

## **COVID-19 FAQ AND PRACTICAL EMPLOYER TIPS (Update 3/31/2020)**

This information is based on the federal Families First Coronavirus Response Act (FFCRA), effective April 1, 2020 – Dec. 31, 2020, the Illinois Shelter-in-Place Order (Order), **now effective through April 30, 2020**, related new laws, and new guidance from the Dept. of Labor. For FFCRA details, see my special Client Bulletin on COVID.

These past few weeks have been a whirlwind of change for all of us. Besides the global pandemic statistics and stories, we have new laws to assist businesses and workers, and sometimes daily updates, clarification and changes from DOL on how FFCRA should be interpreted and enforced. In a continuing effort to keep you apprised of the current legal workplace information, below are the latest updates, practical tips and key information.

### **Significant Updates and Changes to Application and Enforcement of FFCRA Leave Per Multiple Recent DOL Guidance Bulletins**

#### **1. Shelter-in-place orders are NOT quarantine or isolation order and do not meet qualifying condition for FFCRA sick leave.**

**The new DOL guidance and model notice updated the specified reasons for such leave.**

**Originally, this was one reason:** To comply with a recommendation or order from public official or health care provider that an employee shouldn't be at work because of coronavirus factors." Without regulations or guidance from DOL, many employers and attorneys took the conservative position that this included shelter-in-place orders. If an employee was unable to work or telework for that reason, she would be eligible for paid sick leave.

**Updated reason:** DOL recently changed the reason to: "Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19." Such orders differ from shelter-in-place, and only an official "quarantine" or "isolation" order counts for FFCRA leave and related tax credits.

#### **Bottom Line:**

**- if employer has no work for employee simply due to a shelter order, and none of the other 6 conditions exist, there is no FFCRA sick leave (and therefore no tax credits.) Instead, employee can obtain unemployment benefits.**

**- if employer has work (whether as an Essential Business on-site per a shelter order, or via telework), employee's inability to work or telework must be due to 1 of the 6 conditions to get sick leave and tax credit. A shelter-in-place order alone is not enough.**

**Q: What does it mean to be unable to work, including telework for COVID-19 related reasons?**

An employee is unable to work if the employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents him from being able to perform that work, either under normal circumstances at the normal worksite or by telework.

If employer and employee agree that employee will work his normal number of hours, but outside of his normally scheduled hours (for instance early in the morning or late at night), then employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents employee from working that schedule.

**2. Intermittent leave allowed**

Another major change in the recent guidance is that an employee who meets 1 of the conditions need not be fully unable to work or telework, but only unable to work her full schedule. DOL now indicates that if the employer and employee agree, the employee can work part-time and take intermittent paid sick (and if applicable, paid family) leave under FFCRA. (More details below under Intermittent Leave.)

**3. Small Business Exemption for < 50 Employees for Child Care Leave**

**DOL has now specified factors that will be considered for exemption from FFCRA for employers with less than 50 employees, including religious or nonprofit organizations, but only as to leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons, when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:**

1. The provision of leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee(s) would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

**4. Independent Contractor Benefits – Unemployment and FFCRA**

Pandemic Unemployment Assistance program

The federal government established this plan providing extended unemployment relief to individuals, including:

- an additional \$600 per week for up to 4 months;
- extension of benefits for an additional 13 weeks (capped at 39 weeks) through December 31, 2020 after state benefits end; and
- expansion of covered workers to **self-employed workers, independent contractors,** and those with limited work history.

To be covered, workers must:

(1) be ineligible for or have exhausted regular unemployment resources available under state or federal law (including [independent contractors](#), who are typically excluded from unemployment protections); and

(2) certify that he or she is capable of and available to work but unable or unavailable to work or telework because the individual:

- is diagnosed with COVID-19, or is experiencing symptoms or seeking a diagnosis of COVID-19;
- has a member of his or her household that has been diagnosed with the illness;
- is providing care to a family member with COVID-19;
- has primary caregiving responsibility for a child who is unable to attend school due to COVID-19;
- cannot reach his or her place of work because of a quarantine or the advice of a health care provider to self-quarantine;
- has become a breadwinner after the head of household has died from COVID-19;
- has had to quit working as a direct result of COVID-19; or
- has a work location that is closed as a direct result of a COVID-19 public health emergency.

