

March 31, 2020

American Dental Association COVID-19 FAQs

The following FAQs have been prepared to provide guidance as the American Dental Association responds to developments in connection with the 2019 novel Coronavirus/COVID-19. Jackson Lewis attorneys are monitoring this developing situation, which will continue to evolve during the coming weeks. You should monitor the Centers for Disease Control and Prevention (CDC) and the Department of Labor websites for updates and consult with legal counsel as circumstances develop and new issues arise. Answers to these FAQs may vary based on individual circumstances, your policies, applicable state or local laws and the rapidly evolving nature of this public health situation.

Visit [Jackson Lewis' COVID-19 resource page](#) for more information.

Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) is legislation passed by the United States Congress and signed by the President to respond to the crisis caused by COVID-19.

1. What employers are covered by the FFCRA?

The FFCRA covers employers with fewer than 500 employees and certain public entities. The law also allows the U.S. Department of Labor (“USDOL”) to issue regulations that would exempt small businesses with fewer than 50 employees when the law would jeopardize the viability of the business as a going concern.

2. What benefits are available under the FFCRA?

The FFCRA provides expanded Family and Medical Leave Act (“FMLA”) benefits, as well as paid sick leave for covered leaves taken between April 1, 2020 and December 31, 2020.

The FFCRA amends the FMLA to allow an employee who is unable to work (or telework) to take FMLA leave due to a need to care for the employee’s child (under 18 years of age) if the child’s elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a “public health emergency.”

A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.

The FFCRA also adds a paid sick leave obligation.

Covered employers must provide up to 80 hours of paid sick leave for employees for the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for their child if the school or place of care of the child has been closed, or the childcare provider of the child is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

3. Are full-time and part-time employees eligible for different amounts of paid sick leave?

Yes. Full-time employees are entitled to 80 hours of paid sick leave. A part-time employee is entitled to leave for his or her average number of work hours in a two-week period.

4. How are hours worked by a part-time employee calculated?

Dental practices should calculate the hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, the employer may use a six-month average to calculate the average daily and weekly hours. If the employee has not been employed for at least six months, the employer may use the number of hours that the Dental practice and the employee agreed that the employee would work upon hiring.

5. How much money will an employee receive for FMLA and sick leave under the FFCRA?

The first 10 days of FMLA leave due to school closures are unpaid. Subsequent absences for this reason must be paid at two-thirds the employee's regular rate of pay. For paid FMLA leave, the law includes a \$200 per day cap and \$10,000 total cap per employee. During the unpaid portion of FMLA leave, an employee may elect to substitute FFCRA paid sick leave or any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave. However, employers cannot force to the employee to use FFCRA paid sick leave or other accrued paid leave during this time.

The amount of pay received for paid sick leave depends on the employee's reason for taking the leave. For absences related to the employee's own care (the first three reasons listed above), the employee must receive the greater of the employee's regular rate of pay or the applicable minimum wage, capped at \$511 per day or \$5,110 in total.

For absences to care for others (the last three reasons listed above), the employee must receive two-thirds of the employee's regular rate or the applicable minimum wage, capped at \$200 per day or \$2,000 in total.

6. Does the FFCRA provide a new 12-week FMLA entitlement period?

No. The FFCRA does not provide a new 12-week entitlement period, it simply adds another reason for leave and specifies payment for that leave.

7. Do the usual FMLA eligibility rules apply?

No. To be eligible for the expanded FMLA leave, an employee must have been employed for at least 30 calendar days prior to the leave. The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius do not apply.

8. May a dental practice require an employee to supplement their FFCRA using other available paid leave?

No, and an employee may not unilaterally require an employer to do so. The employer and employee may jointly agree that the employee's existing paid vacation, personal, medical, or sick leave may be used to supplement their FFCRA benefits.

9. When does the FFCRA go into effect?

Both the paid FMLA and the Paid Sick Leave provisions take effect April 1, 2020. They will remain in place until the end of 2020.

10. What tax benefits are available the FFCRA?

Covered employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualified paid sick leave wages paid for each calendar quarter, up to the wage caps previously discussed. Covered employers may also take advantage of a Medicare tax credit, which has been increased to account for the employer's expenses associated with maintaining group health plan coverage (to the extent excludable from employee income).

Employers should consult their tax professional to learn more about how to take advantage of these tax credits.

11. Do dental practices need to maintain documentation under the FFCRA?

Yes. If an employee takes paid leave under the FFCRA, the dental practice must require the employee to provide appropriate documentation in support of the reason for the leave.

According to IRS guidance, posted March 31, 2020, “an Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.”

12. Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

The USDOL has provided the following FAQ on this question. However, please note that such FAQs are not law and could be subject to change without notice.

