As discussed during the March 27, 2020, Families First Coronavirus Response Act (“FFCRA”) Webinar presented through MASBO, updated guidance was expected from the United States Department of Labor (“DOL”) regarding the implementation of the Emergency Paid Sick Leave Act (“EPSLA”) and the Expanded Family and Medical Leave Act (“EFMLA”). On the same day, the President signed the Coronavirus Aid, Relief, and Economic Security law or “CARES” Act that addresses the obligations of schools in order to receive federal funding during school closures. On March 29, 2020, the DOL issued the “Families First Coronavirus Response Act: Questions and Answers” (“Guidance”) to provide assistance in interpreting the FFCRA. The Secretary of Labor subsequently promulgated temporary regulations at 29 C.F.R. Part 826 (“Regulations”), to implement public health emergency leave under Title I of the Family and Medical Leave Act (“FMLA”), and emergency paid sick leave that will be in effect only from April 1, 2020, through December 31, 2020. The temporary rules have been submitted to the Office of the Federal Register (“OFR”) for publication and may vary slightly from the published document if minor changes are made during the OFR review process. Pending publication, the Regulation may be found at: https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf.
DEFINITIONS AND GENERAL SCOPE OF THE FFCRA

1. What is the Effective Date of the Act?

The FFCRA, as it was passed on March 18, 2020, provided that the Act would take effect 15 days after it was signed by the President. If the date the Act was signed is not included in the calculation, the fifteenth day after March 18, 2020, would be April 2, 2020. Guidance from the DOL, however, indicates that the calculation includes the date the Act was signed and that the Act is effective April 1, 2020.

2. Does the FFCRA Apply Differently to Salaried Positions Versus Hourly Positions?

The Act does not distinguish between hourly and salaried employees, per se. Neither the Act nor the guidance from the DOL specifically explain how to calculate the daily rate of pay for a salaried employee. Unless otherwise identified by a contract, collective bargaining agreement or past practice, we recommend calculating the daily rate of a salaried employee based on the employee’s annual salary divided by the employee’s number of duty days. An hourly rate may then be determined by utilizing a standard eight (8) hour day. It is possible that further guidance may still be issued as to the proper calculation of salaried employees.

From a practical standpoint, however, due to the cap on the rate of pay for leave in the FFCRA, there is a disparity as to the percentage of pay that a higher earning employee versus a lower paid employee may receive such that it does not benefit a salaried employee to claim more than 8 hours of work per day. A higher paid employee, such as a principal, may not receive the full amount of a days’ pay while an employee earning a lower salary, such as a custodian, may receive his or her full pay. For example, if the employee is taking leave under the EPSLA, an employee is paid the hourly wage earned but pay is capped at $511 per day for all employees. A full-time employee who otherwise would work an 8 hour shift, earning $20 per hour would receive the full days’ wages of $160. A full-time employee earning $70 per hour would normally earn $560 per day but would receive only $511 or about 90% of the employee’s normal pay based on the daily cap. Similarly, salaried employees who are not subject to overtime but who otherwise claim more hours, would not receive this benefit. If an employee earning $45 per hour claims to work 60 hours in one week or 12 hours per day, he or she would not be entitled to $540 earned but would be capped at receiving $511 each day.

One other issue to be mindful of is that although full-time employees are eligible to be paid for overtime hours earned under the EPSLA, they can only receive a total of 80 hours of pay, regardless of whether they otherwise would have been paid for working more hours due to overtime. Thus, an employee working 50 hours one week, is only eligible to receive 30 hours the next week. Additionally, any overtime hours worked are not paid at the overtime premium rate.
3. **What is Considered “Full-Time Employment?”**

The DOL guidance has been updated to clarify that, for purposes of the EPSLA, a “full-time employee” means an employee who works 40 or more hours per week. A “part-time employee” is anyone who works less than 40 hours per week.

The distinction between full- and part-time employees does not apply under the EFMLA, although the total hours that an employee works each week affects the pay that he or she is entitled to receive.

