



HR STRATEGIES

COVID-19 LABOR & EMPLOYMENT LEGISLATION AND QUESTIONS

In response to the ongoing COVID-19 pandemic, we have prepared the following information to help guide employers during this time of crisis. Please remember that this is a new and rapidly evolving situation, and legislation at the federal, state and local level is changing daily. Accordingly, use this information as a guide only, and make sure that you are following the most current information before making decisions

New Federal Law Passed: The Families First Coronavirus Response Act

- On March 18, 2020, Congress passed the Families First Coronavirus Response Act
- The President signed the Act on the evening of March 18, 2020, meaning that it will go into effect on April 2, 2020. The program will remain in effect until December 31, 2020.
- Two significant components that affect employers:
 - *Emergency Family and Medical Leave Expansion Act*
 - *Emergency Paid Sick Leave Act.*



EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Expanded Coverage and Eligibility:

- The Act significantly amends and expands the FMLA to cover **any employer with less than 500 employees** (FMLA generally only applies to employers with 50 or more employees)
 - *So, small employers that generally are not subject to the FMLA will be impacted by this new law.*
 - *It lowers the eligibility requirement such that any employee who has been employed for at least 30 days, a significant departure from typical requirement that employee have at least 12 months of service*

Reasons for Emergency Leave:

- Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave** to allow an employee, who is:
 - *Unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.*
- This is now the only qualifying need for Emergency FMLA and a significant change from the prior version of the bill passed by the House over the weekend, which contained several other COVID-19-related reasons to provide Emergency FMLA.

Paid Leave:

- The first 10 days (rather than 14 days, as proposed in the original version of the bill passed by the House) of Emergency FMLA may be unpaid. :
 - *During this 10-day period:*
 - An employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period.
 - *After the 10-day period:*
 - The employer generally must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The new Act now limits this pay entitlement to **\$200 per day** and **\$10,000 in the aggregate per employee**.

Calculating Pay for Non- Full Time Employees:

- Employees who work a part-time or irregular schedule are entitled to be paid based on the **average number of hours** the employee worked for the six months prior to taking Emergency FMLA
 - *Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.*

Job Restoration:

- Employers with 25 or more employees:
 - *Will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work.*
- Employers with fewer than 25 employees:
 - *Are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA.*
 - *This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.*

Tax Credits: Tax credits are available to employers based on the amount paid out in the form of paid leave pursuant to this legislation.

- Employers entitled to refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act (see below). Qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child or because of “substantially similar symptoms”) for up to 10 days per employee in each calendar quarter.
- Employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.
- Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.



EMERGENCY PAID SICK LEAVE ACT

Reasons for Paid Sick Leave: The Act allows an eligible employee to take paid sick leave because the employee is:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19.
- Advised by a health care provider to self-quarantine because of COVID-19 concerns.
- Experiencing COVID-19 symptoms and seeking medical diagnosis.
- Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns.
 - *Note: this is no longer limited to just family members.*
- Caring for the employee's child if the child's school or place of care is closed, or the child's care provider is unavailable due to public health emergency.
- 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.

Eligibility:

- Requires employers with **fewer than 500 employees** to provide fulltime employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave at the employee's regular rate (or two-thirds the employee's regular rate to care for an individual subject to quarantine or the employee's child due to school/day care closure, or if the employee is experiencing a "substantially similar condition").
 - *Note: there is an exception to this section for employers who are healthcare providers or emergency responders at the employer's election.*

Cap on Paid Sick Leave Wages:

- Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others or if the employee is experiencing a “substantially similar condition.”

Carryover and Interaction with Other Paid Leave:

- This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.