### **FFCRA for Contractors and Self-Employed**

FFCRA applies to a person who “regularly carries on a trade or business...and would be entitled to receive paid leave...if the individual were an employee of an employer (other than himself or herself).”

Paid sick leave is available to independent contractors for up to ten days where unable to work or telework because the individual is subject to a government quarantine or order of isolation related to COVID-19; has been advised by a health care provider to self-quarantine; or is experiencing symptoms of Coronavirus and is seeking medical attention.

The amount of daily sick leave available to an eligible independent contractor is the *lesser* of (a) \$511 per day up to a maximum of \$5,110 for ten days' paid sick leave, or (b) 100% of the individual's average daily self-employment income for the taxable year. If the leave is occasioned by the independent contractor's need to care for another individual subject to an order of quarantine or isolation or advised to self-quarantine, or to care for his or her child whose school had been closed or whose childcare provider is unavailable due to COVID-19 precautions, then the *lesser* of (a) \$200 per day up to a maximum of \$2,000 for ten days' paid sick leave, or (b) 67% of the average daily self-employment income for the taxable year.

Paid family leave is available to an eligible independent contractor who is unable to work or telework because of a need to care for a family member subject to a government order of quarantine or isolation or advice by a health care provider to self-quarantine, or to care for a son or daughter whose school has been closed or whose childcare provider is unavailable due to COVID-19. The maximum number of days of such paid family leave is 50, and the paid benefit available is the *lesser* of \$200 per day or 67% of the average daily self-employment income for the taxable year.

The average daily self-employment income is defined in the FFCRA as the net earnings for the taxable year from self-employment of the individual divided by 260. The amount payable to the self-employed individual may be taken by the independent contractor as a 100% tax credit.

### **Practical Tips:**

As employers consider and implement necessary changes to deal with business slowdown, shutdowns, employee illness and absences, it is crucial to remember standard compliance rules, such as:

- **expense reimbursement laws and policies**, particularly for employees required to work from home;
- paying **exempt employees a full week's salary** for any week that employee performed some work (subject to certain exceptions.)
- with some many employees working from home, it is recommended to have a clear **telecommuter policy** outlining terms and expectations. A good policy covers items like tracking hours, meal breaks for non-exempt, expense reimbursement for meals, if applicable, and workers comp.

### **Handling employees with possible symptoms/exposure**

**Q: Can an employer require that an employee disclose confidentially whether he or she has been exposed to others who have tested positive for Coronavirus?**

Yes, the ADA permits an employer to require that an employee disclose health information with respect to whether the employee poses a direct threat to the health or safety of himself/herself or others. While an employee may allege that he or she is “regarded as” having a disability, where there are “association” claims alleging that he or she is being discriminated against for associating with a person, the direct threat defense should be applicable and persuasive.

**Q: Must an employer pay an employee who is required to stay out of work because there is a reasonable belief that the employee has recently returned from China and/or has been exposed to, or has contracted, Coronavirus?**

It depends. If an employee performs work for the employer while he or she is out of the office/facility, he or she must be paid. If the employee is an exempt employee, the employee must be paid for the entire workweek during which he or she performs more than minimal work. If the employee is non-exempt, he or she must be paid for the time actually worked. Also, depending on the employer’s policy and/or state/city law, the employee may be entitled to use paid sick time or other paid time off (e.g., vacation, personal days, etc.). Otherwise, generally, the employee need not be paid for such time out of the office. However, employers may decide to be generous or flexible, to encourage employees with symptoms or who may have been in contact with an infected person will stay away from the worksite.

**Q: Can an employer terminate or otherwise discipline someone who refuses to come into work out of fear of Coronavirus?**

It also depends. If an employee reasonably believes that to be in imminent danger, the employer may not terminate or discipline for refusing to come to work under the Occupational Safety and Health Administration’s anti-retaliation guidelines. Otherwise, the employee can be disciplined or terminated. But be aware of “protected concerted” activity if multiple employees join together and refuse to come to work.

