UPDATE: GENERAL GUIDANCE FOR EMPLOYERS ON LEGAL ISSUES RELATED TO COVID-19

Alerts
October 2020

Employers across the country continue to face unique and unprecedented challenges in responding to workforce issues in light of the COVID-19 pandemic. The law is changing quickly to address issues presented by the spread of COVID-19. The following provides updated guidance and insight into common workplace issues that can arise in response.

FEDERAL LEGISLATION: THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) and the CARES ACT

1. The Families First Coronavirus Response Act (FFCRA)

The Families First Coronavirus Response Act (FFCRA) signed by the President on March 18, 2020 and effective April 1, 2020, imposed significant paid leave obligations on most employers with fewer than 500 employees through the Emergency Family and Medical Leave Expansion Act (the "EFMLEA") and the Emergency Paid Sick Leave Act (the "EPSLA"). An exemption applies for businesses with fewer than 50 employees who can show that providing the benefits would jeopardize the viability of the business as a going concern. Portions of these paid leave provisions, however, have been incorporated by states into their own COVID19 laws for companies that are not covered by the FFCRA due to the employee thresholds.

The United States Department of Labor issued its first guidance on these laws on March 24, 2020 and has updated a number of times since then.

The DOL Guidance is available here: https://www.dol.gov/newsroom/releases/whd/whd20200324.

Most of the useful guidance is in the Questions and Answers document: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

In addition, the DOL issued temporary rules implementing the FFCRA on April 1, 2020 and made them permanent on April 6: https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

On August 3, 2020, a federal court in New York issued an opinion in *New York v. U.S. Dep't of Labor* holding that the DOL's initial rules were too restrictive given the purpose and wording of the FFCRA. In particular, the court held that the following parts of the rule were invalid: (1) the requirement that FFCRA paid sick leave is only available if an employee has work from which to take leave; (2) the requirement of employer approval for an employee to take intermittent FFCRA leave; (3) the broad definition of an employee who is a "health care

provider," (whom an employer may exclude from FFCRA leave eligibility); and (4) the requirement of certain documentation before taking FFCRA leave.

In response, the DOL issued a new set of rules on September 16, and they are available here: https://www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act

The DOL's new rules did not adopt all of the court's conclusions and actually pushed back on some of them, including the requirement that FFCRA paid sick leave is only available if an employee has work from which to take leave and the need for employer approval before an employee can take intermittent EFMLEA leave. But the DOL did revise its definition of healthcare employee and its documentation requirements.

The DOL created a poster to meet the employer notice requirement, and it is available here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- Special Paid Leave to Care for Child Due to School or Childcare Closure under Amendments to the FMLA

The FFCRA amends the FMLA through the Emergency Family and Medical Leave Expansion Act (EFMLEA). The EFMLEA adds a new category for leave "for a qualifying need related to a public health emergency."

Coverage: Employers with fewer than 500 employees (counted at the time the leave is to be taken) are obligated to provide such leave, and any employee who has worked for the employer for at least 30 days is eligible (including time spent as a temp employee who is later hired full-time and including employees who were laid off not earlier than March 1, had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, and were rehired). The leave is available to an employee who cannot work (or telework) due to a need to care for a child whose school or childcare is closed due to a public health emergency. Employers who are healthcare providers can elect to exclude any of their employees, and employers of emergency responders can elect to exclude those emergency responders. According to DOL Guidance, coverage is not provided for employees who cannot work because their employer has no work for them. Additionally, if a parent had the option of sending a child to school but chose to keep the child enrolled in virtual school instead, the days during which the child could have been in school are not days for which the parent is eligible for paid leave under the EFMLEA (nor the EPSLA).

Paid and Unpaid Leave: The first 10 days of the EFMLEA leave are unpaid under this law, but they will likely be paid under the Emergency Paid Sick Leave Act described below. Thereafter, the employer must provide paid leave equal to at least two-thirds of the employee's regular rate of pay (as determined under the FLSA) based on the number of hours that the employee otherwise would be normally scheduled to work (including overtime), up to a maximum of $200 per day.

Effect on Other Paid Leave: The EFMLEA permits employees to choose to use accrued paid time off (vacation, personal, medical or sick leave). According to DOL Guidance, the employee can use PTO to cover the difference between EFMLEA pay and full pay, but only if the employer agrees. Otherwise, the employee must choose between EFMLEA paid leave or PTO.

Intermittent Leave: As noted, the DOL's position is that intermittent leave is available only if the employer agrees. This differs from the August 3, 2020 federal court decision in *New York v. U.S. Dep't of Labor*, which invalidated the employer approval requirement for intermittent leave. The scope of this court decision is unclear, as the court did not specify whether its holding applied nationwide. In response to that decision, the DOL reiterated its position requiring employer approval for intermittent leave. Employers should seek counsel before requiring an otherwise eligible employee to obtain approval for intermittent leave.