4. **Does the FFCRA Apply to School Districts?**

Yes. The DOL has issued updated guidance to clarify that public sector employees, except for certain federal employees, are eligible for both EPSLA and EFMLA. The guidance specifically identifies employees of states, cities, townships, municipalities, and “similar government entities” as being covered by the FFCRA.

**THE EMERGENCY PAID SICK LEAVE ACT (“EPSLA”)**

5. **Are the Two Weeks of Paid Sick Leave Contingent on Employees Teleworking?**

No. Sick leave under the EPSLA is used when an employee is unable to work or telework. Therefore, the employee is not expected or required to telework during those 80 hours. As explained below in Question 6, however, in certain circumstances, it may be possible for an employee to take intermittent paid leave when teleworking, if agreed to by the employer.

6. **Can the Two Weeks of Emergency Paid Sick Leave Be Used Intermittently?**

In some situations, yes. Employees who are unable to telework their normal schedule of hours due to any of the qualifying reasons in the EPSLA (as well as the EFMLA) may take intermittent paid sick leave (and EFMLA paid leave) in any increment if agreed to by the employer.

Employees who are not teleworking but are working at the usual normal worksite, however, must take EPSLA leave in full-day increments. EPSLA taken for the purpose of caring for a son or daughter if school or a place of childcare is closed may take a full leave day intermittently (i.e., take leave on Monday, Wednesday and Friday but work on Tuesday and Thursday) if agreed to by the employer.

An employee taking EPSLA for any other reason under the EPSLA (governmental quarantine order, advised by healthcare provider to self-isolate, experiencing COVID-19 symptoms, caring for another individual who meets any of those conditions, or
experiencing other similar conditions specified by HHS) cannot use intermittent paid EPSLA. Employees taking leave for these reasons must continue to do so until they either no longer need emergency paid sick leave or have exhausted their paid sick leave allotment. An employee who returns to work without exhausting the sick leave allotment may take any remaining paid leave at a later time, until December 31, 2020, if another qualifying reason occurs.

Employees taking EFMLA who are not teleworking may take leave intermittently if agreed to by the employer.

7. **Are Eligible Employees Entitled to the Two Weeks of EPSLA on Top of Any Other Leave They May Already Have Accrued?**

Yes. The DOL guidance specifically provides that this is a new requirement that applies beginning April 1, 2020. Any pre-existing leave does not impact the amount of emergency paid sick leave that an employee may be eligible for under the terms of the EPSLA. In addition, both EPSLA and EFMLA can be used together for a total of 12 weeks for purposes of caring for a child.

8. **If an Employee is Already on Restricted or Reduced Hours Per Week, Does the Employer Have to Pay Them the Full 80 Hours or the Average Number of Hours Normally Worked in a Two-Week Period (If Hours Had Not Been Reduced Due to Restrictions)?**

No. An employee who is working part-time is entitled to EPSLA leave only for his or her average number of hours worked in a two-week period. The EPSLA does not make a distinction as to the reason why the employee is working part-time, such as whether the employee’s schedule was reduced due to an injury or lack of work. According to the DOL guidance, if this calculation cannot be made because the employee has not been employed for at least six months, the employer must use the number of hours that the employer and employee agreed that the employee would work upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

9. **If an Employee Goes on Vacation Knowing the Restrictions and Knowing That He or She Will be Subject to a 14-Day Quarantine Upon His or Her Return, Is the Employee Still Entitled to Emergency Paid Sick Leave?**

At this time, neither the FFCRA nor the DOL guidance address the prospect of employees intentionally taking vacations and the effect such actions may have on the employee’s eligibility for EPSLA leave. Pursuant to the EPSLA, an employee’s vacation will only result in eligibility for paid leave under the EPSLA if the employee is subject to a federal,
state or local quarantine or isolation order or has been advised by a health care provider to self-quarantine, or is experiencing symptoms and is seeking a diagnosis related to COVID-19, whether related to the employee, or for an individual for whom the employee is caring, who has been quarantined. Quarantine is a term that has legal significance.