**Q: Do employers have to pay someone who refuses to come into work out of fear of Coronavirus?**

No, unless the employee is actually ill and covered by paid sick leave laws or policy, short-term disability benefits, or workers’ compensation. But employees who reasonably believe there are OSHA health/safety issues, such as lack of proper personal protective equipment may be protected from retaliatory discharge based on public policy. However, the employees should report for work and attempt to convince the employer to rectify the unsafe condition(s) while employed and actively reporting for work.

**Q: When can an employee return to work after having a fever or symptoms of COVID-19?**

If employee symptoms and/or fever, must be fever-free for 72 hours and wait 7 days after symptoms first appeared. If employee was exposed (due to certain travel or contact with someone with COVID), must be fever-free for 72 hours and isolate 14 days after exposure.

**Q: Can employer ask about COVID symptoms?**

Employer can ask employees to advise employers if they have COVID symptoms (generally fever, chills, cough, shortness of breath) and to provide details. Not entitled to ask about any other symptoms/illness. But employer should **not violate employee privacy/ADA confidentiality by disclosing to staff/others the identity of infected employees**, nor do others need to know. Simply advise that “an employee” has been infected.

**Q: Can employers take employees’ temperatures?**

Although employers are permitted to **take employees’ temperatures for COVID purposes, it is not advised**. There are many details and concerns: technical procedures, sanitation/safety of individual taking the temperature, privacy, documentation, is employee paid, etc.

**Q: What records can employer require of employee for FFCRA leave?**

Employers may require an employee to provide a medical provider certification in the form of FMLA paperwork indicating they are subject to quarantine for leave due to the following: government quarantine or isolation order related to COVID-19; employee advised by a health care provider to self-quarantine related to COVID-19; employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis; or employee is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

For leave because an employee has been advised to self-quarantine, or employee must care for an individual subject to quarantine or isolation order, employers can require employee to inform employer of the potential exposure, and provide a medical provider certification and their relation to the individual they are caring for.

For leaves to care for employee’s child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons, the employee should provide proof of the closure (e-mail, news article, etc.)

**Q: What records should employers keep when employee takes paid sick leave or expanded family and medical leave?**

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If one of your employees takes expanded family and medical leave to care for his or her child

whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

### **Intermittent Leave**

#### **Q: May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?**

Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.

You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

#### **Q: May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)?**

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you may take paid sick leave on Mondays, Wednesdays, and Fridays to care for your child, but work at your normal worksite on Tuesdays and Thursdays.

The Department encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements.

**Q: May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if I am not teleworking?**

Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your employer and you agree, you may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while your child is at home because your child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of your leave.

The Department encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements.

### **Reduced Pay, Furloughs, and Unemployment Benefits**

**Q: Can I reduce pay as an option during this crisis?**

Yes, one option during business slowdown is reducing pay. Employers are generally permitted to reduce salary (no consent necessary) prospectively, as long as you treat similarly situated employees consistently, and the reductions don't violate discrimination laws, minimum wage

laws, employment contracts, if any, or FLSA minimum salaries for exempt employees. (Per the new overtime rules effective 1/1/20, minimum salary is \$35,568 for most exempt categories (e.g. executive, administrative) and \$107,432 for the "highly compensated" exemption. Per FLSA, employers can use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10 percent of the standard salary level.)

**Q: What if I don't have enough work for employees?**

Employers have the option of allowing employees to use accrued leave, providing additional company-paid leave, placing employees on full or partial unpaid leave/furlough, or conducting layoffs. Decisions and selections of employees for options should be based on business and operational reasons, not legally protected bases like age, gender, race, etc.

**Q: What is a furlough?**

A furlough is a forced leave or a partial leave with reduced hours. Employers need only pay employees who are not exempt from overtime per FLSA for actual hours worked. Employers need not pay exempt employee for any week in which the employee performs no work, but make sure the FLSA annual minimum salary requirement for exemption is maintained. Check with your insurance representative for coverage rules on inactive employees under the current circumstances.

**Q: What is a layoff?**

A layoff is a termination of employment without cause - temporary or permanent – due to lack of work. Employees may be recalled if more work becomes available. COBRA and unemployment benefits apply. Make sure the termination is consistent with employment contract, if any, and beware that the timing could affect non-compete/solicit restrictions.