Calculating Rate of Pay:

- A business employing fewer than 500 employees is required, at the request of the employee:
 - *To pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act.*



WORKING REMOTE



Remote Work Issues

- Allowing employees to work remotely, to the extent feasible (can they perform their regular job duties?), is a practical step in reducing transmission rates
- A detailed telework policy will greatly assist an employer in making this transition.
- If teleworking is permitted, must an employer offer a teleworking option to all employees?
 - *No. Employers who permit remote work arrangements are not required to offer the arrangement to employees in all positions. Employers should notify their employees that some positions require the employee to be physically present in the workplace and, therefore, are not eligible to telecommute. Employers should consider making available flexible leave policies and alternate work schedules for employees who must work on-site*

Remote Work Special Considerations:

- Is the employee exempt or non-exempt under federal and state wage and hour laws?
 - *Tracking hours remotely may be problematic for hourly employees, depending on in-office procedure for tracking hours.*
- Employer must be in tune with pay requirements for exempt employees:
 - *If the employee does some work from home, whether approved or not and regardless of their location, employer is required to pay the employee their full weekly salary.*
- Where the job may not be done remotely, such as with support staff, consideration should be given to other possible accommodations, such as modifying job duties and shifts to permit safe completion of required job tasks.



REQUESTING HEALTH
INFORMATION FROM AN
EMPLOYEE RELATED TO COVID-19

Requesting Health Information from an Employee Related to COVID-19

- EEOC Guidance: when an employee calls in sick, the employer may ask whether he/she is experiencing the symptoms of the virus:
 - *fever, chills, cough, shortness of breath, sore throat*
- Information provided by employee in response to these questions must be treated as confidential in compliance with the ADA.
- Employers may measure employees' body temperature, which generally is a medical examination.
 - *Employers are cautioned that some people may have COVID-19 without an accompanying fever*

Requesting Health Information from an Employee Related to COVID-19 Cont'd

- Employers may require employees to stay home if they have symptoms of COVID-19. When an employer has a reasonable belief that employees will pose a direct threat due a medical condition, the employer can require those employees to be medically examined to determine if they have contracted the disease.
 - *Employers may, and should, send employees home if they exhibit potential symptoms of COVID-19 at work, even if the employee objects.*




DISCONTINUATION OF HOME ISOLATION



Per the CDC



- There are three options for determining when a person may end home isolation, using either:
 - (1) A time-since-illness-onset option (2) A time-since-recovery option (3) A test-based option
- Time-since-illness-onset and time-since-recovery strategy (non-test-based strategy):
 - *Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:*
 - At least three days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath)
 - AND At least seven days have passed since symptoms first appeared
- Test-based strategy:
 - *A test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing. For jurisdictions that choose to use a test-based strategy, the recommended protocol has been simplified so that only one swab is needed at every sampling. Persons who have COVID-19 who have symptoms and were directed to care for themselves at home may discontinue home isolation under the following conditions:*
 - Resolution of fever without the use of fever-reducing medications
 - Improvement in respiratory symptoms (e.g., cough, shortness of breath)
 - AND Negative results of an FDA Emergency Use Authorized molecular assay for COVID-19 from at least two consecutive nasopharyngeal swab specimens collected more than 24 hours apart (total of two negative specimens).
- may discontinue home isolation when **individuals with laboratory-confirmed COVID-19 who have not had any symptoms** least seven days have passed since the date of their first positive COVID-19 diagnostic test and have had no subsequent illness.
- When employees return to work after taking time off for COVID-19 virus or symptoms, the ADA does allow the employer to require doctors' notes certifying their fitness for duty



HIRING EMPLOYEES DURING COVID-19 PANDEMIC

Hiring Employees During COVID-19 Pandemic

- You may screen applicants for symptoms of the COVID-19 coronavirus after you make a conditional job offer, as long as you do so for all entering employees in the same type of job.
 - *You can also take an applicant's temperature as part of a post-offer, preemployment medical exam after you have made a conditional offer of employment.*
- You may delay the start date of an applicant who has COVID-19 or symptoms associated with it. According to current CDC guidance, an individual who has the COVID-19 coronavirus or symptoms associated with it should not be in the workplace.
 - *In fact, the EEOC has also said you may withdraw a job offer when you need the applicant to start immediately but the individual has COVID-19 or symptoms of it.*



DISCRIMINATION/
HARASSMENT ISSUES AND
COVID-19

Discrimination /Harassment Issues and COVID-19

- 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.”*
- Closely monitor any concerns that employees of Asian descent are being harassed or subjected to disparate treatment at work because of national origin.
- You cannot, of course, base a decision to bar an employee from the workplace on the employee’s national origin.
 - *That said, if an employee, regardless of their race or national origin, was recently in China or in Italy and is exhibit symptoms of COVID19, you may have a legitimate reason to bar that employee from the workplace.*