 15 calendar days of the date requested, then give a final notice of request with 24-48 hours deadline. If certification is never provided, then the employer may look back at the time missed after FFCRA sick leave as unexcused absence and follow standard attendance policy and practice.

QUESTION:

We have a BDC employee whose hours were recently reduced to 24/week. If this employee requests extended FMLA and EPSL due to needing to care for a child (let's assume they qualify in this scenario), can we first offer remote work as an alternative? If we offer this and they turn it down, must we still comply with the leave request? Is there a reason why we shouldn't at least make an offer for them to work remotely? If they can work remotely and decline our offer, how does that play out?

ANSWER:

You can offer remote work and combine it with intermittent leave. You would need to work out a schedule with the employee that is mutually agreeable.

See: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#5>

QUESTION:

If we call an employee back from furlough and they refuse, can we terminate them? Do they also lose their UC benefits?

ANSWER:

You want to be careful in this situation. First, make sure you distinguish between furlough and layoff. Furloughs are temporary finite periods with a specific (but flexible) return date. An employee could still obtain other permanent employment and not return.

Your best practice would be to give some amount of notice (i.e. 5 to 7 calendar days) before the return date. In the notice, have the employee sign whether they "accept" or "decline" the offer. If they decline, provide space for a reason. If they indicate the reason is a childcare issue, medical leave, or family care leave, then you may need to retain them and put them on the emergency Family First Coronavirus Response Act (FFCRA) leave. Even if they decline, during the pandemic, they may still apply for and receive benefits depending on the circumstances.

QUESTION:

PART 1 Are there any exceptions where we would have to pay/offer the Family First Coronavirus Response Act (FFCRA)? My understanding is they would go on state or federal assistance?

PART 2 Do we complete a form and file it with any entity to claim this exemption?

ANSWER:

PART 1 You would have to honor any state provided benefits which were already in place prior to FFCRA. Employees should be allowed to use paid sick leave and vacation time when out on a doctor certified medical leave for their own illness. Employees who are not eligible for FMLA/CFRA leave to care for a family member still are eligible for the six weeks Paid Family Leave (PFL).

Reference: https://www.edd.ca.gov/pdf_pub_ctr/de2511.pdf

For parents having to provide childcare due to school closures, only the federal FFCRA plan offered paid leave for childcare purposes up to 12 weeks. The CA PFL does not apply to childcare but does apply if caring for a family member with a medically certified illness. You would then have to decide how to handle employees staying home to provide only childcare. You could offer an unpaid personal leave.

PART 2 No, there is no application. As with any law, you would just need to be able to show the legitimate business reason for not complying or for utilizing an exception, if you were to be challenged, audited, or investigated as part of an employee claim against you. In this case you would need documentation showing you were less than 50 total headcount employees AND show financials supporting that paying out the benefit would cause lasting financial harm to or close the business altogether.