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or

treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

13. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

The USDOL has indicated that an employer with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- a. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- b. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- c. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

14. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

The USDOL has indicated that "A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business may be exempt from mandated paid sick leave or expanded family and medical leave requirements only if:

- o the employer employs fewer than 50 employees;
- o leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and

- an authorized officer of the business has determined that at least one of the three conditions described above [in question 13] is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.”

15. Where can I get more information about the FFCRA?

Additional guidance and FAQs can be found in this [Jackson Lewis article](#) or the USDOL’s [FFCRA Questions and Answers](#) page. Additionally, the USDOL should be issuing regulations shortly.

Closures, Layoffs, and Other Responses Related to COVID-19

1. Are employees entitled to paid leave under the FFCRA if the dental practice is closed (temporarily or permanently) due to COVID-19?

No. If a dental practice closed either temporarily or permanently as a result of COVID-19 (including due to federal, state, or local closure orders), employees will not be entitled to the benefits provided by the FFCRA.

Employees may be eligible for Unemployment Insurance (see below).

2. If a dental practice closes (temporarily or permanently) while an employee is on paid leave under the FFCRA, what happens?

If a dental practice closes while an employee is on paid leave under the FFCRA, the dental practice must pay for any paid sick leave or expanded family and medical leave the employee used before the Practice closed. As of the date the dental practice closes, the employee is no longer entitled to leave under the FFCRA. This is true whether the closure is due to lack of business or a required closure pursuant to a Federal, State or local directive.

3. Do any laws apply to the temporary or permanent shutdown of a dental practice or layoff of dental practice employees?

Yes. Certain laws may apply to employers with 50 or more full-time employees who layoff or permanently shut down a worksite. We recommend consulting with legal counsel before taking these actions.

4. Are there ways for an employer to manage its workforce other than through terminations?

Yes. While terminations are one method to handle the current crisis, it is certainly not the only one. A dental practice could creatively manage its workforce through a combination of hours' reductions, wage reductions, and furloughs (temporary layoffs). Furloughs can occur on a periodic basis and do not necessarily need to occur in large blocks. A dental practice could also move toward a rotating staff (for example, two weeks on two weeks off).

5. How must a furlough or reduction in hours be communicated to employees?

It must be communicated to employees that the furlough or hours reduction is temporary and that the intent is for the employees to return to their jobs and/or regular work schedule on a definite date. The furlough or hours reduction must not extend beyond six months. Furloughs or hours reductions extending beyond six months may trigger plant closing notification laws for covered employers (see #3 above).

6. Can a dental practice reduce an exempt employee's salary if the exempt employee's hours are reduced?

An exempt employee's salary can be reduced on a prospective basis provided that the change in salary is a bona fide change and intended to be permanent or long-term and the employee continues to receive a salary that meets the minimum requirements for the applicable exemption. Short-term, day-to-day, or week-to-week adjustments will result in a loss of the exemption.

General Guidance on COVID-19

1. How can dental practices protect their staff?

Dental practices should remain calm and assure staff that they are monitoring the CDC and DOH websites. Management should remind staff of the importance of good hygiene, and not to report for work if they are ill.

The CDC strongly recommends that dental practices provide emergency dental services only at this time. For more information, see [CDC's Guidance for Dental Settings During the COVID-19 Response](#).

2. May employers send employees home if they develop symptoms of COVID-19 infection?

Yes. An employer never has to allow a sick employee to remain at work. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace.

For more information, see [CDC's Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with COVID-19](#).

3. Does OSHA mandate that employers take steps to safeguard employees from COVID-19 exposures?

OSHA requires employers to provide employees with employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to such employees. If all appropriate steps are taken to protect an employee, then under OSHA, it would not be reasonable to believe there is risk of danger of death or serious injury such that an employee could refuse work. The key is ensuring training, engineering controls, administrative controls and proper personal protective equipment.

4. If employees claim COVID-19 infections arose out of work-related contacts, are such claims covered by workers' compensation benefits?

Workers' compensation coverage will presumably be available in connection with workplace exposures that lead to infection and COVID-19 disease. Such coverage may provide some protection for employers concerned about potential liability and damages. However, where there is wide-spread community spread of the virus, it may be difficult if not impossible to prove that the exposure that lead to infection occurred at work.

5. If an employee or patient has been found to have the COVID-19 infection what action should be taken?

The local Department of Health may contact the Dental Practice and direct proper precautions. Expect that the dental practice will need to close, that some or all of the staff will need to be advised of the possibility of infection. Employees who were in contact with the infected employee or patient will likely need to stay at home for the 14-day incubation period, and the Dental Practice will likely need to be closed for a period of time to conduct a deep cleaning. The name of the infected employee or patient should not be disclosed to other employees or patients due to numerous state and federal confidentiality and privacy laws.

6. Will my insurance cover lost revenue due to closing or due to reduced business because of COVID-19?

That depends on the Company's insurance policy. Dental practices should work with their broker now to determine what kind of coverage may exist.