Reinstatement after Leave: Most covered employers will be subject to reinstatement obligations for employees who take this leave, but the reinstatement obligations are limited when the employer employs fewer than 25 employees. Also, as with regular FMLA, employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave.

Sunset: Leave under the Act can only be taken between April 1 and December 31, 2020, but reinstatement obligations can last more than a year after the leave for a small employer (fewer than 25 employees) who is unable to restore the employee upon return from leave but is making reasonable efforts as required.

- Two Weeks of Paid Sick Leave under the Emergency Paid Sick Leave Act

Coverage: A separate title of the FFCRA, the Emergency Paid Sick Leave Act, requires private employers with fewer than 500 employees (counted at the time the leave is to be taken), and certain government employers, to provide up to two weeks of paid sick leave (80 hours for full time employees and the average number of hours worked in a 2-week period for part-time employees). For private employers, "employees" are those covered under FLSA, and there is no minimum length of employment or hours of work for an employee to qualify for the leave. However, as with the EFMLEA, employers who are healthcare providers can elect to exclude any of their employees from the Act, and employers of emergency responders can elect to exclude those emergency responders. According to the DOL's September 2020 revisions to its FFCRA guidance, coverage is not provided for employees who cannot work because their employer has no work for them. This differs from an August 3, 2020 federal court decision in *New York v. U.S. Dep't of Labor*, which invalidated the work availability requirement. The scope of this court decision is unclear, as the court did not specify whether its holding applied nationwide. After this decision, the DOL reiterated its position that an employee cannot take EPSLA and EFMLEA leave if the employer has no work available. Given these inconsistent positions, employers should seek counsel before denying EPSLA or EFMLEA leave due to lack of work.

Paid Leave: Specifically, the employer must provide paid sick time to an employee who is unable to work (or telework) due to a number of situations. The paid leave is 100% of regular pay but capped at $511 per day ($5,110 in the aggregate) for leave related to a government-ordered quarantine, a self-quarantine or isolation on the advice of a healthcare provider because of COVID-19 concerns, or the employee's experiencing COVID-19 symptoms and seeking of a diagnosis. The paid leave is at least 2/3 of regular pay but capped at $200 per day ($2,000 in the aggregate) for leave related to taking care of someone quarantined or isolated, taking care of a child whose school or childcare provider closed, or a substantially similar condition specified by DHHS.

Effect on Other Leave: The sick leave does not preempt state and local paid sick leave laws or diminish employee rights under existing collective bargaining agreements and employer policies. The employer may not require an employee to use other paid leave provided by the employer before the employee uses the emergency paid sick time under this new law.

Intermittent Leave: According to the DOL's September 2020 revisions to its FFCRA guidance, intermittent leave is available only if the employer agrees. This differs from an August 3, 2020 federal court decision in *New York v. U.S. Dep't of Labor*, which invalidated the employer approval requirement for intermittent leave. The scope of this court decision is unclear, as the court did not specify whether its holding applied nationwide. After this decision, the DOL reiterated its position employees must obtain their employer's approval to take EPSLA or EFMLEA leave intermittently. Given these inconsistent positions, employers should seek counsel before requiring approval for an employee to take intermittent EPSLA or EFMLEA leave.

Prohibited Acts: The Act prohibits employers from: requiring employees to find a replacement worker as a condition for using paid sick leave; requiring employees to use other leave before using paid sick leave; and discharging, disciplining, or discriminating against any employee who takes leave or engaged in protected activity under the Act.

Reinstatement after Leave: Generally, employees are entitled to reinstatement upon return from leave, but employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave.

Sunset: The Act, and the requirements under the Act, expire on December 31, 2020.

- Tax Credits For Paid Sick And Paid Family And Medical Leave

Division G of the FFCRA provides for tax credits to employers providing paid leave under EFMLEA and/or EPSLA. The IRS, the Department of Treasury and the DOL issued a notice regarding the tax credits on March 20, 2020. In short, covered employers can withhold the amount paid out as sick leave (under the EPSLA) and childcare leave (under the EFMLEA) from payroll taxes that it otherwise would have paid to the federal government. If that is not sufficient to cover the paid leave, the employer can request funds from the government. In addition, the DOL is giving a 30-day grace period so that employers can come into compliance. The DOL will not enforce the Acts against employers as long as they are acting reasonably and engaging in good faith efforts to comply. The joint notice is available here: https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

DOL Guidance notes that employers should retain documentation from its employees supporting a qualifying need for leave so that the employer can provide the documentation to the IRS to claim the tax credit.

