Available in the link below, the EEOC offers new Q&A related to disabilities issues, including: (1) five regarding disability-related inquiries and medical exams; (2) four regarding confidentiality of medical information; (3) five regarding hiring and onboarding; (4) four regarding reasonable accommodation; and (5) one regarding furloughs and Layoffs. The EEOC also states that unlawful harassment for all protected classes can be reduced by “explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic.”

The Department of Labor continues to roll out new Q&A about paid leave. Without much fanfare, they simply include new questions and answers at the end of the existing Q&A. Recent additions can be found near the end of the Q&A link provided below.

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Some of the complexities that many have identified and discussed on and offline, without the benefit of guidance, are now addressed. Two examples appear below.

The first answer may surprise some. The law on the FMLA piece states, “[a]n employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave.” The law on the “sick” leave piece clearly states that an employer may NOT require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid “sick” time. So some (perhaps many) inferred that an employer, therefore, could not “require” concurrent use in the FMLA context. The new Q&A provides important new guidance on this issue.
Question: Under what circumstances may an employer require an employee to use his or her existing leave under a company policy and when does the choice belong to the employee under the Department’s regulations, specifically 29 CFR 826.23(c), 826.24(d), 826.60(b), and 826.160(c)?

Answer: Paid sick leave under the Emergency Paid Sick Leave Act is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer may not require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the Emergency Paid Sick Leave Act. (See also Question 32.)

In contrast, an employer may require that any paid leave available to an employee under the employer’s policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run concurrently with paid expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. In this situation, the employer must pay the employee’s full pay during the leave until the employee has exhausted available paid leave under the employer’s plan—including vacation and/or personal leave (typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee’s regular rate of pay, up to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act ($200 per day or $10,000 in total). If the employee exhausts available paid leave under the employer’s plan, but has more paid expanded and medical family leave available, the employee will receive any remaining paid expanded and medical family in the amounts and subject to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act. Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay under the Emergency Family and Medical Leave Expansion Act so that the employee may receive the full amount of the employee’s normal compensation.

Finally, an employee may elect—but may not be required by the employer—to take paid sick leave under the Emergency Paid Sick Leave Act or paid leave under the employer’s plan for the first two weeks of unpaid expanded family and medical leave, but not both. If, however, an employee has used some or all paid sick leave under the Emergency Paid Sick Leave Act, any remaining portion of that employee’s first two weeks of expanded family and medical leave may be unpaid. During this period of unpaid leave under the Emergency Family and Medical Leave Expansion Act, the employee may choose—but the employer may not require the employee—to use paid leave under the employer’s policies that would be available to the employee to take in
order to care for the employee’s child or children because their school or place of care is closed or the child care provider is unavailable due to a COVID-19 related reason concurrently with the unpaid leave.

The second example of new Q&A addresses an issue many pondered from the start, as various versions of state orders rolled out and evolved . . . and continue to evolve. The issue pertains specifically to the “sick” leave piece that covers 80 hours (often characterized as two weeks) of leave in six events – one of which vaguely includes where the employee “is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.” The question emerged as to what qualified. This new Q&A finally addresses that.

**Question:** Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those orders?

**Answer:** Yes, as explained in Question 60, for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority. However, in order for such an order to qualify you for leave, being subject to the order must be the reason you are unable to perform work (or telework) that your employer has for you. You may not take paid leave due to such an order if your employer does not have work for you to perform as a result of the order or for other reasons.

For example, if you are prohibited from leaving a containment zone and your employer remains open outside the containment zone and has work you cannot perform because you cannot leave the containment zone, you may take paid leave under the FFCRA. Similarly, if you are ordered to stay at home by a government official for fourteen days because you were on a cruise ship where other passengers tested positive for COVID-19, and your employer has work for you to do, you are also entitled to paid sick leave if you cannot work (or telework) because of the order. If, however, your employer closed one or more locations because of a quarantine or isolation order and, as a result of that closure, there was no work for you to perform, you are not entitled to leave under the FFCRA and should seek unemployment compensation through your State Unemployment Insurance Office.

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