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LEGAL UPDATE

COVID-19 & Employment Law FAQs

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DISCLAIMER

Be advised that these Frequently Asked Questions (FAQs) relate to the ongoing COVID-19 pandemic and the answers to these FAQs only pertain to the facts of this pandemic as they exist at the time of publication. As a result, these FAQs should not be read to apply to situations unrelated to the ongoing COVID-19 pandemic.

This publication is produced to provide general information on the topic presented. It is distributed with the understanding that the publisher is not engaged in rendering legal or professional services. Although this publication is prepared by professionals, it should not be used as a substitute for professional services. Particularly due to the quickly evolving nature of the COVID-19 pandemic, whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.

Frequently Asked Questions (FAQs)

What is the paid sick leave entitlement for employees under the new Families First Coronavirus Act (FFCRA)?

The paid sick leave provisions of the new FFCRA will become effective on April 1, 2020 and remain in effect only until December 31, 2020. Employers are permitted to exclude “emergency responders” from this new entitlement. Further, this new entitlement applies regardless of how long the employee has worked for the employer.

Employers must provide employees with this paid sick time if the employee is unable to work (or telework) due to a need for leave because:

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 health care 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 a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter 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.

Employers must provide the following amount of additional paid sick time, which does not carryover from one year to the next:

- Full-time employees: 80 hours
- Part-time employees: average number of hours worked over a 2-week period

The paid sick leave provided to an employee under the FFCRA will cease beginning with the employee's next schedule work shift immediately following the termination of the need for paid sick time.

The FFCRA sets forth how much employees must be paid if leave is taken. The amounts are set forth depending upon the reasons for leave:

- If leave is taken for reasons (1)-(3): the regular rate, but no more than $511 / day
- If leave is taken for reasons (4)-(6): 2/3 the regular rate, but no more than $200 / day

The FFCRA provides that employers are prohibited from doing the following:

- Requiring, as a condition of providing paid sick leave under the FFCRA, that the employee search for and find a replacement to cover their hours.
- Discharging, disciplining, or discriminating against any employee for taking leave under the FFCRA, or filing a complaint or initiating a proceeding under or related to the FFCRA, or participating in any such action.

Employers are required to post a notice in a conspicuous place regarding these provisions. The required notices may be found here:

Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)

Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)

What is the paid family and medical leave entitlement for employees under the new Families First Coronavirus Act (FFCRA)?

This provision of the FFCRA will become effective on April 1, 2020 and remain in effect only until December 31, 2020. Notably, employers are permitted to exclude "emergency responders" from this new requirement. This provision creates a new category for leave under the Family Medical Leave Act (FMLA), called "Public Health Emergency Leave."

An employee is eligible if they have been employed by the employer for at least 30 calendar days.

An employee may take Public Health Emergency Leave if the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the **school**[1] or place of care has been closed, or the **child care provider**[2] of such son or daughter is unavailable, due to a **public health emergency**.[3]

Employees may take the following amount of Public Health Emergency Leave for a qualifying reason:

- 10 days of unpaid leave. Note that an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. All additional days of leave must be compensated by the employer. **For all practical purposes, however, it is likely that the first 10 days will qualify for paid sick leave under the new paid sick leave provisions of the FFCRA. See above for an additional discussion.**
- Up to 10 weeks of paid leave. Note that the FMLA allows for 12 weeks of unpaid leave. Any amount of leave taken as Public Health Emergency Leave shall be deducted from the employee's remaining FMLA allotment during that benefit year. The employees pay is calculated at 2/3 their regular rate, but in no event more than $200 per day.

Again, employers are required to post a notice in a conspicuous place regarding these provisions. The required notices may be found here:

Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)

Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act (FFCRA)

Where can I find additional resources for the FFCRA?

The U.S. Department of Labor has created resources to help assist employers and employees in understanding the new rights and responsibilities under the FFCRA. Those resources may be accessed here:

Families First Coronavirus Response Act: Employee Paid Leave Rights

Families First Coronavirus Response Act: Employer Paid Leave Requirements

Families First Coronavirus Response Act: Questions and Answers

Families First Coronavirus Response Act Notice – Frequently Asked Questions

How does the Family and Medical Leave Act (FMLA) apply to COVID-19?

It depends. The answer will depend upon the reason for leave requested under the FMLA. Remember that there is an additional available form of FMLA leave under the FFCRA known as Public Health Emergency Leave. This form of leave is discussed in the answer immediately above. Otherwise, FMLA leave will not be available for the employee unless: (1) the employee meets the eligibility requirements; (2) the employee has FMLA leave available in that benefit year; and (3) the employee's leave is for a qualifying reason (e.g. to care for the employee's own serious health condition or to care for certain family members with a serious health condition).

For additional information about COVID-19 and the FMLA, the DOL has published a series of Questions and Answers here: https://www.dol.gov/agencies/whd/fmla/pandemic

How does the Fair Labor Standards Act (FLSA) apply to COVID-19?

For information about COVID-19 and the FLSA, the DOL has published a series of Questions and Answers here: https://www.dol.gov/agencies/whd/flsa/pandemic

How does the Americans with Disabilities Act (ADA) apply to COVID-19?

Some have opined that since COVID-19 is transitory in nature, the ADA does not apply. Others suggest that as the COVID-19 disease continues to progress and worsen, that it could qualify as a disability in that it substantially limits a major life activity. Additionally, it has been suggested that if an employer "regards" an employee with COVID-19 as being disabled (meaning, treats an employee as having COVID-19, whether or not the employee actually has it), that could trigger a level of ADA coverage.