- Unemployment Compensation under the Emergency Unemployment Insurance Stabilization and Access Act of 2020

The FFCRA also included the Emergency Unemployment Insurance Stabilization and Access Act of 2020, which, among other things, eliminated the one-week waiting period for unemployment compensation benefits and provided 100% federal funding for what is normally 50% funding of sharable unemployment benefits (with each state normally covering the other 50%). These provisions apply through December 31, 2020. The provisions also provided funds for states for non-benefit related resources (i.e., for technology, systems, and administrative costs). To qualify for the funding under these provisions, each state is required to meet certain conditions designed to ensure that workers have access to benefits.

Accordingly, states implemented such requirements. For example, in North Carolina, the Governor issued an Executive Order on March 17, 2020, and the state's Department of Commerce's Division of Employment Security acted upon the order to ensure that individuals who, as a result of COVID-19, are separated from employment, have had their hours of employment reduced, or are prevented from working due to a medical condition caused by COVID-19 or due to communicable disease control measures, be eligible for unemployment benefits to the maximum extent permitted by federal law. The measures waived the waiting period for benefits, the "able to work" and "available to work" requirements, the work search requirements, the "actively seeking work requirements," and the "lack of work" requirement. That agency also required employers to provide employees with notice of the availability of unemployment compensation at the time of separation from employment with certain information included in the notice (possible immediate benefits availability, claims can be filed online or by phone, and employees must provide to the agency name, social security number, and authorization to work if not a U.S. citizen or resident).

- The CARES Act

The United States Senate passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") on March 25, 2020, and, on March 27, the U.S. House passed it and it was signed by the President. The CARES Act is a $2 trillion stimulus measure that has a number of aspects.

- Forgivable Small Business Loans – Paycheck Protection Program

The CARES Act provided small business loans under a newly-created "Paycheck Protection Program." That program closed on August 8, 2020.

- Government-Backed Loans for Air Carriers and Other Entities

The CARES Act also provided government-backed loans to other employers with a number of strings attached. These employers included air carriers and other businesses that did not otherwise receive adequate economic relief in the form of loans or loan guarantees provided under the Act.

- Enhanced Unemployment Compensation

The CARES Act bolstered state unemployment compensation systems by adding $600 per week to benefits amounts through July 31, 2020, and providing for the extension of unemployment compensation by an additional 13 weeks through December 2020. After the $600 per week benefit ended there was a short period when unemployment compensation had a $300 per week boost (through FEMA) between July 26 and September 5, 2020.

- Employee Retention Tax Credits

The CARES Act has provisions allowing "employee retention" tax credits through December 31, 2020 for certain employers who have either (1) had their operations fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19 or (2) had a 50% decline in gross receipts in calendar quarter compared to the same quarter from the prior year. The tax credit against applicable employment taxes for each calendar quarter will equal 50 percent of the "qualified wages" paid after March 12, 2020 and before January 1, 2021 with respect to each employee. Qualified wages are capped at $10,000 in wages paid per employee, and thus the tax credit can be up to $5,000 per employee for the year.

Qualified wages vary based on employer size and reason for eligibility. For employers whose average number of full-time employees was greater than 100 in 2019, qualified wages are those paid to employees for time that they are not providing services (whether they are furloughed or given reduced hours) because of either of the qualifying reasons above. For employers whose average number of full-time employees in 2019 was not greater than 100, qualified wages are those paid to all employees (even if not furloughed) during the period of closure or reduced operations because of a government limiting order (if the first reason applies) or those paid to all employees during a quarter of declined gross receipts (if the second reason applies).

Qualified wages will not include any wages for which tax credits are available because they are paid pursuant to the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Extension Act. Qualified wages can include the employer's qualified health plan expenses, to the extent they are excludable from the employee's gross income.

The CARES Act employee retention tax credits are not available to an employer that obtained a Paycheck Protection Program loan.

- Delay of Payment of Employer Payroll Taxes

The CARES Act includes a provision allowing businesses to delay paying to the federal government Social Security payroll taxes that would otherwise become due between the Act's effective date and the last day of 2020. If employers opt to do this, they must pay half of those delayed taxes at the end of 2021, and the other half at the end of 2022. This would allow employers to keep for a longer period of time the cash that they would otherwise pay as social security tax at 6.2% of employees' salaries.

This benefit is not available to an employer that obtained a Paycheck Protection Program loan.

- Benefits Plans Flexibility

The CARES Act provides for the easing or delay of some minimum contribution requirements for plans subject to the Employee Retirement Income Security Act of 1974 (ERISA).