For example, as it applies to a State quarantine in Minnesota, a quarantine or isolation order is one that is issued pursuant to Minnesota Statutes, section 144.419, by the Department of Health. It is very restrictive and does not allow the quarantined individual to have contact with other individuals unless authorized by the Department of Health. The person is under a number of restrictions and is constantly monitored by the Department of Health.

At the present time, neither the federal government nor the State of Minnesota have ordered a quarantine or isolation for any Minnesota resident in general simply because of travel. Presently, unless individually ordered to do so by the Department of Health or the school, there is no mandatory quarantine for individuals who return from travel. Rather, the 14-day restrictions are recommendations from the CDC. An employee voluntarily following these recommendations simply because of traveling does not qualify for leave on that basis alone.

Nonetheless, employers may not wish to risk having the employee risk infection of other employees. Employers can require employees to stay home and work from home if possible. How this may affect an employee’s right to leave is discussed in response to Question 11 below.

10. **Can Employers Require Employees to Use Paid Sick Leave Before Using EPSLA Sick Leave?**

No. The EPSLA explicitly provides that employers cannot require employees to use other paid leave afforded by the employer before using their emergency paid sick leave, assuming the employee qualifies for leave under the EPSLA or EFMLA. An employee may choose to use other forms of available paid leave(s) before using EPSLA leave. That choice, however, lies solely with the employee, assuming the employee qualifies for such leave pursuant to the employees’ contract, collective bargaining agreement or employer policy.

11. **If A Public School Orders an Employee Not to Report to Work for 14 Days After He or She Returns from Traveling Out of State, Does This Action Constitute a “Local Quarantine or Isolation Order”?**

The DOL regulations apply a very expansive definition to the term “quarantine order.” These new rules provide that Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place,
stay at home, quarantine, or otherwise restrict their own mobility. Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.

If the employee is able to telework, the employee is not entitled to take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

12. If a School Has Ordered an Employee Not to Report to Work Due to Concerns That the Employee Has Been Exposed to COVID-19, can the Employer Require that Employee to Take Emergency Paid Sick Leave?

The DOL regulations are clear that an employer cannot require an employee to take EPSLA paid leave and that the employee is entitled to use any other paid leave to which the employee otherwise would be entitled instead of EPSLA leave.

13. If an Employee Takes Leave under the FFCRA, Is the Employer Required to Continue the Employee’s Health Insurance Coverage?

Employees are entitled to continue elected group health insurance coverage (including family coverage) during EPSLA or EFMLA on the same terms as if the employee continued to work. Employees must continue to make any normal contributions they would otherwise be making if employed. In general, health insurance coverage during an FFCRA should be addressed in the same manner as leave taken for any other reason under the FMLA.

14. What Effect, if Any, Does the EPSLA Have on An Employee Who Was Working Fewer Hours Due to a Workers’ Compensation Injury?

As noted in the response to Question No. 8 above with respect to an employer’s obligations to provide paid leave to an employee working part-time, employees only receive paid leave for the number of hours they normally would be working at the time the leave is taken. Similarly, if an employee is not reporting to work at all due to a workers’ compensation injury, the employee would not be entitled to paid leave pursuant to the FFCRA. Questions regarding eligibility for workers’ compensation should be referred to your workers’ compensation carrier.
THE EXPANDED FAMILY MEDICAL LEAVE ACT (EFMLA)

15. **Does the EFMLA Change How the Existing FMLA Provisions Are Addressed?**

The EFMLA creates a new, temporary basis for which employees can take leave, with different rules than the previously-established types of leave available under the FMLA. The existing provisions of the FMLA, however, all remain in effect.