Federal and state WARN notice requirements govern for mass layoffs. Federal WARN notice (60 days) is required if the company employs at least 100 full-time employees and will lay off at least 1/3 or 50 employees. Illinois WARN Act also requires 60-day notice for a company with at least 75 full-time employees (or 75 or more employees whose regular work hours total at least 4,000 hours per week.)

Note that layoffs of less than 6 months do not trigger the WARN requirements, but employers may not know how long a layoff might last, particularly under the present circumstances. Both statutes provide an exception for layoff due to unforeseeable circumstances or the result of a natural disaster - we don't know if a pandemic would qualify.

As with any employment separation, employees should be paid accrued compensation and unused PTO/vacation at termination, or no later than the next regularly-scheduled pay-date. Provide laid-off employees with applicable notice regarding continuation of medical insurance benefits (COBRA or state insurance continuation for employers with less than 20 employees) and 401(k) rollover.

**Q: If I furlough any employees and stop paying their salaries before April 1, can I give them any work during the furlough?**

Yes, furlough is essentially an unpaid leave. If you did a “partial” furlough, you still provide an employee with some work. For any week that employee’s salary/wages for the work are less than the weekly benefit they would receive through unemployment, under Illinois unemployment law, they can file for and receive partial unemployment benefits to make up the difference.

**Q: Can furloughed employees file for unemployment benefits immediately?**

Yes, although due to the volume of claims, claimants are experiencing delays/issues with online filing and could have similar delay in receiving benefits. But once approved, their benefits will be retroactive to the week following furlough start (there is a one-week waiting period.)

**Q: Would I have to pay full salary for 2 weeks of sick leave to cover FFCRA if they have been furloughed? And how would that effect their unemployment benefits?**

Paid leave amount depends on reason for leave and is subject to caps: based on employee’s regular salary (capped \$511 per day or \$5,110 total), unless reason for leave is to care for sick family member, then must be 2/3 salary (capped \$200 per day or \$2,000 total.) Caps match tax credits.

Also, apart from the sick leave, FFCRA FMLA leave might also apply: This is a leave of up to 12 weeks if the employee is unable to work (or telework) because they must care for the employee’s child due to school closure or the caregiver is unavailable. The first 10 work days of emergency FMLA leave are unpaid, except employee can choose to use FFCRA paid sick leave or accrued company PTO/sick leave for those days. For the remaining (up to) 10 weeks, leave is paid at 2/3 regular pay, capped at \$200 per day and \$10,000 total (match tax credits.)

It now appears that employees who receive FFCRA benefits will not be eligible for unemployment benefits for the same period.

**Q: Can I furlough employees after April 1? Will they be entitled to FFCRA benefits?**

FFCRA is effective April 1 – Dec. 31, 2020. If one of the FFCRA conditions applies to an employee during that period, then yes.

**Q: For furloughed employees, do I need to cover their health insurance and would they owe company their portion?**

Generally, yes, but check with your insurer re: coverage for inactive employees. Procedures for paying employee premiums should be included in the employee memo.

**Q: Do I need to designate a time frame for the furlough (end date)? Does it matter if I extend the date based on what transpires with the virus?**

You can impose indefinite furlough, although usually best to define period with caveat that it may be extended.

**Q: If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?**

No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits.

For more details on furloughs, see the DOL Fact Sheet: [furloughflsafactsheetsept2019.pdf](#)

**Q: May I collect unemployment insurance benefits for time in which I receive pay for paid sick leave and/or expanded family and medical leave?**

No. If your employer provides you paid sick leave or expanded family and medical leave, you are not eligible for unemployment insurance. However, each State has its own unique set of rules; and [DOL recently clarified additional flexibility to the States](#) (UIPL 20-10) to extend partial unemployment benefits to workers whose hours or pay have been reduced. Therefore, individuals should contact their State workforce agency or State unemployment insurance office for specific questions about eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

**Q: If I elect to take paid sick leave or expanded family and medical leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?**

If your employer provides group health coverage that you've elected, you are entitled to continued group health coverage during your expanded family and medical leave on the same terms as if you continued to work. If you are enrolled in family coverage, your employer must maintain coverage during your expanded family and medical leave. You generally must continue to make any normal contributions to the cost of your health coverage. See WHD Fact Sheet 28A: <https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections>.