Provisions of CARES Act

1. How does CARES expand eligibility for unemployment insurance?

Two categories of workers are eligible for new and/or enhanced unemployment benefits under CARES. First, employees who are currently eligible for unemployment benefits under state law (“Eligible Employees”). Second, “Covered Individuals” who are not currently eligible under state law for benefits may receive benefits if the employee provides self-certification that he or she is able and available to work, but is unemployed or partially unemployed due to any of the following:

- Has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis.
- The individual is providing care for a family member or household member who has been diagnosed with COVID-19.
- The individual is the primary caregiver for a child or other person in the household who is unable to attend school or another facility as a direct result of COVID-19.
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19.
- The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 concerns.
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19.
- The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19.
- The individual has to quit their job as a direct result of COVID-19.
- The individual’s place of employment is closed as a direct result of COVID-19.

Significantly, the Act provides payment to those not traditionally eligible for unemployment benefits, such as individuals who are independent contractors, self-employed, or have a limited work history but are unable to work as a direct result of COVID-19.

2. Who is not eligible for these expanded unemployment benefits?

Individuals are not eligible if they are able to work remotely or if they are receiving paid sick leave or paid Family and Medical Leave Act benefits. Additionally, State unemployment authorities maintain the authority to determine eligibility. However, states may not restrict the coverage to a more limited group of individuals than provided under federal law. Therefore, all states are required to expand eligibility to those affected by COVID-19 as defined by the act.

3. How does the Act affect the unemployment compensation available to eligible individuals?

Section 2104 of the CARES Act provides that eligible individuals will receive the total amount of benefits they would regularly be entitled to under state law, plus an additional

amount of \$600 per week for up to four months. The additional \$600 payment applies to weeks of unemployment beginning after the date on which each state enters into an agreement with the federal government under that provision and currently expires July 31, 2020. These payments are taxable to the employee.

Section 2107 of the CARES Act provides an additional 13 weeks of unemployment benefits to those who remain unemployed after state unemployment benefits are exhausted. This provision expires on December 31, 2020. All but eight states (Arkansas, Alabama, Florida, Idaho, Kansas, Missouri, North Carolina and South Carolina) offer 26 weeks of unemployment insurance benefits. However, receipt of assistance under the unemployment provisions shall not exceed 39 weeks, unless otherwise extended. As with the expanded benefit payments, these additional weeks of unemployment are available after the date on which each state enters into an agreement with the federal government under that provision and expires December 31, 2020.

The Act also provides funding to pay the cost of the first week of unemployment benefits for states that choose to waive the typical seven-day waiting period, thereby paying recipients as soon as they become unemployed. This provision expires on December 31, 2020.

4. Are all employees entitled to these expanded benefits?

No, to receive the expanded benefits provided under Sections 2104 and 2107, the individual must be employed in a state that chooses to enter into an agreement with the U.S. Secretary of Labor to provide expanded benefits under these Sections. This means individuals employed in states that choose not to enter into such an agreement will not be entitled to the additional \$600 per week or additional 13 weeks of benefits.

5. Are employees who have had their hours reduced or are otherwise partially unemployed eligible for unemployment benefits under the Act?

Yes. The expanded assistance covers employees during weeks of “unemployment, partial unemployment, or inability to work caused by COVID-19” beginning on or after January 27, 2020 and ending on or before December 31, 2020. Note, however, while every state allows for partial unemployment insurance benefits for reduced hours, the maximum amount that an individual may earn and qualify for benefits varies by state.

6. If an individual has their salary reduced but not their work schedule, are they eligible to receive unemployment insurance benefits?

Likely, no. Individuals who receive a reduced salary but continue to work the same weekly schedule are not likely to be considered partially or fully unemployed and as such will be not eligible to receive these expanded unemployment insurance benefits. Ultimately, each state’s eligibility criteria will continue to control.

Follow Jackson Lewis' real-time state charts, tracking COVID-19 developments here:

- Closure Orders <http://bit.ly/JLClosures>
- Mass Gathering Limitations <http://bit.ly/JLGatherings>
- Paid Family Leave Guidance <http://bit.ly/JL-PFL>
- Predictive Scheduling Guidance <http://bit.ly/JLPredict>
- Paid Sick Leave Guidance <http://bit.ly/JL-PSL>
- State Disability and Workers' Compensation Guidance <http://bit.ly/JL-Dis-WC>
- Unemployment Insurance Guidance <http://bit.ly/JL-UI>
- Health Screening: bit.ly/JL-Health

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Reproduction of this material in whole or in part is prohibited without the express prior written consent of Jackson Lewis P.C., a law firm focused on labor and employment law since 1958. Our 950+ attorneys located in major cities nationwide help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse. For more information, visit

www.jacksonlewis.com.