16. **Can an Employer Recommend Alternate Child Care Providers to Employees Seeking FFCRA Leave Due to Closure or Unavailability of a Child Care Provider?**

The FFCRA, EPSLA, EFMLA and DOL guidance interpreting these Acts do not expressly address this issue. The EFMLA defines the term “qualifying need related to a public health emergency” as a situation where the employee cannot work or telework due to a need to care for that employee’s son or daughter whose school or place of care has been closed, “or the childcare provider of such son or daughter is unavailable, due to a public health emergency.” The DOL Regulations are instructive as to the standard an employee should meet to obtain leave under this provision and suggests that an employee should provide a statement that affirms 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 leave. The guidance does not suggest that the employee must affirm that the employee was unable to find alternate care. However, the temporary Regulations provide that an employee also must include in the statement a representation that “no other suitable person is available to care for the child during the period of requested leave.”

17. **Can Emergency Paid Sick Leave Be Substituted for the Initial Two Weeks of Unpaid Expanded FMLA Leave?**

Yes, if the reason for the employee’s leave is to care for a child whose school, place of care, or childcare provider is closed for reasons related to COVID-19, as both the Emergency Paid Sick Leave Act and the Expanded Family and Medical Leave Act allow leave for this reason.

The employee also may substitute any other form of paid time off, vacation, or sick time that he or she has accrued, even if that type of paid leave normally could not be used for caring for a well child.

18. **Can the EFMLA Leave be Used Intermittently?**

As noted in response to Question 6, the DOL guidance now clarifies that leave under the EFMLA may be used intermittently, with the employer’s permission, and only on an agreed-upon schedule between the employer and employee.
19. **How are Employer and Employee Contributions to Insurance Premiums Affected by the EFMLA?**

As noted in response to Question 13, the DOL guidance reiterated the existing requirement under the FMLA that group health insurance (including family coverage) must be continued while an employee is on leave on the same terms as if the employee remained working and that the employee must continue to make any normal contributions, unless the employee chooses to forego coverage during his or her leave.

20. **If an Employee Used FMLA in the Last 12 Months, Does That Count Against their Leave Entitlement for Emergency FMLA?**

The most recent DOL guidance confirms that all FMLA usage, including expanded FMLA usage, is capped at 12 weeks in a 12-month period. The DOL guidance also notes that EFMLA leave taken now may reduce the employee’s ability to take FMLA leave for other reasons in the upcoming twelve-month period.

Again, schools should keep in mind, that tracking employee leave time is still necessary, even if tax credit cannot be taken.

21. **Can Employees Use FMLA Without Any Underlying Health Condition or Anyone to Care For (e.g., Solely to Avoid Potential Exposure)?**

No. The FFCRA provides that leave is available only if the employee meets the express qualification terms under the EPSLA or EFMLA. The recent DOL guidance confirms that this is the only set of circumstances for which expanded FMLA leave is available. The DOL guidance further expressly provides that having a fear of contracting the virus is generally not sufficient (unless, for example, the employee has an underlying condition such as anxiety that is exacerbated by this fear and may eligible for regular FMLA).

22. **Can Employers Force Employees to Use their Two Weeks of Emergency Sick Time Concurrently with their Expanded FMLA Leave?**

The DOL guidance explains that employees are eligible for both emergency sick time and expanded FMLA leave, but only for a total of twelve weeks of paid leave. We therefore anticipate that most employees would choose to use their two weeks of emergency sick time concurrently with the first two unpaid weeks of expanded FMLA leave, if it is available.

However, it should also be noted that employers cannot require employees to use other types of paid leave before using emergency paid sick leave.
Alternatively, an employee may choose to use other accrued paid time off before using emergency paid sick time. Doing so, however, can shorten the amount of paid time an employee may be able to use.