If you do not return to work at the end of your expanded family and medical leave, check with your employer to determine whether you are eligible to keep your health coverage on the same terms (including contribution rates). If you are no longer eligible, you may be able to continue your coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA, which generally applies to employers with 20 or more employees, allows you and your family to continue the same group health coverage at group rates. Your share of that cost may be higher than what you were paying before but may be lower than what you would pay for private individual health insurance coverage. (If your employer has fewer than 20 employees, you may be eligible to continue your health insurance under State laws that are similar to COBRA. These laws are sometimes referred to as "mini COBRA" and vary from State to State.) Contact the Employee Benefits Security Administration at <https://www.dol.gov/agencies/ebsa/workers-and->

[families/changing-jobs-and-job-loss](#) to learn about health and retirement benefit protections for dislocated workers.

If you elect to take paid sick leave, your employer must continue your health coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

## **FAQ about Illinois Shelter-in-Place Order (effective 3/21 – 4/30/20)**

**Q: Is my business exempt from the Order as an Essential Business and/or as performing Essential Operations? (See definitions below.)**

**Q: Are some or all of our employees exempt from the Order because they perform essential services or Minimum Basic Operations which can only be performed at our worksite?**

Essential services means providing essential products and services for Essential Businesses or Operations or otherwise carrying out Minimum Basic Operations. Minimum Basic Operations includes the minimum necessary activities to maintain the value of inventory, preserve plant and equipment condition, ensure security, process payroll and employee benefits and facilitate employees working remotely.

**Q: How do I decide and handle 1) employees at the worksite, 2) employees working from home, and 3) employees unable to work or work from home?**

Decisions and selections of employees to work on-site (if applicable), work at home, provide paid leave, furlough/unpaid leave or lay off should be based on business and operational reasons, not legally protected bases like age, gender, race, etc. It's a good idea to send employees a memo explaining the company's interim plans and details.

### **1. Employees at the Worksite**

Whether you have full staff, skeleton crew, or rotating shifts, you might provide letters for these employees to carry with them, verifying their exemption for essential work. The memo to employees should include, and the company should follow, applicable safety and health rules and procedures (monitor and follow updates on CDC website.) For example:

Company should perform routine environmental cleaning of all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs.

Employees should be required to follow social distancing rules (stay at least 6 feet apart) and CDC-recommended cough and sneeze etiquette, and hand hygiene. Cover noses and

mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available). Wash hands with soap or use hand sanitizer frequently.

Sick employees should stay home. Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines.

Employees who appear to have acute respiratory illness symptoms, such as cough or shortness of breath, upon arrival to work or who become sick during the day, should stay away from other employees and go home immediately. Follow CDC guidelines for isolation and return to work. (See also ADA Guidelines below.)

## 2. Employees Working from Home

Employees who are able to work from home (whether Essential Business or not) and for whom company has work, should do so. Company should provide employees with work-at-home rules/procedures. FFCRA leave benefits only apply under specified conditions, and only if employee is unable to work or telework their normal schedule.

## 3. Employees Unable to Work On-Site or At Home

Some/all employees may be unable to work on-site or at home for any of the following reasons, which are covered by FFCRA:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine related to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
- is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

Note that **inability to work or telework normal schedule may be due to a Shelter Order** and Employer is not an Essential Business or performing Essential Operations or Employee does not perform Minimum Basic Operations. But this is **not a qualifying condition for FFCRA leave**.

**Q: All of my employees have been working from home; can we continue this under the Shelter Order and once FFCRA is effective?**

Yes. Under FFCRA, if employees can work from home (and you have work for them), the statutory paid sick leave and FMLA benefits don't apply.