The CARES Act also empowered certain workers to withdraw up to $100,000 from their 401(k) or another defined contribution plans without facing penalties and, if they choose to pay themselves back (into their plans), they may take three years to do so. In addition to such hardship distributions, employees may qualify

for a larger loan from their retirement plans than has been available ($100,000 instead of $50,000).

- Net Operating Loss Rule Changes for Businesses

A provision of the CARES Act suspends a previous rule that limited the amount of net operating losses companies can offset to 80% of a company's taxable income. Companies can now apply losses to the entire taxable income of a previous year. In addition, companies that lost money in 2018, 2019, or 2020 can take those losses for each of those years and carry them back up to five years to reduce their taxable income in a previous year. The companies would amend their tax returns for the relevant previous years and get a refund check from the IRS a few weeks later.

- Change in Interest Deduction Rules for Businesses

The CARES Act raises the limit on the amount of loan interest companies can deduct on their tax returns. That amount rises to 50% from 30% of earnings before interest, tax, depreciation, and amortization (EBITDA).

- Other Features

The CARES Act had many other features not directly concerning employers. Among them was the provision of money directly to all individuals. It also addressed many provisions towards supporting the healthcare system in the fight against coronavirus.

WORKPLACE SAFETY AND HEALTH

- Do we have an obligation to protect employees from the virus at our worksites?

Yes. OSHA requires that employers "furnish…a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. Employers must use "feasible methods" to keep their workplace safe, such as:

- Notifying and training employees on precautions, such as proper handwashing, coughing into elbows, sneezing into tissues, social distancing, staying home in the event of a fever, and sanitizing work areas and work equipment after use;
- Notifying employees if there is known exposure to COVID-19 in the workplace, including if an employee, vendor, or another visitor at the workplace has been diagnosed with COVID-19.
- Undertaking reasonable cleaning measures.
- In positions with a high risk of exposure (such as health care workers, medical transport personnel, ad mortuary personnel), and some positions with a medium risk of exposure (such as workers with frequent contact with the general public in communities of ongoing community transmission of COVID-19), the employer should provide personal protective equipment (PPE) to employees, and this PPE may include some sort of face mask, gloves and eye protection.

Many state and local governments also impose obligations on employers as part of re-opening orders. Employers should review the applicable orders in the states in which they have employees to ensure compliance. https://web.csg.org/covid19/state-reopen-plans/

In July 2020, Virginia was the first state to issue detailed workplace safety requirements and procedures for employers related to COVID-19 outside of the re-opening orders. The new rules by the Virginia Safety and Health Codes Board ("VSHCB") which apply to most private employers in Virginia, require employers to conduct risk assessments and to take certain measures based on risk level, including screening workers for coronavirus or coronavirus symptoms before entering the workplace, prohibiting workers suspected of having coronavirus from entering the workplace, implementing specific return to work protocols, requiring workers to use personal protective equipment, follow disinfection, sanitation, and social distancing procedures, worker training on COVID-19, and preparing an infectious disease response plan.

Employers obligated to complete an OSHA 300 log must report on the log if a worker has a confirmed, work-related (as defined in 29 CFR 1904.5) case of COVID-19 and at least one general recording criteria (listed in 29 CFR 1904.7) is met, like requiring medical treatment beyond first-aid or days away from work. On April 17, 2020, OSHA released a statement that OSHA will not enforce the record-keeping requirement unless the employer has objective evidence that a case is work-related and the evidence of such was reasonably available to the employer. https://www.dol.gov/newsroom/releases/osha/osha20200410-2 On May 19, 2020, OSHA updated its guidance requiring employers to make reasonable efforts to determine if the exposure was job related. https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. The guidance states that certain types of evidence may weigh in favor of or against work-relatedness. For instance:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
- Evidence of causation pertaining to the employee illness at issue provided by medical providers, public health authorities, or the employee herself should be considered.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.

Employers also should follow CDC guidance regarding returning to work an employee diagnosed with, or displaying symptoms of, COVID-19 or who have been in close contact with someone with COVID-19. See the section below on Returning to Work.

- What other steps should we take?
- Place appropriate restrictions on business travel and provide guidance on personal travel. *See* Travel Section*, below*.
- Set expectations for when an employee is ill – encourage the employee to stay home when presenting any symptoms and require the employee to stay home if the employee has a fever.
- Provide tissues, wipes, and hand sanitizer to employees (if available). Post CDC guidance poster (https://www.cdc.gov/coronavirus/2019-ncov/about/share-facts-h.pdf).
- Check with janitorial services to ensure proper cleaning procedures.
- Implement quarantine for employees returning from international travel (and consider for domestic travel to U.S. hotspots).