**EMPLOYEE DOCUMENTATION**

23. **What Documentation Can an Employer Require Related to Emergency Paid Sick Leave or Expanded FMLA Leave?**

The Regulations require that an employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. See 29 C.F.R. § 826.100. Such documentation must include a signed statement containing the following information: (1) the employee’s name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave as follows:

a. **Quarantine or Isolation Order.** An employee requesting paid sick leave because the employee is subject to a quarantine or isolation order must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

b. **Health Care Provider Self-Quarantine.** An employee requesting paid sick leave because the employee was advised by a health care provider to self-quarantine must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.

c. **COVID-19 Symptoms.** The Regulations do not specifically address what is required for an employee who is seeking leave in order to obtain a diagnosis or treatment for COVID-19. As the purpose, however, is to seek treatment or a diagnosis, the employer should be entitled to some documentation as to the treatment or attempt to obtain treatment that the employee sought as the employee is not entitled to take leave under this provision without seeking a diagnosis. Paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis.

d. **Caring for Another Who is Quarantined.** An employee requesting paid sick leave under § 826.20(a)(1)(iv) to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.
e. **Care of a Child.** An employee requesting to take paid sick leave under § 826.20(a)(1)(v) or expanded family and medical leave to care for his or her child due to a school or place of care closure must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

f. **Other Serious Health Conditions.** For leave taken under the FMLA for an employee’s own serious health condition related to COVID-19, or to care for another individual (identified in the Regulations as including the employee’s spouse, son, daughter, or parent) with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply. See 29 C.F.R. 825.306. In other words, an employee must provide medical certification from a health care provider that sets forth the following information: (1) the name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization; (2) the approximate date on which the condition commenced, and its probable duration; (3) a statement or description of appropriate medical facts regarding the patient’s health condition for which leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other regimen of continuing treatment; (4) if the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee’s job as well as the nature of any other work restrictions, and the likely duration of such inability. If the patient is a covered family member, information must be sufficient to establish that the family member is in need of care, as described and an estimate of the frequency and duration of the leave required to care for the family member.

As for the employee’s return to work, Section 826.130 of the Regulations describes an employee’s right to return to work after taking paid leave under the EPSLA or the EFMLA. In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave. See 29 CFR 825.214; 29 CFR 825.215. However, FFCRA does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken.

An employer can only require a fitness-for-duty certification when an employee has taken leave due to his or her own serious health condition. Thus, if an employee takes unpaid FMLA to care for a family member’s medical condition, the FMLA regulations do not
address whether the employer may require a certification that the employee has not been infected by his or her child.

24. The Only Medical Facility in Our City Has Stated That They Will Not Provide a Medical Note for an Employee to Be Out of or Return to Work. How Do We Know They are Cleared to Come Back?

The DOL Guidance is clear that employees are required to produce documentation to support their use of EPSLA leave. Because the EPSLA and EFMLA are to be read consistently with the FMLA, employers should be permitted to obtain the same information in a medical certification that an employer could otherwise obtain through the FMLA. To the extent that employee is unable to get the medical certification from the health provider, it is recommended that less formal documentation be accepted. It seems unlikely that a medical facility would allow an employee who tested positive for COVID-19 to return to work, and the employee could potentially produce documentation to indicate that he or she was awaiting test results.

EMPLOYEES WHO HAVE EXHAUSTED ALL TYPES OF LEAVE

25. If Employees Do Not Have PTO, But Cannot Work Due to Quarantine or Compromised Health, Are Schools Required to Pay Them?

The FFCRA creates a new leave requirement effective April 1, 2020 that may provide additional paid leave that applies regardless of the employee’s existing PTO status. If, however, the provisions of the EPSLA or EFMLA do not apply to an employee or do not fully compensate the employee for work missed, an employer is not required to pay the employee.

Note that all other types of FMLA remain unpaid. Thus, if an employee is taking FMLA leave for his or her own compromised health and not due to contracting COVID-19, that FMLA leave is still unpaid to the extent the employee does not have PTO that can be used to substitute for unpaid leave.

