

The Coronavirus Pandemic and the FMLA

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AASPA has received many questions from school systems about the effect the COVID-19 pandemic outbreak has on managing FMLA leaves. Here are some general principles to apply:

- Under the FMLA regulations, whenever an "employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement." Because schools are shut down for more than one week due to the COVID-19 outbreak, the school system should not deduct FMLA leave from an employee's FMLA leave entitlement for any employee who is currently on FMLA leave so long as the employee would otherwise not be expected to work during the shutdown. For example, teachers, paraprofessionals, food service employees, bus drivers and school secretaries who do not regularly report to work when schools are not in session would have deductions for FMLA leave suspended for each day of the shutdown. On the other hand, employees who are still expected to report to work, such as custodian or maintenance employees and central office staff would have leave due to an FMLA-qualifying reason count against the employee's FMLA leave entitlement.
- If the school implements an online student learning platform that requires teachers to work from home, then any teachers on FMLA leave would have the leave count against their FMLA leave entitlement during any days on which they would otherwise be required to work. For example, if teachers are only required to work for half a day, then a teacher on FMLA leave would be charged a half-day of FMLA leave.
- Under no circumstances may the school district require an employee on FMLA leave to perform work, which would constitute an interference with an employee's FMLA rights. There is a "de minimis" exception to this rule for minor requests that would not be deemed to interfere with the employee's FMLA leave (such as asking an employee to respond to some emails or complete a 5-minute survey).
- May an employee volunteer to perform work while on FMLA leave? Technically, yes. However, if the leave is due to the employee's own serious health condition, the school district should require medical clearance for the employee to perform the type of work involved. In addition, whatever the reason for which an employee is on FMLA leave, the school district should obtain a

written statement from the employee that any work is being performed voluntarily and that the employee has the right not to perform work or continue performing work at any time.

- At the conclusion of the shutdown, any employee who is still in need of FMLA leave would pick up where they left off on the first day of the shutdown, assuming the leave still qualifies as FMLA leave.
- Regarding the use of available paid leave while on FMLA leave, the regulations require that the use of available paid leave be administered according to the school district's "established policies" for using paid leave. Additionally, the school district "may not discriminate against employees on FMLA leave in the administration of their paid leave policies." Accordingly, if an employee is currently on FMLA leave and is substituting available paid sick, personal or vacation leave, the school district may not deduct paid leave from the employee's accrued paid leave if it is not deducting paid sick, personal or vacation from other employees who are being paid during the Coronavirus-related shutdown.
- Does Coronavirus constitute a serious health condition under FMLA? That depends on how serious the virus becomes for a particular person. In order for a medical condition to meet the definition of a "serious health condition" under the FMLA leave, the condition must result in incapacity from work, attending work or engaging in regular daily activities that also involves in-person medical visit on at least one occasion and a regimen of ongoing treatment such as prescription medicine. An overnight stay in a hospital automatically meets the definition. Otherwise, even if the period of incapacity lasts more than three consecutive calendar days, unless the employee receives medical treatment, the medical condition would not constitute a serious health condition.
- If the school district learns of the need for FMLA leave for any employee during the shutdown for any FMLA-qualifying reason (e.g., to care for a parent, spouse or child with a serious health condition), the school district still must comply with the FMLA notice requirements and provide required notices to the employee.