(see https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html)

- Send home any employees displaying symptoms.
- Prohibit visitors with symptoms from entering the workplace.
- Monitor federal, state, and local guidance regarding workplaces and large events.

It is important to continuously communicate with your workforce so that your employees understand the measures being taken to keep them safe.

- Can an employer send an employee home if the employee displays COVID-19 symptoms?

Yes. The ADA does not prohibit employers from following CDC guidance and sending home employees who demonstrate symptoms associated with COVID-19.

- Can employers take the temperature of employees?

Normally, it would violate the ADA to require employees to submit to temperature checks. However, EEOC guidance provides that given the widespread nature of COVID-19 an employer may measure employee's temperature. Employers should be cognizant of (1) who administers the checks, (2) where and how temperature readings are maintained (for confidentiality concerns, *see* below under Other Legal Risks), and (3) avoiding the appearance of discrimination based on any protected category (such as disability, perceived disability, or national origin). Only properly trained and qualified personnel should take the temperatures, both to ensure a proper process and protect the employee and others from possible infection. The EEOC also cautions that some people with COVID-19 may not present with a fever.

- May an employer require an employee who is out sick with flu-like symptoms to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

Yes, subject to any appliable state law restrictions. In general, an employer may impose one or more of these requirements if the employer has a reasonable belief, based on objective evidence, that the employee's present medical condition could pose a direct threat to safety in the workplace. If an employer's policies do not currently include such requirements, changes should be communicated to employees in writing. The EEOC also cautions employers to be cognizant that of employees may be unable to obtain documentation based on overwhelmed healthcare resources. Current CDC guidance states that, however, if an employee has properly isolated in accordance with CDC guidance and/or a health care provider's instructions, after a confirmed or suspected COVID-19 diagnosis, employers should not require the sick employee to provide a negative COVID-19 test result or healthcare provider's note to return to work.

- What should an employer do if an employee tests positive?

If an employee tests positive, the employer should send the employee home immediately (if the employee is not already at home) and require that the employee quarantine in accordance with CDC guidance and the employee's health care provider's instructions. *See* the Section Returning to Work After Exposure below. Such employees may be entitled to paid leave under the EPSLA if they cannot work during the quarantine.

Employers should notify their employees and any customers or vendors who may have been in close contact of the potential exposure. Employers should evaluate where the infected employee most frequently worked and socialized to evaluate the extent of possible exposure. Employers should not identify the employee by name or any other specifically identifying characteristics.

The employer can notify local public health agencies and seek guidance on next steps. As of the date of this memorandum, it appears that only certain health care providers are obligated to give notice of a positive test result. Other employers do not generally have this obligation.

- Can an employer ask an employee about possible symptoms?

Yes. Employers can ask employees to identify if they have experienced symptoms associated with COVID-19, such as fever, cough or a sore throat. The EEOC says such questions are allowed based on the direct threat justification. It is important to focus questions related to CDC identified COVID-19 symptoms rather than symptoms associated with other unrelated conditions.

- Can an employer ask an employee about symptoms suffered by family members?

Not directly. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone who has either been diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members may unnecessarily limit the information obtained about an employee's potential exposure to COVID-19. *See* Other Legal Risks Section, *below*.

RETURNING TO WORK AFTER EXPOSURE

- When can an employer allow an employee who tested positive for COVID-19 or has symptoms of COVID-19 to return to work?

Employers have obligations to take reasonable measures to keep the workplace safe. CDC guidance and many state and local re-opening orders require employers to remove infected employees from the workplace (although telework is permitted).

On July 17, 2020, the CDC updated its guidance to reflect a move away from testing as a means for determining when a worker can return to work. The CDC reasons that persons with COVID-19 can shed the SARS-COV-2 RNA even when they are no longer infectious. Therefore, testing can keep a worker out of work for longer than necessary. For persons with symptoms who know or think they have COVID-19, the CDC recommends that the employee isolate until all of the following have occurred: 10 days since symptom onset; at least 24 hours without a fever (without use of fever reducing medication); *and* symptoms have improved. An individual's healthcare provider can recommend a longer period of isolation if the individual had severe symptoms, or the healthcare provider might recommend two negative tests in a row, 24 hours apart to allow the individual to end isolation sooner. For persons with a positive test but no symptoms, the CDC recommends isolation for 10 days since the positive test, or the individual's healthcare provider can recommend two negative tests in a row, 24 hours apart to allow the individual to end isolation sooner. See updated August 12, 2020 guidance here: https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/isolation.html?deliveryName=USCDC_2067-DM32480

The CDC guidance is updated frequently, so be sure to check the CDC website for the latest recommendation.