If the employee has exhausted or is not otherwise qualified for any employer-provided PTO or leave under the FFCRA or FMLA and is not otherwise entitled to unpaid leave pursuant to a contract, statute (i.e.: Minn. Stat. § 122A.40, subd. 12 – one year leave of absence for teachers due to health conditions) or as an accommodation for disability under the ADA, the employer is not required to provide unpaid leave to the extent an employer chooses to provide a discretionary unpaid leave with or without benefits, employers should allow all employees subject to the same or similar circumstances to also take an unpaid leave to avoid claims of unequal treatment and discrimination based on a protected class.
26. **If an Employee Produces Medical Documentation Evidencing That They Cannot Report to Work and Should Work Remotely, Does the Employer Have the Right to Take the Position that It Does Not Have Remote Work Available?**

Assuming the employee is not entitled to leave under the FFCRA, the employer has the inherent managerial right to determine the duties of an employee, whether telework is available or how to accommodate medical conditions that may affect the ability of an employee to report to work. If an employee says that he or she cannot report to work because of a medical issue that he or she is experiencing, and teleworking is not an option, then the employee may be eligible for leave under the EPSLA. If the reason is not related to COVID-19 but due to an underlying health condition, the employee may be entitled to FMLA as set forth above. If the EPSLA is not applicable and the employee is still not able to report to work after two weeks, and their medical issue still rises to the level of a “serious health condition,” the employee may then qualify for unpaid FMLA leave.

**TAX CREDITS**

27. **To Whom Does the Tax Credit Apply?**

“Eligible Employers” are entitled to refundable tax credits for qualified sick leave wages and qualified family leave wages (collectively “qualified leave wages”), under sections 7001 and 7003 of the FFCRA respectively. These tax credits are increased by the qualified health plan expenses allocable to, and the Eligible Employer’s share of Medicare tax on, the qualified leave wages. “Eligible Employers” are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide paid sick leave under the EPSLA and to provide paid family leave under the Expanded FMLA. Although the FFCRA requires most government employers, including public schools, to provide paid leave, it does not entitle those governmental employers (defined as including political subdivisions of the state or any instrumentality of the state which will include public schools) to tax credits for this leave. See H.R. 6201, 116th Cong. §7001(e)(4) (paid sick leave); H.R. 6201, 116th Cong. §7003(e)(4) (paid family leave).

28. **Is the Tax Credit an Income Tax Credit, or Could it be Treated as Reduction in Federal Payroll Taxes?**

The IRS is treating the employer sick and family leave payments under the FFCRA as a refundable income tax credit. Again, this tax credit does not apply to political subdivisions or instrumentalities of the state, meaning all public schools. In addition, all employers are required to treat paid leave provided to employees under the FFCRA as qualified leave wages and compensation. Therefore, employees must pay income tax, social security and Medicare taxes that are subject to normal withholding regulations. The FFCRA does not include an exception to exempt qualified leave wages from taxable income.
29. **Are Public Schools Still Required to Provide EPSLA and EFMLA Even Though They Are Not Eligible to Receive Tax Credits Under the FFCRA?**

Yes. The EPSLA and the EFMLA employer leave obligations are separate subdivisions of the FFCRA from the subdivisions addressing tax credits. The fact that Congress determined that certain government entities are ineligible to receive a tax credit has no bearing on a public school’s responsibilities under the EPSLA or the EFMLA.

**OTHER PERSONNEL ISSUES RELATED TO COVID-19**

30. **Can Schools Set Specific Hours for Teleworking?**

The FFCRA and the DOL guidance do not contain specific restrictions on when teleworking can occur nor do the Governor’s Emergency Executive Orders. As such, schools should be able to set the hours that employees are expected to telework, subject to the Wage and Hour restrictions or limits set forth in an employee’s contracts or collective bargaining agreements. The DOL does advise, however, that to the extent the hours of teleworking can be flexible, employers reach an understanding with employees as to the specific hours they will work to allow them breaks during the day to care for children who are at home due to school or childcare closures. Employees who are provided these accommodations are not entitled to additional leave under the FFCRA as they are otherwise being paid for work performed.

