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## Federal Family and Medical Leave Act and COVID-19

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By Sharon Freilich and George Kasper

**[Note to Readers: This Alert accurately summarizes the FAQ published by the DOL on the application of the FMLA to the COVID-19 pandemic. As of March 16, 2020, Congress is considering legislation that would amend the FMLA and would require changes to that FAQ. If such legislation is passed, we will post information on the Pullman & Comley website.]**

The United States Department of Labor has issued “COVID-19 or other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers” (the “DOL COVID-19 FAQ”). The DOL COVID-19 FAQ provides the following clarifications regarding Federal Family and Medical Leave Act (“FMLA”) coverage:

- An employee who stays home to avoid getting COVID-19 is not eligible for FMLA protections.
- An employee who stays home to care for children whose school has closed to mitigate the spread of COVID-19 is not eligible for FMLA protections.
- Being diagnosed with COVID-19, like being diagnosed with the flu, does not entitle an employee to FMLA protections unless complications arise that create a “serious health condition” as defined by FMLA.

Under FMLA a serious health condition is defined, in pertinent part, as:

- A condition that requires inpatient care in a hospital, hospice, or residential medical care facility;
- A condition that incapacitates an employee or employee’s family member for more than three consecutive days and requires ongoing medical treatment; or
- A chronic condition that causes occasional periods when an employee or employee’s family member is incapacitated and requires treatment by a health

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care provider.

The DOL COVID-19 FAQ indicates that under the Americans with Disabilities Act an employer may require an employee who is out sick with COVID-19 to (1) provide a doctor's note, (2) submit to a medical exam, or (3) remain symptom free for a specified amount of time, before returning to work. The DOL cautions that healthcare resources may be overwhelmed, and it may be difficult for employees to get appointments with doctors or other health providers to verify that they are well or no longer contagious.

If the employee at issue is eligible for FMLA protections, the employer may require a "fitness for duty certification" to prove that the employee is able to resume work, provided that the employer has a uniformly-applied policy or practice that requires similarly situated employee to obtain and present such certifications. Employers are required to notify employees in advance if the employer will require a "fitness for duty certification" to return to work.

Throughout the DOL COVID-19 FAQ, the DOL encourages employers to support community mitigation strategies and consider flexible leave policies for their employees.

More information on employer responses to COVID-19 is on the Pullman & Comley website at <https://www.pullcom.com/newsroom-publications-FOCUS-Responding-to-COVID-19>

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