Even after returning to work, the workers should wear a facemask at all times until all symptoms have resolved to avoid exposure to immuno-compromised persons. For employees who had COVID-19 ruled out but tested positive for another illness, return to work should be based on that illness. It is important to note that the CDC guidance relates to health and safety, and does not supersede a doctor's recommendation or an employee's protected leave rights. Employers should not force an employee to return to work before their protected leave has expired. (See sections above regarding FFCRA and other leaves of absence.)

- When can an employer allow an employee who has been in contact with someone who has COVID-19 to return to work?

For persons who were in "close contact" with someone who has COVID-19, the CDC recommends self-isolation (which the CDC defines as "quarantining") for 14 days after the last contact (or for someone caring for a person with COVID-19, 14 days after the person's quarantine ends). The CDC defines "close contact" as:

- being within 6 feet of someone who has COVID-19 for a total of 15 minutes or more;
- providing care at home to someone who is sick with COVID-19;

- having direct physical contact with the person (hugged or kissed them);
- sharing eating or drinking utensils;
- the person with COVID-19 sneezed, coughed, or somehow got respiratory droplets on the other person.

https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html#:~:text=You%20should%20stay%20home%20for,after%20exposure%20to%20the%20virus (updated August 3, 2020)

The CDC recommends quarantining for 14 days even if the person who was in close contact with the person with COVID-19 tests negative because symptoms could develop up to 14 days after exposure.

TRAVEL

- Can an employer restrict employee business or personal travel?

Business Travel: An employer may restrict business travel. Employers should continue to consult the CDC's website: "Coronavirus Disease 2019 Information for Travel" for up-to-date travel notices concerning risk. Employers should also monitor guidance from the U.S. Department of State regarding international travel. In August 2020, the State Department reduced its Level 4 travel advisory (warning U.S. citizens to avoid *all international travel* due to the global impact of COVID-19) to Level 3 (reconsider travel) or below. The CDC still recommends limiting all nonessential international travel. Employers also should consider that many states and countries have quarantine requirements for travelers. Those quarantine requirements can make travel for work more expensive and logistically challenging.

Personal Travel: No. Employers cannot prevent employees from traveling to affected areas for personal reasons, even high-risk areas, but they can deny a time off request based on the destination, the business cost of a resulting quarantine or other legitimate business-driven reasons. Also, employers can make their employees aware of U.S. State Department and CDC guidance regarding travel. Employers can follow CDC recommendations on self-quarantine or self-monitoring (including working from home, if applicable) as a result of personal travel and should advise employees of the employer's protocols.

- What if an employee has a family member who has traveled to a high-risk area or displayed COVID-19 symptoms?

Employers may request that employees report to the employer if any immediate or close-contact family members have traveled to high-risk areas or displayed COVID-19 symptoms. After consulting the CDC guidance, the employer may decide to require the employee to self-quarantine for 14 days following possible exposure to someone with COVID-19.

COMPENSATION

- Do employers have to pay employees for leave?

If employers are covered by the FFCRA that was passed this week, there are paid sick leave and new FMLA requirements that may apply. See the Recent Federal Legislation Section above.

Otherwise, employers are generally not required to pay for leave due to COVID-19, subject to state or local paid sick leave statutes and employee rights to use PTO and other paid leave under state family and medical leave laws. Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Salaried exempt employees must receive their full salary in any week in which they perform any work, even if they only work part of the week, subject to certain limited exceptions.

The FLSA does not require employer-provided vacation time. Where an employer offers vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

It is prudent to allow any employee to use accrued/allotted, unused PTO for all or part of the quarantine period. Generally, employers should not force employees to use sick leave over any other type of available leave (vacation and unpaid leave).

Employers should be mindful of their own policies and of ongoing updates to state sick leave laws, as some states are extending sick leave statutes to cover the COVID-19 situation. If employer policies and applicable state laws do not mandate paid sick leave, employers have flexibility to decide if the leave should be paid or unpaid.

- Do employers have to offer unpaid leave?

An employee sick with COVID-19 or caring for a family member with COVID-19 likely will qualify for leave under the FMLA. In a situation in which an employer sends an employee home for symptoms consistent with the pandemic, covered employers should follow the requirements of the FMLA for eligible employees, including providing FMLA eligibility notices and notice of rights. Employers may need to provide employees with additional time to obtain medical certifications, given the likelihood of an overwhelmed health care system.

Employers with fewer than 500 employees will be required to provide FMLA leave to employees who cannot work because of the need to take care of children who are out of school because of COVID-19 as described in the Recent Federal Legislation Section above. Much of this leave will need to be paid.