## Illinois Shelter Order Definitions

### **Essential Activities:**

- **For health and safety:** seeking emergency services, obtaining medical supplies or medication or visiting a health care professional
- **For necessary supplies and services:** obtaining groceries and food, household consumer products, supplies they need to work from home, and products necessary to maintain the safety, sanitation and essential operation of residences
- **For outdoor activity:** walking, hiking, running or biking - including going to public parks and open outdoor recreation areas, except for playgrounds
- **For certain types of work:** Providing essential products and services at Essential Businesses or Operations or otherwise carrying out activities specifically permitted in the order, including Minimum Basic Operations
- **To take care of others:** Caring for or transporting a family member, friend or pet in another household

### **Essential Government Functions:**

- All services provided by state and local governments needed to ensure the continuing operation of the government agencies and provide for the health, safety and welfare of the public
- This Executive Order does not apply to the United States government

### **Essential Businesses and Operations:**

- **Healthcare and Public Health Operations:** Working at or obtaining services from hospitals; clinics; dental offices; pharmacies; public health entities; healthcare manufacturers and suppliers; blood banks; medical cannabis facilities; reproductive health care providers; eye care centers; home healthcare services providers; mental health and substance use providers; ancillary healthcare services — including veterinary care and excluding fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities
- **Human Services Operations:** any provider funded by DHS, DCFS or Medicaid; long-term care facilities; home-based and residential settings for adults, seniors, children, and/or people with disabilities or mental illness; transitional facilities; field offices for food, cash assistance, medical coverage, child care, vocational services or rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, and social services and other necessities of life for needy individuals — excluding day care centers, day care homes, group day care homes and day care centers licensed as specified in Section 12(s) of the order
- **Essential Infrastructure:** Working in food production, distribution and sale; construction; building management and maintenance; airport operations; operation and maintenance of utilities, including water, sewer, and gas; electrical; distribution centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal;

and internet, video, and telecommunications systems

- **Stores that sell groceries and medicine**
- **Food, beverage and cannabis production and agriculture**
- **Organizations that provide charitable and social services**
- **Media**
- **Gas stations and businesses needed for transportation**
- **Financial institutions**
- **Hardware and supply stores**
- **Critical trades**, including plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers that maintain the safety, sanitation and essential operation of residences, Essential Activities, and Essential Businesses and Operations
- **Mail, post, shipping, logistics, delivery and pick-up services**
- **Educational institutions**, for purposes of facilitating distance learning, performing critical research, or performing essential functions
- **Laundry services**
- **Restaurants for consumption off-premises**
- **Supplies to work from home**
- **Supplies for Essential Businesses and Operations**
- **Transportation, for purposes of Essential Travel**
- **Home-based care and services**
- **Residential facilities and shelters**
- **Professional services**
- **Day care centers for employees exempted by this Executive Order**
- **Manufacture, distribution, and supply chain for critical products and industries**
- **Critical labor union functions**
- **Hotels and motels**, to the extent used for lodging and delivery or carry-out food services
- **Funeral services**

All non-essential business and operations must cease, aside from **Minimum Basic Operations**. Business can continue with employees working from home. Minimum Basic Operations includes the minimum necessary activities to maintain the value of inventory, preserve plant and equipment condition, ensure security, process payroll and employee benefits and facilitate employees working remotely.

**Q: What are the ADA guidelines for handling employees and applicants in the COVID-19 context?**

The EEOC has issued [guidelines under the Americans with Disabilities Act](#) (applicable to employers with 15 or more employees.) But the Illinois Human Rights Act disability provisions apply to all-size Illinois employers, as do many other state and local laws. I recommend that these ADA guidelines be followed by all employers.

- The ADA rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public

health authorities about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.**

- The EEOC has provided guidance (a publication entitled [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act](#)), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic.
- The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a [separate section](#) that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

**Q: How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

**Q: When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

**Q: Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

**Q: When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be

necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

**Q: If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

**Q: May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

**Q: May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

**Q: May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

Lori A. Goldstein  
Law Office of Lori A. Goldstein, LLC  
1787 Orchard Lane #8355  
Northfield, Illinois 60093  
(847) 624-6640 phone  
(847) 256-6640 fax

[lori.a.goldstein@gmail.com](mailto:lori.a.goldstein@gmail.com)  
[www.lorigoldsteinlaw.com](http://www.lorigoldsteinlaw.com)