31. **How Should Schools Respond to Employees Who are Objecting to or Refusing Their Modified Responsibilities (e.g., Remote Teaching, Providing Child Care Services for Essential Employees)?**

DOL guidance supports the position that fear of catching the coronavirus is not a basis for leave under the FFCRA or the FMLA. Absent an underlying serious health condition that is exacerbated by such concerns (i.e. clinical anxiety) that qualified under the ADA, such fears also do not support an employee’s objection to perform directed tasks. Although the Governor’s Orders and the MDE guidance both discuss providing accommodations to employees, this directive is tempered by the Governor’s and MDE’s recognition that changes to work duties are governed by law and collective bargaining agreement. Most collective bargaining agreements are not going to entitle an employee to modified work duties as the direction of work is an inherent managerial right. Transfers in collective bargaining agreements generally relate only to the right to transfer to a vacant position within the applicable bargaining unit. Absent the termination, resignation or creation of a new position, employees will not have the right to transfer to another position. From a practical perspective, such transfers likely will not alleviate concerns as the undesired responsibilities generally are being performed by all employees. Notwithstanding the foregoing, the spirit of the Governor’s Orders and the MDE guidance should be followed to the extent reasonable based on an employee’s medical condition.
Thus, absent a health care provider’s statement that the employee cannot perform the job at all and must be given a leave, reasonable accommodations would be appropriate such as social distancing or other similar specific recommendations, if the job reasonably can be performed with these accommodations. If the accommodation is not reasonable, the employer should have the right to suggest and provide a reasonable alternative.

Employees who simply refuse to report to work or perform tasks without providing substantiation as to a need for some type of reasonable accommodation, could be deemed insubordinate and subject to disciplinary action and, potentially disciplinary action if the work directive is reasonable and the conduct is not remediated following written notice of potential consequences.

32. **If an Employee Has Exhausted All Available Leave, and Refuses to Come to Work, is that Considered a Voluntary Resignation?**

Without more information regarding why the employee is refusing to come to work, it is difficult to definitively advise whether such an action constitutes job abandonment, voluntary resignation, or something else. The answer also depends on the employee’s specific job and any contractual or statutory rights the employee may have to that position. It is advisable that if this situation arises, the employer should seek legal counsel to address the specific circumstances of the situation.

33. **Are Schools Required to Pay All Employees During the Closure Period According to the Governor’s Order?**

Pursuant to Executive Order 20-19, the same provisions from the prior two Orders are essentially continued and remain in effect to provide distance learning. Thus, employees are still under the direction of the Governor to report to work, even if it is by remote access, if available. MDE has reiterated that because: 1) funding continues and schools have been given even more flexibility as to their use of funding and 2) schools are expected to provide distance learning, food service, childcare and transportation, the State expects schools to continue to employ their regular employees and to honor current contracts with vendors as long as those vendors pay those employees, even if their employees are not working or providing service.

However, on April 2, 2020, MDE provided guidance that the Executive Order does not preclude districts or charter schools from making budget-based layoffs of staff and administrators for programs where dedicated funding streams don’t exist, in accordance with applicable local labor agreements. Districts and charter schools should consult their attorneys for questions about compliance with employment contracts and with questions about unemployment compensation.
In addition, Congress recently passed the CARES Act. Section 18006 of this Act provides that as a condition of schools receiving funds under “Education Stabilization Fund” shall, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus. Thus, schools receiving these funds will potentially lose them if they are unable to evidence continued implemented payment of all school employees to the extent possible.

34. **How Is Workers’ Compensation Coverage Impacted When Staff are Working from Home?**

   We recommend contacting your workers’ compensation insurer for additional information on this topic.

35. **If an Employee Currently on Maternity Leave is Planning to Take Maternity Leave in April or May 2020, Could That Teacher Work from Home or Return Early Instead of Taking Sick Leave or Unpaid FMLA?**

   The FFCRA has no bearing on maternity leave. Therefore employers should continue to follow existing policies and protocols with respect to maternity leave under their employee contracts and the FMLA.