- What if an employee refuses to come to work to avoid getting COVID-19?

Preventative leave taken by an employee to avoid exposure is not protected under the FMLA or Families First Coronavirus Response Act (FFCRA) leave provisions, as currently enacted. However, employers should encourage employees who are ill or exposed to potentially ill family members to stay home and consider flexible leave policies.

The ADA (and similar state laws) may protect employees with certain mental health conditions, severe anxiety, or similar conditions that could contribute to needing an accommodation to work remotely or take a leave during an outbreak. The ADA may similarly protect employees with an autoimmune disorder or similar condition.

Some states and the District of Columbia allow employees to take leave under state paid sick leave laws or special COVID-19 leave if the employee or an individual with whom the employees shares a household is at high risk for serious illness from COVID-19.

- If an employer directs exempt employees to work without pay or take vacation, will that decision impact the employee's exempt status?

Employers cannot direct employees to work without pay.

Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Exempt, salaried employees must generally receive their full salary for any week in which they perform work, subject to certain limited exceptions, but need not be paid their salary in weeks in which they perform no work.

- Does my company have to pay employees who are sent home due to a mandatory plant or facility closure due to a government state of emergency?

It depends on the length of the closure and the status of the employee. For exempt employees required to be paid on a "salaried basis" and non-exempt employees under the fluctuating workweek compensation scheme, the employer does not need to pay the employee for any workweek in which the employee performs no work. If the employee works any part of the workweek, a private employer may direct these employees to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary

The FLSA only requires employers to pay nonexempt employees (other than employees who are paid under the fluctuating workweek method) for hours that the employees have actually worked. Therefore, an employer is not required to pay nonexempt employees if the employer is unable to provide work to those employees due to a mandatory plant or facility closure due to a government issued state of emergency.

Employers also should consider whether employees are eligible to receive unemployment compensation benefits during a temporary shutdown. Refer to the applicable state department of labor website. In North Carolina, the Governor's March 17, 2020 Executive Order specifically mentioned reduced hours as a result of COVID-19 as a reason for the Department of Commerce and Division of Employment Security to ensure that individuals can obtain unemployment compensation.

- Do employers have to permit employees to work at home?

It depends. While "work-at-home" is not a required accommodation under the ADA, it is a potential accommodation for those suffering from an underlying disability. It is also a recognized way of controlling the spread of infections. Given the current environment, the better practice is to allow for such work if duties can be adequately performed remotely.

Employers should document the temporary nature of any "work from home" arrangements offered so that employees are not entitled to ask for work-at-home as an accommodation in the future after the pandemic. Possible language: "Because of the extraordinary situation in the workplace caused by COVID-19, you will be

working remotely for a temporary period. We understand that you might not be able to perform all of your job's essential functions during this temporary period because you will be working remotely."

- If an employer requires employees to work from home, must the employer pay those employees who are unable to work from home?

For exempt employees, an employer may be required to pay if the employee is otherwise able to work remotely. Because specific circumstances vary, please check with your counsel for guidance. As for non-exempt employees, different rules apply. If the employee is unable to work, an employer is not required to compensate the employee. See the Recent Federal Legislation Section above for ways in which this lack of compensation may be alleviated. Employers are advised to confer with their counsel for further guidance.

- Are employers required to cover additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require FLSA-covered employees to pay or reimburse the employer for items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Additionally, employers may not require employees to pay or reimburse the employer for such items if telework is being provided as an accommodation to a disabled employee.

State law may impose additional obligations relating to reimbursement of expenses. Some states include expense reimbursements in their definition of "wages." Certain states, like California and Illinois, have statutes that specifically require employers to reimburse employees for expenses incurred by the employee on behalf of the employer. Telecommuting expenses that exceed normal household and personal expenses may fall under this category.

TELEWORKING

- How can my company control overtime if we allow non-exempt employees telework?

Under the FLSA, employers must compensate employees for all work – even telework – that is "suffered or permitted," even if the work was not requested by the employer. If an employer "knows or has reason to believe" that an employee is working, it must compensate the employee for the work. Employers looking to control overtime should clearly establish work hours for teleworking employees and maintain policies that require authorization to work outside of usual working hours. For example, employers can require that employees obtain written authorization from Human Resources of their immediate supervisor before performing work outside of their usual schedule.

However, even with such policies in place, employers must still pay employees for work – including unauthorized work – performed outside regular work hours that it knows of or has reason to believe has occurred. In other words, employers are required to take some affirmative measures to determine if employees are working outside of their regular hours. Such measures might include establishing a procedure for teleworking employees to report any hours worked outside of their usual schedule. Employers must clearly communicate such procedures to their workforce and should not expressly or implicitly discourage the use of the reporting mechanism.