Can an employer send an employee home if: (a) the employee displays symptoms of COVID-19; or (b) the employers has credible information that the employee – or a member of their

household – has been in direct contact with somebody who has either been diagnosed with, or is displaying symptoms of, COVID-19?

Yes. The CDC guidance advises that employees who become ill with symptoms COVID-19 should leave the workplace. Advising those employees to go home is likely not a disability-related action under the Americans with Disabilities Act (ADA) since COVID-19 is generally transitory in nature. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. Any decision to send an employee home should be based upon credible, factual and confirmed information, and not mere gossip and rumor. Additionally, if the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, such employee may be entitled to paid sick leave under the Families First Coronavirus Response Act (FFCRA).

Does an employer have to pay an employee if sent home because: (a) the employee displays symptoms of COVID-19; or (b) the employers has credible information that the employee – or a member of their household – has been in direct contact with somebody who has either been diagnosed with, or is displaying symptoms of, COVID-19?

It depends. The answer depends upon a variety of factors, including but not limited to whether the employee's leave is for a qualifying reason under the paid sick leave provisions of the FFCRA, any existing policies and practices, applicable collective bargaining provisions, etc. Some agencies have taken the position that if an employee is sent home, the employee should be placed on paid administrative leave so that the employee does not need to use their accrued leave time. Those agencies believe that treating employees in this manner does three things: (1) it forecloses an employee from arguing that they want to remain at work rather than using up their sick time, and potentially infect others in the agency; (2) it would not only comply with the provisions of the FFCRA, but go above and beyond that required by the law; and (3) likely improve the morale of the agency personnel.

Can the employer require an employee to use sick leave or other accrued time off when the employee is required to stay home and/or self-quarantine?

See the question and answer immediately above. It is recommended that employers not require employees to use sick leave or other accrued time off for days missed when the employer requires the employee to stay home and/or self-quarantine.

How much information can the employer request from an employee when the employee reports feeling ill at work or calls in sick?

During the COVID-19 pandemic, employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If COVID-19 is deemed to be transitory in nature (like that of seasonal influenza or spring/summer 2009 H1N1), then such inquiries are not disability-related. If COVID-19 becomes severe enough, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that COVID-19 poses a direct threat.

Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

May employers take its employees' temperatures to determine whether they have a fever?

During normal circumstances, no because doing so would be a medical examination. However, since the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements. Employers should remember that the presence or absence of a fever is not alone indicative that the employee has COVID-19 since some infected individuals may be asymptomatic, and since a fever could be unrelated to COVID-19 entirely. In any such instance, additional testing is necessary in order to make a definitive conclusion.

May an employer ask an employee who has returned from traveling whether the employee was exposed to COVID-19 during the trip?

If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.

May an employer ask employees who do not exhibit symptoms of COVID-19to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to the

disease?

No. If COVID-19 is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees withoutsymptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.

If an employee voluntarily discloses (without a disability-related inquiry) that (s)he has a specific medical condition or disability that puts him or her at increased risk of complications, the employer must keep this information confidential. The employer may ask the employee to describe the type of assistance (a)he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of COVID-19 complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only in this circumstance may employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of COVID-19 complications.

May an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

Must employers continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during the COVID-19 pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude them from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that (s)he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative

reasonable accommodation.

May an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

May an employer require an employee to undergo a fitness for duty exam?

Yes, provided that the employer has a reasonable belief that the employee has COVID-19. If an employee tests positive for COVID-19 and is out of work as a result, the employer may require the employee to provide a note from a health care provider that the employee is fit to return to work, prior to returning to duty.

Is an employee entitled to workers' compensation benefits if they claim that they contracted COVID-19 while at work?

In certain states, legislation has been filed to address this issue. However, in light of legislation, agencies should reach out to their insurance carriers and local counsel to determine whether there will be any presumptions with respect to whether the contraction of COVID-19 will be deemed to have been sustained in the performance of his/her duties.

What should an agency do if an employee tests positive for COVID-19?

In the event that an employee tests positive for COVID-19, agencies should consider the following:

- Send that employee home.
- Send home all employees who worked closely with that employee for a 14-day period of time to ensure the infection does not spread. Employers may want to ask the infected employee if they can identify all individuals who worked in close proximity (three to six feet) with them in the previous 14 days. Employers should not identify the infected employee as doing so could violated confidentiality laws.
- Consider hiring a cleaning company to disinfect the affected workspaces.

What discrimination concerns should employers be aware of in light of the COVID-19 pandemic?

Employers should always be on guard to prevent discrimination in the workplace. However, in light of the COVID-19 pandemic, employers should be particularly aware of discrimination and harassment

based on national origin. The CDC recently warned: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.” As a result, employers should be on guard to make sure that employees of Asian descent are not being harassed or discriminated against in the workplace.

May an employer make changes to scheduling, work shifts or other terms and conditions of employment?

The answer to this question largely depends upon whether the workforce affected is unionized or not. Under the NLRA and the state collective bargaining laws (G.L. c. 150E), employers must bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Employers who make unilateral changes to mandatory subjects of bargaining may face a charge of unfair labor practices even in emergency situations such as this one. Employers are best advised to review their applicable collective bargaining agreement and consult local labor counsel on how to proceed if they wish to make such changes.

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[1] The term “**school**” means an “elementary school” or “secondary school” as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

[2] The term “**child care provider**” means a provider who receives compensation for providing child care services on a regular basis, including an “eligible child care provider” (as defined in section 658P of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

[3] The term “**public health emergency**” means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.