As always, employers should inform all non-exempt employees, including those that telework, that they must record all time worked and that "off the clock" work is not permitted. Any request by a manager to a non-exempt employee to work without recording their time should be reported and handled immediately.

The Department of Labor's Field Assistance Bulletin on this issue is available at: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

- How can my company protect company information and data while employees are teleworking?

Employers should require employees working from home to follow the company's data security requirements, including accessing the company's information and networks through secure connections, using dual factor authentication or other secure methods of access. This is particularly true if employees are using their personal devices for work. Employers also can prohibit or place additional security requirements on the use of public Wi-Fi for work. Employers can and should, to the extent feasible, prohibit employees from using personal email or texting to conduct company business, and should prohibit employees from creating or storing company or customer documents and information on personal devices or personal cloud data storage sites. Employees using hard copy files should agree to protect the confidentiality of the files and agree to maintain them in a secure location. Spoofing and hacking schemes are flaring up to take advantage of the pandemic. Employers should remind employees to be careful of such schemes. This website from the FBI provides good guidance: https://www.ic3.gov/preventiontips.aspx#item-13

OTHER LEGAL RISKS AND CONSIDERATIONS

1. Off Duty Conduct Restrictions: Some states prohibit blanket restrictions on employee off-duty conduct (like personal travel) so mandatory bans on personal travel and personal activities are risky.
2. State and Federal Leave Laws: Employers should remain aware of their obligations under state and federal leave laws to allow employees leave to care for themselves and others who are ill, including persons in affected areas. Employers should remain up to date on FMLA and state leave law requirements and should consult counsel if necessary.
3. Age and National Origin Discrimination Concerns: Employers should not treat employees differently based on their age, national origin or other protected class and must not make determinations of risk or exposure based on an employee's protected characteristic. Employers should rely on CDC guidance to determine risk of COVID-19.
4. Confidentiality: Employers must maintain the confidentiality of employee's medical information and any medical leave details. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but not disclose the identity of the quarantined employee due to federal and state law restrictions.
5. Disability Discrimination and Harassment: Employers must be careful to prevent discrimination and harassment against employees who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. Employers should ensure the confidentiality of all employees' medical information and leave details to prevent harassment. Employers should also consider reminding employees of anti-harassment and discrimination company policies and tamp down rumors about employees related to employee health or travel. Employers must be vigilant about promptly

responding to and investigating any complaints of harassment or bullying in the workplace.

6. GINA: The Genetic Information Nondiscrimination Act of 2008 prohibits taking adverse employment actions based on genetic information, and family medical history is considered "genetic information" under GINA. Asking "Is anyone in your household exhibiting symptoms of COVID-19 should not be construed as asking about family medical history because it could include non-family members.
7. Privacy Concerns: Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. Employers should maintain this information in a separate, confidential medical file and limit access to individuals with a business need to know. In addition, some states require employers to use reasonable physical, administrative, and technical measures to protect the security of medical information.

FURTHER GUIDANCE

CDC Guidance for Employers: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html

CDC Interim Guidance for Businesses and Employers: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

CDC Guidance for Coronavirus 2019 Information for Travelers: https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html

For additional posters and print resources: https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html

EEOC Pandemic Guidance: https://www.eeoc.gov/facts/pandemic_flu.html

WHAT YOU SHOULD KNOW ABOUT THE ADA, THE REHABILITATION ACT, AND COVID-19:

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Moore & Van Allen Employment and Labor team

Rachael Coe rachaelcoe@mvalaw.com, 704.331.3655
Brandon Gaskins brandongaskins@mvalaw.com, 843.579.7038
Tony Lathrop tonylathrop@mvalaw.com, 704.331.3596
Clinton Magill clintonmagill@mvalaw.com, 843.579.7073
Karin McGinnis karinmcginnis@mvalaw.com, 704.331.1078
Sarah Negus sarahnegus@mvalaw.com, 704.331.3667
Emily Pera emilypera@mvalaw.com, 704.331.3787
Paul Peralta paulperalta@mvalaw.com, 704.331.1024

Moore&VanAllen

UPDATE: GENERAL GUIDANCE FOR EMPLOYERS ON LEGAL ISSUES RELATED TO COVID-19

Randy Phillips randyphillips@mvalaw.com, 704.331.1048
Russ Sizemore russsizemore@mvalaw.com, 704.331.1022
John Zaloom johnzaloom@mvalaw.com, 919.286.8182

These informational materials are current as of October 9, 2020 and are not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. You should contact any member of the Moore & Van Allen Employment and Labor team for advice on specific legal problems.